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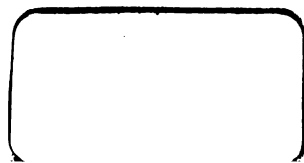
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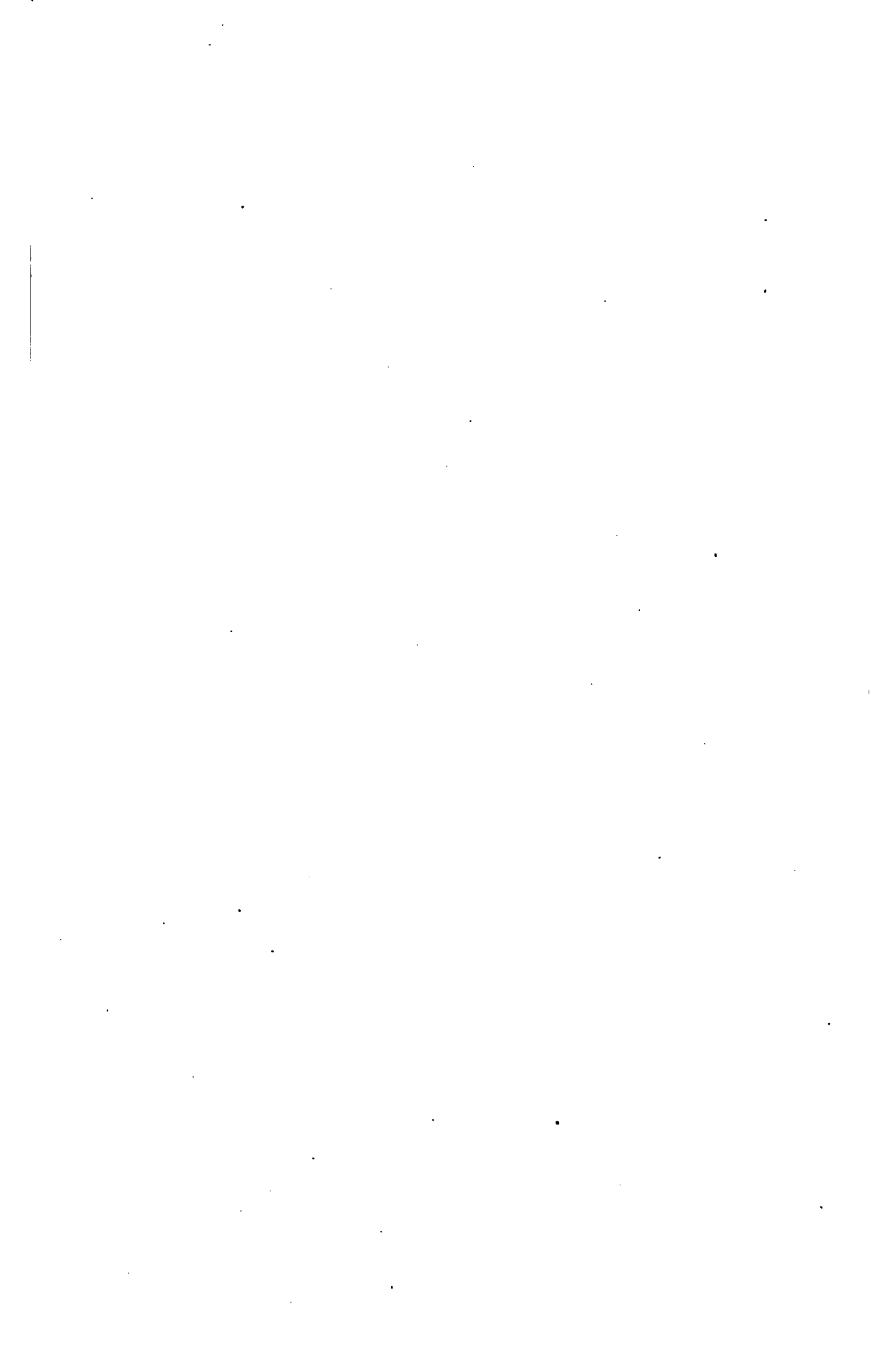
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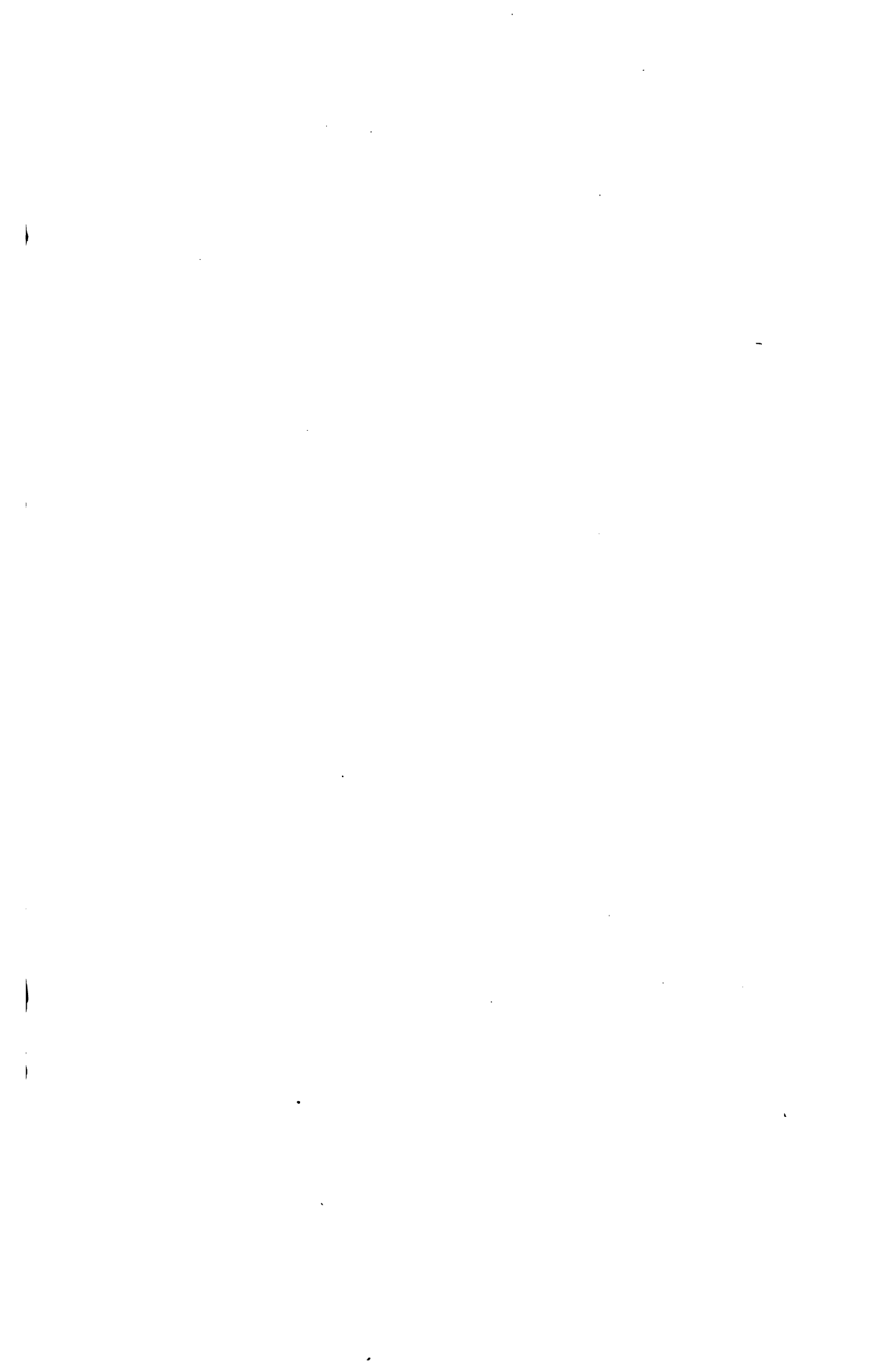


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NOTES ON IOWA REPORTS

Being Chronological Annotations

OF

the decisions of the Iowa Supreme Court showing their Present Authoritative Value as evinced by all subsequent citations by that court thereon, with parallel references to Northwestern Reporter, American Decisions, American Reports, American State Reports, American and English Annotated Cases, and Lawyers' Reports Annotated (both series)

TOGETHER WITH

Full Parenthetical notes of other Iowa cases relating thereto, and cross references to similar and analogous ones annotated, and to decisions from foreign tribunals

BY

LEV RUSSELL

OF THE ST. LOUIS (MO.) BAR,

AUTHOR OF "STATUTES OF KENTUCKY," ETC.

VOLUME TWO

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NOTES

ON

IOWA REPORTS

VOLUME TWO

Annotations to Decisions Reported in Volume 12 Iowa

DUNCOMBE *v.* PRINDLE, 12 Iowa 1.

I. Statutes—Construction of—Constitutionality.—Where a statute is susceptible of two constructions one of which is consistent with the Constitution and one repugnant thereto, the former construction will be adopted, p. 8.

Reaffirmed and extended in Stewart *v.* Board of Supervisors of Polk County, 30 Iowa 15, 1 Am. Rep. 238, holding that a statute will be declared unconstitutional only when it is palpably inconsistent therewith.

Reaffirmed and extended in McGuire *v.* Chicago, B & Q. R. R. Co., 131 Iowa 348, 108 N. W. 905, holding further that every presumption is to be indulged in favor of the constitutionality of a statute; that although courts will declare statutes unconstitutional, they do so with great caution.

Cited with approval in State *v.* Tait & Tait, 22 Iowa 143, upholding constitutionality of the statute granting the State the right to appeal from a justice's court in criminal prosecutions.

Cited with approval in Galusha, treasurer, *v.* Wendt, Ex'x, 114 Iowa 603, 87 N. W. 514, on the question of whether or not a statute was retro-active as impairing the obligation of contracts.

(Note.—See further sustaining and explaining, but not citing, the text, Merchants' Un. Barbed Wire Co. *v.* Brown, Auditor, 64 Iowa 275, 20 N. W. 434; Boyd *v.* Ellis, 11 Iowa 97; Eikenberry & Co. *v.* Edwards, 67 Iowa 626, 25 N. W. 835, 56 Am. Rep. 360, and there are others.—Ed.)

2. Constitutional Law—Statutes—Subject in Title.—The attaching and making part of Webster County certain portions of Humbolt County, was not in conflict with the title of the act of January 24, 1855, entitled "an act to extend the boundaries of Kossuth County," as such was necessary to the purposes of the act, and such act contains but one object, and is constitutional, pp. 9, 10.

Reaffirmed in Porter v. Thomson, 22 Iowa 394.

Cited with approval in Morseman v. Younkin, 27 Iowa 358, a case turning on another question of constitutional law.

Cross reference. See other rules hereof. See further, in this connection, annotations under Davis & Bro. v. Woolnough, (9 Iowa 104) Vol. 1, p. 549.

3. Statutes—Passage of Act—Evidence of—Enrolled Bill.—The enrolled bill to which is affixed the signatures of the President of the Senate, Speaker of the House, and to which is appended its approval by the Governor, is the ultimate proof of the passage of the act by the General Assembly, p. 11.

Reaffirmed and extended in Koechler & Lange v. Hill, 60 Iowa 551, 585, 14 N. W. 742, 759, holding further that the enrolled bill when properly signed and approved is the conclusive expression of the legislative will, and that it prevails over anything found in prior proceedings in connection and inconsistent therewith as shown by the journals, etc.

Cross reference. See other rules hereof in connection herewith.

4. Statutes—Passage of Act—Evidence of—Preamble to Act.—The facts recited in the preamble to an act are not conclusive proof of their truthfulness, p. 12.

Reaffirmed in Koehler & Lang v. Hill, 60 Iowa 565, 14 N. W. 749.

Cross reference. See other rules hereof in connection herewith.

MILLER v. BRADFORD, 12 IOWA 14.

1. Conveyances—Recording—Sufficiency of—Defective Registration—Effect—Constructive Notice.—The record of a conveyance is only constructive notice of the facts and descriptions therein recited. *A priori*, where a deed to land is registered, reciting that the estate conveyed is a "one-half *undivided* interest, etc.," it is not constructive notice of the estate conveyed, which in fact is "one-half of an *individual* interest, etc.," pp. 19, 20.

Reaffirmed and extended in Noyes, Adm'r v. Horr, 13 Iowa 571, 572, holding further that where an index entry to a recorded mortgage on two tracts of land, describes only one of them, constructive notice is not imparted as to the tract not described in the entry.

Reaffirmed and extended in Barney v. McCarty, 15 Iowa 515, 519, 520, 83 Am. Dec. 427, holding further that constructive notice dates

from the time of *recording* a conveyance, and not from the time of *filing* it for record: That the index entry is part of the recording, and where such an entry fails to show a mortgage on realty, the recording thereof does not impart constructive notice.

Reaffirmed and extended in Whalley v. Small and Small, 25 Iowa 189, holding further that a deed which is filed for record, but never in fact recorded and indexed, does not impart constructive notice.

Cited in Nickson v. Blair, 59 Iowa 532, 13 N. W. 642, not in point, but on a parity.

(Note.—See further sustaining and explaining the text and above cases, but not citing the text, Disque v. Wright, 49 Iowa 541; Hodgson, Adm'r v. Lovell, 25 Iowa 98, 95 Am. Dec. 775; Miller v. Ware, 31 Iowa 524; Thomas v. Kennedy, 24 Iowa 407, 95 Am. Dec. 740; Barney v. Little, 15 Iowa 535, 536; Jones v. Berkshire, 15 Iowa 251, 83 Am. Dec. 412; White v. Hampton, 13 Iowa 261; Bostwick v. Powers, 12 Iowa 457; Scoles v. Wilsey, 11 Iowa 261; Calvin v. Bowman and Neal, 10 Iowa 529.—ED.)

Cross reference. See further annotations and cross references under Scoles v. Wilsey (11 Iowa 261) Vol. I p. 812.

WAYNANT v. DODSON, 12 IOWA 22.

1. Attachment—Delivery Bond—Judgment in Attachment Action—Requisites—Action on Delivery Bond.—A judgment in an attachment action need not order that the judgment be a lien on the attached property or order its sale, in order for the attaching plaintiff to maintain an action on the delivery bond executed therein, p. 22.

Reaffirmed and extended in Garretson v. Reeder, 23 Iowa 24, 25, holding further that in order to continue an attachment lien it is not necessary for the judgment to order the attached property to be sold.

Reaffirmed and extended in New Haven Lumber Co. v. Raymond, 76 Iowa 227, 40 N. W. 822, holding further that a judgment in an attachment action which fails to recite that the attachment is confirmed, is, nevertheless, competent in an action on the delivery bond therein executed.

Reaffirmed and varied in Valley Bank of Clarinda v. Shenandoah National Bank, 109 Iowa 47, 79 N. W. 476, holding further that where a person claiming to own attached property intervenes in the action and executes a delivery bond therefor, the obligation of the bond becomes absolute twenty days after the rendition of the judgment against the defendant (debtor), and the statute of limitation runs from such time, although the judgment may fail to dispose of the attached property.

Cross reference. "Delivery bond—Effect of, etc."—See annotations under Austin & Co. v. Burgett (10 Iowa 302) Vol. I p. 688.

PARMENTER *v.* CHILDS; NOBLE *v.* CHILDS; AND EBERMAN *v.* CHILDS.
12 IOWA 22.

1. Garnishment—Default Against Garnishee—Motion for Execution Against—Motion to Set Aside Default.—Where in a garnishment proceeding a default is entered against the garnishee and the record affirmatively shows that he failed to answer as required, it is not error for the court to overrule a motion to set aside such default, based on the unsupported affidavit of the garnishee that he had been at all times in court ready to answer. In moving to set aside a default, or in showing cause against the issuing of an execution, the garnishee must rebut the presumption of indebtedness arising from the default, and, also, show a sufficient excuse therefor, pp. 26, 27.

Reaffirmed and qualified in McPhail & Co. *v.* Hyatt, 29 Iowa 142, holding that before execution may issue against a garnishee he must have an opportunity to resist and show cause against the motion therefor.

Cited and qualified in Evans *v.* Mohn, 55 Iowa 303, 304, 7 N. W. 594, holding that the trial court is vested with a sound judicial discretion in determining what constitutes negligence of the garnishee on a motion to set aside a default against him, and that such court's ruling will not be disturbed on appeal, unless it be shown that such discretion has been abused.

(Note.—See further, specially, Westphal, Hinds & Co. *v.* Clark, 46 Iowa 262; Fagg *v.* Parker, 11 Iowa 18; Fifield *v.* Wood, 9 Iowa 249; Houston *v.* Wolcott, 7 Iowa 174.—ED.)

Cross reference. See further annotations under Smith, Twogood & Co. *v.* Clark & Henley (9 Iowa 241), Vol. I, p. 571.

GIMBLE *v.* ACKLEY, 12 IOWA 27.

1. Replevin—Property Seized under Execution.—A party whose personal property is unlawfully seized by an officer may maintain replevin therefor, p. 30.

Reaffirmed and extended in Ramsden *v.* Wilson, 49 Iowa 212, holding further that a person entitled to the possession of personal property wrongfully seized by an officer, may maintain replevin therefor.

(Note.—See further sustaining and explaining, but not citing, the text, Cooley *v.* Davis, 34 Iowa 128; Shea *v.* Watkins, 12 Iowa 605; Perkins *v.* Wisner, 9 Iowa 320; Smith *v.* Montgomery, 5 Iowa 370; Miller *v.* Bryan, 3 Iowa 58; Wilson *v.* Stripe, 4 G. Greene, 551.—ED.)

Cross references.

"Issue in replevin." See annotations under Rule 3 of Kingsbury *v.* Buchanan (11 Iowa 387) Vol. I, p. 830. See also, annotations under Buck *v.* Rhodes (11 Iowa 348) Vol. I p. 823.

2. Executions—Replevin Bond—Effect—Subsequent Purchaser.—Where the judgment debtor executes a replevin bond for personal

property seized under an execution, and thereafter sells such property to a third person, the sale passes the title to the property. The execution of a replevin bond in such a case operates to release the judgment or execution lien, as against third persons or *bona fide* purchasers, p. 31.

Reaffirmed in Harrow v. Ryan, 31 Iowa 159.

Cited in Reeves & Co. v. Sebern, sheriff, 16 Iowa 237, 85 Am. Dec. 513, holding that an execution lien on chattels attaches upon *actual levy* thereon.

Cross reference. See Rule 1 hereof and cross references there found.

SMITH v. CLARK & WHITING, 12 IOWA 32

1. Bills of Exchange—Acceptance—Evidence of—Parol Evidence of—Custom.—In an action against the drawees of three several drafts or bills of exchange where the plaintiff relies upon an oral acceptance thereof by the defendants, it is competent for them to prove, for the purpose of disproving acceptance, that it was their custom in accepting drafts to always do so in writing, and to charge them to the drawers and credit them to the drawees on their books, pp. 33, 34.

Reaffirmed and extended in Tackman v. Brotherhood of American Yeoman, 132 Iowa 71, 106 N. W. 352, 8 L. R. A. (New Series) 974, holding further that a habit of doing a thing is of probative value, and, if clearly shown as a definite course of action, is always admitted to prove that the particular thing was done as usual.

Unreported Citations, 5 N. W. 779; 123 N. W. 959.

REED & DOWNS v. HOUSTON & HUNT,*12 IOWA 35.

1. Mechanic's or Materialman's Lien—Contract with Owner of Land Necessary.—In order for a mechanic or materialman to assert a lien on land for work done or material furnished in erecting a building, there must be a contract with the owner of the land therefor: A contract with a person having no interest in the land on which the building is erected, will not support such a lien, p. 35.

Reaffirmed, explained and extended in Monroe v. West, 12 Iowa 123, 79 Am. Dec. 524, holding that "owner" includes any person who has an *estate or interest* in land, and the lien extends to the whole of his (the contracting party's) estate or interest: Holding further that the lien of a mechanic or materialman attaches at the time of the *commencement* of the labor, or the furnishing of materials, and is good as against grantees, mortgagees, and purchasers subsequent thereto.

(Note.—See further, Price & Hornby v. Seydel, 46 Iowa 696; Heaton & Todd v. Horr, 42 Iowa 187; Miller v. Hollingsworth, 33 Iowa 224; Redman v. Williamson, 2 Iowa 488.—Ed.)

Cross references. See further, specially, annotations under *Monroe v. West* (12 Iowa 119), *Infra.* p. 23:

"Mechanic's or Materialman's lien—Contract concerning, etc."—See annotations under *Cotes & Davies v. Shorey* (8 Iowa 416) Vol. I p. 522.

"Promise to pay by subsequent purchaser of property incumbered by mechanic's, etc., lien—Effect."—See annotations under *Mervin v. Sherman* (9 Iowa 331) Vol. I p. 585.

KNIGHT *v.* DUNSMORE & CHAMBERS, 12 IOWA 35.

1. Negotiable Instruments—Indorsement by Person Not Party to—Guaranty—Notice, etc.—When not Necessary.—Where a person who is not a party to a negotiable promissory note indorses it in blank, he thereby becomes guarantor thereof; but unless he is given reasonable notice of non-payment of the note by the maker, he is discharged: Provided that the holder of the note may affirmatively show that such indorser received no detriment by reason of want of notice, and thus relieve himself from the result of such failure to give such notice, p. 37.

Reaffirmed in *Griffin v. Seymour*, 15 Iowa 33, 83 Am. Dec. 396.

Reaffirmed, explained and qualified in *Sabin & Moon v. Harris*, 12 Iowa 89, holding that a guarantor of the *payment* of a negotiable instrument by indorsement, where the indorsement is not in blank, is liable in an action by the payee, without proof of demand and notice of non-payment, or the use of diligence against the maker; but that if, in such action, the guarantor shows that he has been damaged from the want of such notice, or diligence, it is a defense *pro tanto* to the plaintiff's (payee's) action: But where an indorsement is in blank by a person who is not a party to the instrument, then, under secs. 953, 954 of the Code of 1851, the indorsement constitutes a guaranty of the performance of the contract, but notice of non-payment by the maker must be given such guarantor (blank indorser) within a reasonable time, and there must be due diligence used to collect from the maker, and the burden of proof as to diligence, etc., is on the payee (holder) and not the guarantor (blank indorser).

Cited in *Picket v. Hawes*, 14 Iowa 462, involving the liability of an indorser of a non-negotiable instrument.

(Note.—See further, specially, on this question, *Iowa Valley State Bank v. Sigsted*, 96 Iowa 497, 65 N. W. 407; *Phillips v. Dippe*, 93 Iowa 35, 61 N. W. 217; *Summers v. Barrett*, 65 Iowa 294, 17 N. W. 561 and 21 N. W. 647; *Belden v. Ham*, 61 Iowa 42, 15 N. W. 591; *Second National Bank v. Gaylord*, 34 Iowa 246; *Robinson v. Lair*, 31 Iowa 9; *Voorhies v. Atlee*, 29 Iowa 49; *Griffin v. Grundy County*, 10 Iowa 226 and 15 Iowa 31, 83 Am. Dec. 396; *Peck v. Frink*, 10 Iowa 193, 74 Am. Dec. 384; *Twogood & Co. v. Coopers & Clarke*, 9 Iowa 415, some important cases explaining and sustaining the text.—ED.)

HAWLEY v. WARNER, 12 IOWA 42.

1. Replevin—Action on Bond—Evidence of Ownership of Property—When Admissible in Mitigation of Damages.—Where a judgment in an action of replevin adjudges that the plaintiff is entitled to the *possession* of the property, then in an action on the bond the defendant (plaintiff in replevin) may show, in mitigation of damages, that the plaintiff (defendant in replevin) is not the owner of the property: But such evidence is inadmissible where the judgment in replevin determines the *title* to the property, p. 43.

Reaffirmed in Hayden v. Anderson, 17 Iowa 163, 164.

Cross references. See further annotations and cross references under Gimble v. Ackley (12 Iowa 27), ante. p. 4; Buck v. Rhodes (11 Iowa 348) Vol. I p. 823.

WOOD v. BAILEY, 12 IOWA 46.

1. Officers—Deputies—Powers of—Deputy County Clerk.—The deputy county court clerk has power to administer oaths in all cases where the clerk may do so, pp. 46, 47.

Reaffirmed and extended in Finn & Co. v. Rose, 12 Iowa 566, holding further that the deputy clerk of the district court may administer oaths, and that in such case it is unnecessary that the absence or inability of the clerk be stated; that such deputy may approve an attachment bond and issue the writ; and that the deputy's signature to a jurat, accompanying a petition for an attachment, need not be under seal.

Cross references. See further annotations under Finn & Co. v. Rose (12 Iowa 565), *Infra*, p. 96.

"Ministerial officers—Deputies"—See annotations under Abrams v. Ervin (9 Iowa 87) Vol. I, p. 548.

CASSEL v. WESTERN STAGE CO., 12 IOWA 47.

1. Replevin—Verdict—Sufficiency of—Form of—Judgment on Verdict.—Where in an action of replevin the plaintiff claims the right of *possession* of personal property, and the defendant claims no property or title, but denies having it in possession, whereupon the jury returns a verdict finding the *ownership* in the plaintiff, and assessing the value of the property and the damages for its detention, it is sufficiently responsive to the issue, and judgment may be entered thereon. The form of a verdict is sufficient if it expresses the intention of the jury, p. 49.

Reaffirmed and explained in State v. Funck, 17 Iowa 371, 372, holding that formal defects in a verdict are immaterial, but it must be responsive to the issue, and so expressed as to show that the jury decided the questions submitted: If from the pleadings and the verdict the intention of the jury be shown, it is sufficient.

Reaffirmed and extended in *Armstrong v. Pierson*, 15 Iowa 477, 478, holding that where from the pleadings and the language of the jury's verdict there is no doubt of their intention, the court may put it in form, if necessary.

(Note.—See further sustaining, explaining and extending, but not citing text, *Noble v. Des Moines & St. L. Ry. Co.*, 61 Iowa 639, 17 N. W. 27; *Helphrey v. Ch. & R. I. R. R. Co.*, 29 Iowa 483; *Lee & Co. v. Bradway*, 25 Iowa 218; *Hamilton v. Barton*, 20 Iowa, 505; *Morrison v. Overton*, 20 Iowa 465; *Fromme v. Jones*, 13 Iowa 474; *Bass v. Hanson*, 9 Iowa 563; *Stevens v. Campbell*, 6 Iowa 538; *McGregor, Laws & Blackmore v. Armill*, 2 Iowa 30, and there are many others.—Ed.)

2. Replevin—Issue in.—In an action of replevin the question to be determined is the right to the *possession* of the property *at the time of the commencement of the action*, p. 48.

Reaffirmed in *Campbell v. Williams*, 39 Iowa 647, 648; *Marshall v. Bunker*, 40 Iowa 123.

(Note.—See further sustaining, but not citing, the text, *Hilman v. Brigham*, 117 Iowa 71, 90 N. W. 491; *Brody v. Cohen*, 106 Iowa 311, 312, 76 N. W. 683; *Waterhouse v. Black*, 87 Iowa 317, 46 N. W. 1093; *Alden & Co. v. Carver*, 13 Iowa 253; *Kingsbury v. Buchanan*, 11 Iowa 387, and there are others.—Ed.)

Cross reference. See also, in this connection, annotations and cross references under *Buck v. Rhodes* (11 Iowa 348), Vol. 1, p. 823.

3. Replevin—Ownership of Property is Evidence of Right to Possession—When.—Where in an action of replevin the defendant does not claim ownership, or special title, evidence of ownership of the property in the plaintiff, carries with it the right to its possession, pp. 48, 49.

Reaffirmed and varied in *Hatfield v. Lockwood*, 18 Iowa 298, holding that where a tenant cribs one-third of a crop of corn which (under the lease) is, thereupon, to become the landlord's, that the title to the corn vests, upon its being cribbed, in the landlord and draws with it the right to possession.

Cross references. See other rules hereof and cross references there found, in connection herewith. See also, annotations under *Hawley v. Warner* (12 Iowa 42), ante. p. 7.

FERRALL v. IRVINE, ADM'R, 12 IOWA 52

1. Decedent's Estate—Failure to Present Claim in Statutory Period—Equitable Circumstances and Relief—Laches of Creditor.—Where a creditor has full knowledge of the death of his debtor and of the appointment of an administrator, and negligently fails to present his claim within one year and a half (as provided by sec. 1357 of the Code of 1851) his debt is barred, and he is not entitled to equitable relief under sec. 1373 of the Code of 1851, pp. 54, 55.

Cited, reaffirmed and explained in Preston v. Day, Ex'r, 19 Iowa 129; Shomo v. Bissell, 20 Iowa 70; Senat v. Findley, 51 Iowa 25; Potter v. Brentlinger and Guinn, Ex'rs, 117 Iowa 539, 91 N. W. 810; Bentley & Olmstead v. Starr, Adm'r, 123 Iowa 658, 99 N. W. 555; In re Estate of Ring, 132 Iowa 225, 109 N. W. 714.

(Note.—See further sustaining and explaining, but not citing, the text, Mosher v. Goodale, et al, Adm'rs., 129 Iowa 719, 106 N. W. 195; In re Jacob's Estate, 119 Iowa 176, 93 N. W. 94; Schlutter v. Dahling, 100 Iowa 515, 69 N. W. 884; Cory Bros. & Co. v. Gillespie, Adm'r, 94 Iowa 347, 62 N. W. 837; Roaf v. Knight, 77 Iowa 506, 42 N. W. 433; Colby v. King, Adm'r, 67 Iowa 458, 25 N. W. 704; Lacey v. Loughridge, 51 Iowa 629, 2 N. W. 515, and there are many other cases on the question.

N. B.—As the question of negligence is one of fact in each case, no syllabi are attempted above.—Ed.)

Cross references. See further in connection herewith, annotations under McCormack v. Cook, Adm'r (11 Iowa 267), Vol. I, p. 813; Hart v. Jewett (11 Iowa 276), Vol. I, p. 815.

KELLY v. GILLESPIE, 12 IOWA 55, 79 AM. DEC. 516.

1. Promissory Notes—Principal and Surety—Evidence of Suretyship.—In an action on a promissory note against two or more makers thereof, one of the defendants may show that, although he appears as principal he, in fact, signed as surety, and that such fact was known to the payee, p. 57.

Reaffirmed in Corrielle v. Allen, 13 Iowa 291; Lauman, Hedges & Co. v. Nichols, 15 Iowa 164; Christener v. Brown, 16 Iowa 132; Piper v. Newcomer & Campbell, 25 Iowa 222; Preston v. Gould, 64 Iowa 47, 48, 19 N. W. 835, 52 Am. Rep. 431.

Cited with approval in Chambers v. Cochran and Brock, 18 Iowa 165, holding that whatever discharges the principal, discharges the surety; and that reducing a note to judgment does not change the relationship of the parties, take away any of the rights of the surety, or release the creditor from any duties imposed on him in consequence of the suretyship.

Distinguished in Washington Bank v. Krum, 15 Iowa 63, the court holding that the maker of accommodation commercial paper is liable as principal to its innocent holder, for value.

Unreported citation, 101 N. W. 460.

(Note.—See further sustaining and explaining, but not citing, the text, James v. Smith, 30 Iowa 55; Harrison v. McKim, 18 Iowa 485.

Subrogation of surety paying debt—See Johnson v. Belden, 49 Iowa 301; Wilson v. Crawford, 47 Iowa 469; Lamb v. Withrow, 31 Iowa 164.—Ed.)

2. Principal and Surety—Extension of Time by Creditor—When Releases Surety.—Where the creditor, without the consent of

the surety, for a valuable consideration, suspends his right of action on and grants the principal in a promissory note further time (after maturity) to pay it, during which extended time the principal becomes insolvent, such facts release the surety: The fact that the consideration for the extension is an additional note which is tainted with usury, does not render the new contract void, or affect the rule, p. 57.

Reaffirmed in Corrielle v. Allen, 13 Iowa 291, 292; Lauman, Hedges & Co. v. Nichols, 15 Iowa 164.

Reaffirmed and extended in Bonney v. Bonney, 29 Iowa 451, holding further that a binding agreement between the principal and creditor, without the consent of the surety, by which the time of payment of the debt is extended, releases the surety, regardless of whether or not he is thereby prejudiced.

(Note.—See further on this question, Ryan v. Becker, 136 Iowa 277, 111 N. W. 428, 14 L. R. A. (New Series) 329; Haney & C. Co. v. Adaza C. C. Co., 108 Iowa 319, 70 N. W. 81; State v. Stegner, 72 Iowa 13, 33 N. W. 340; Davis v. Graham, 29 Iowa 514; Hunt v. Postlewait, 28 Iowa 427; Gardner v. Baker, 25 Iowa 349; Seymour & Co. v. Butler, 8 Iowa 304.—Ed.)

STATE v. BERRY, 12 IOWA 58.

1. Inferior Courts—Jurisdiction of—Presumption as to Regularity—Appeal—Certiorari.—When a statute expressly confers exclusive jurisdiction over any subject upon an inferior court, and it has acquired jurisdiction over such subject-matter as prescribed by law, every presumption is, thereafter, in favor of the legality and regularity of its proceedings, and questions of irregularity therein, must be raised by appeal or by *Certiorari*: But where the record shows that such court never acquired jurisdiction, no such presumption prevails, pp. 60, 61.

Reaffirmed in Davenport Mut. Sav. F. & L. Ass'n v. Schmidt, 15 Iowa 216; Knowles v. City of Muscatine, 20 Iowa 249, 250; State v. Lane, 26 Iowa 225; Goodrich v. Brown, 30 Iowa 294; State v. Anderson, 39 Iowa 275; Indep. Sch. Dist. of Oakville v. Indep. Sch. Dist. of Asbury, 43 Iowa 446; Biglow v. Ritter, 131 Iowa 214, 108 N. W. 219.

Reaffirmed and extended in Slack et al v. Blackburn et al, 64 Iowa 375, 20 N. W. 478, holding further that all proceedings in an action or proceeding are void, where it affirmatively appears that the court lacked jurisdiction, whether the court be of general or limited jurisdiction; and that where a certain act or acts is or are necessary to confer jurisdiction, the record must affirmatively show such to have been done.

Reaffirmed and extended in Larson v. Fitzgerald, 87 Iowa 407, 54 N. W. 442; State v. Minn. & St. L. Ry. Co., 88 Iowa 695, 56 N. W. 402, holding further that where the record in a proceeding for the establishment of a highway recites that the court found "that all the requirements of the law were performed," that such recital established jurisdiction.

Reaffirmed and qualified in McCollister v. Shuey, 24 Iowa 367; State v. Weimer, 64 Iowa 245, 20 N. W. 172; McBurney v. Graves, 66 Iowa 317, 23 N. W. 684; Richman et al v. Board of Supervisors of Muscatine County, 70 Iowa 631, 26 N. W. 26, holding that where a statute confers jurisdiction upon an inferior court as to a particular subject-matter, upon certain conditions being complied with, such as posting notices and proof thereof in a road motion, that unless the record shows that the *essential requirements* of the statute are obeyed, the court will lack jurisdiction and all proceedings will be void.

Distinguished in Keyes & Crawford v. Tait, 19 Iowa 126, a case involving prescriptive use from which regularity was presumed.

Unreported citation, 48 N. W. 730.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, Alcott v. Acheson, 49 Iowa 569; Woolsey v. Supervisors of Hamilton County, 32 Iowa 130, and there are many others.—Ed.)

Cross references. See further annotations under Morrow v. Weed, (4 Iowa 77); Cooper v. Sunderland (3 Iowa 114) Vol. 1, pp. 300, 253, respectively.

“Inferior Courts—Appeal—Certiorari—” See annotations and notes under Taylor v. Rockwell (10 Iowa 530); Craine v. Fulton (10 Iowa 457); Runner, Wickersham & Wycoff v. City of Keokuk et al (11 Iowa 543) Vol. 1, pp. 729, 742, and 858, respectively.

HAYS, ADM’R v. HORINE, ADM’R, 12 IOWA 61, 79 AM. DEC. 518.

1. Decedent’s Estate—Vendor’s Lien—Judgment of County Court Ordering Claim Secured by Paid—Effect.—Where a vendor’s debt secured by lien on land is adjudged by the county court to be paid by the personal representative of the decedent (purchaser), it does not release the vendor’s lien, although money be afterward paid thereon under the order. The action of the county court in such case is not a judgment in the sense to bar the vendor’s rights, p. 62.

Cited and extended in Smith, Murphy & Co. v. Shawhan, Adm’r, 37 Iowa 534, holding that an order of the county court approving and ordering a claim against a decedent to be paid, is not a “judgment” within the meaning of the statute of limitation: That the stating, verifying and filing of a claim against a decedent is the commencement of an action thereon.

BARLOW AND TOWNSEND v. SCOTT’S ADM’R, 12 IOWA 63.

1. Promissory Note—Assignment after Maturity—Defense.—Where a promissory note is transferred *after maturity*, its consideration may be inquired into as a defense to an action thereon, p. 65.

Cited and qualified in Peabody v. Rees, 18 Iowa 572 (abstract), the court holding that where a negotiable instrument is in good faith in-

dorsed *before due*, and the indorsee *after it is due* indorses it to another who has knowledge that the consideration has failed, that such failure of consideration is no defense to an action by the last indorsee thereon.

STATE v. CROSS, 12 IOWA 66, 79 AM. DEC. 519.

1. Trial — Absence of Witness — Continuance — Diligence.—

Where the accused fails to avail himself of the means given to him by statute to procure the attendance of a witness, or to obtain his deposition, he is not entitled to a continuance by reason of the absence of such witness, p. 67.

Reaffirmed and explained in State v. Rorabacher, 19 Iowa 157, holding that a continuance may be granted for any cause (not resulting from the fault or negligence of the applicant) which satisfies the trial court that substantial justice will thereby be more nearly obtained: That in determining such applications the trial court cannot act arbitrarily, or in violation of the manifest rights of the parties; but that such court has a sound judicial discretion in such cases, which will not be reviewed on appeal, except in case of abuse thereof, and resulting prejudice to the substantial rights of the party complaining.

(Note.—See further on this subject, Childs v. Heaton, 11 Iowa 271; State v. Cox, 10 Iowa 351; Widner v. Hunt, 4 Iowa 355; Brady v. Malone, 4 Iowa 146; Purrington v. Frank, 2 Iowa 565.—Ed.)

2. New Trial in Criminal Cases—Discretion of Trial Court—

Review on Appeal.—The appellate court will more liberally review the trial court's ruling in refusing to grant defendant a new trial in a criminal than in a civil case; and where it appears on appeal in a criminal case that the verdict was clearly against the weight of the evidence, and resulted in injustice, the judgment will be reversed, p. 68.

Reaffirmed in State v. Johnson, 19 Iowa 235, 236.

Cross references. See Rule 3 hereof. See further Rule 2 of State v. Tomlinson (11 Iowa 401) Vol. 1, p. 833.

3. Appeal on Second Verdict—Verdict against Evidence.—

Where under an indictment for rape the accused is convicted and granted a new trial by the trial court, is thereafter again convicted, is refused a new trial and appeals, the fact of the two convictions will have great weight with the appellate court in determining questions of evidence and its sufficiency, p. 68.

Reaffirmed in Grimmelman, Adm'r v. U. P. Ry. Co., 101 Iowa 83, 70 N. W. 93.

(Note.—See further sustaining and explaining, but not citing, the text, Hollenbeck v. City of Marshalltown, 62 Iowa 21, 17 N. W. 155; Burlington Gas Light Co. v. Green, Thomas & Co., 28 Iowa 289.—Ed.)

Cross reference. See Rule 2 hereof.

4. Rape—Assault with Intent to Commit—Conviction of Lower Degree on Charge of Higher.—Where on a trial for rape the evidence

clearly shows that the assault was made by the prisoner with intent to commit the offense, regardless of the resistance of the prosecutrix, the jury may convict accused of assault with intent to commit rape, although they are not satisfied that at the time accused accomplished his purpose there was such want of consent on her part as to constitute the higher degree, p. 69.

Reaffirmed in State v. McLaughlin, 44 Iowa 87; State v. Hagerman, 47 Iowa 151.

Reaffirmed and extended in State v. Atherton, 50 Iowa 191, 192, 1 N. W. 498; State v. Pilkington, 92 Iowa 93, 60 N. W. 502; State v. Deiong, 96 Iowa 475, 476, 65 N. W. 403; State v. Barkley, 129 Iowa 486, 105 N. W. 836, holding further that a person may be indicted for rape and convicted for assault with intent to commit rape, although the evidence shows that the female consented, when it further shows that, before such consent was given, the accused used such force as to evince an intention to commit the crime.

Reaffirmed and extended in State v. Trusty, 118 Iowa 500, 92 N. W. 677; State v. Barkley, 129 Iowa 486, 105 N. W. 836, holding further that evidence of rape includes all the lesser degrees thereof, and that where there is any evidence to support it, it is the duty of the court to instruct the jury as to all the included offenses.

(Note.—See further specially, State v. King, 114 Iowa 413, 87 N. W. 282, 89 Am. St. Rep. 371, 54 L. R. A. 853; State v. Wolf, 112 Iowa 458, 84 N. W. 536; State v. Desmond, 109 Iowa 72, 80 N. W. 214; State v. McDonough, 104 Iowa 6, 73 N. W. 357; State v. Cater, 100 Iowa 501, 69 N. W. 880; State v. Reasby, 100 Iowa 231, 69 N. W. 451; State v. Beabout, 100 Iowa 155, 69 N. W. 429; State v. Hutchinson, 95 Iowa 567, 64 N. W. 610; State v. Cook, 92 Iowa 483, 61 N. W. 185; State v. Kyne, 86 Iowa 616, 53 N. W. 420; State v. Watson, 81 Iowa 380, 46 N. W. 868; State v. Casford, 76 Iowa 330, 41 N. W. 32; State v. Welsh, 73 Iowa 106, 34 N. W. 765; State v. Mitchell, 68 Iowa 116, 26 N. W. 44; State v. Peters, 56 Iowa 263, 9 N. W. 219; State v. Vinsart, 49 Iowa 241; State v. Walters, 45 Iowa 389, some important cases on this subject not citing the text.—Ed.)

Cross reference. See Rule 3 hereof.

5. Rape—Evidence—Resistance—Marks of Violence, etc.—Disclosure and Complaint by Female.—In a prosecution for rape the facts that the female's clothes were not torn, or bore no evidence of the injury; that she made no outcry at the time of its alleged commission, and that she made no disclosure or complaint for several days thereafter, are strong circumstances in favor of the innocence of the accused; but they are to be considered by the jury in connection with the age and intelligence of the female, and the other circumstances of the case, pp. 69, 70.

Reaffirmed and extended in State v. Peterson, 110 Iowa 649, 650, 82 N. W. 330; State v. Snider, 119 Iowa 19, 91 N. W. 763; Garvick v.

B. C. R. & N. Ry. Co., 131 Iowa 418, 108 N. W. 328, 117 Am. St. Rep. 432, holding further that delay by the female in making disclosure and complaint of the crime of rape goes to the credibility of the witness; that such delay may be explained by the State.

Cited with approval in Daugherty v. McManus, 36 Iowa 659; ing the rule where the female is an idiot or an imbecile.

Distinguished in State v. Bebb, 125 Iowa 496-498, 101 N. W. 189, 190, holding that where a female does not disclose or complain of an alleged rape for a long time after its alleged commission, making such disclosure in answer to a question and in explanation of her pregnancy, it is inadmissible on the trial of an indictment for the crime.

Cross references. See other rules hereof and cross references there found. See Rule 3 of State v. Tomlinson (11 Iowa 401) Vol. 1, p. 833.

6. Rape—Consent and Submission—Not Synonymous—Female of Tender Years.—Consent involves submission, but a mere submission does not, necessarily, involve consent. The mere submission of a female child in the power of a strong man, is not such consent as will justify the latter under an indictment for rape, p. 70.

Reaffirmed and extended in State v. Tarr, 28 Iowa 402, 406, applying the rule to a rape charge where the female was an imbecile.

Cross references. See other rules hereof. See further Rule 3 of State v. Tomlinson (11 Iowa 401) Vol. 1, p. 833.

MOODY v. TAYLOR, 12 IOWA 71.

1. Actions—Original Notice—What to Contain.—An original notice must state the amount of plaintiff's demand and its nature; as that it is founded upon a note, open account, contract, or tort; and a notice failing in these requirements will be quashed, on motion of defendant, and the cause continued for service of proper notice, p. 72.

Cited with approval in Dougherty v. McManus, 36 Iowa 659; Woodbury v. Maguire, 42 Iowa 342, holding that where defendant suffers a judgment by default in an action wherein the original notice is insufficient, his remedy is by appeal; that such defect does not affect the jurisdiction.

Cross reference. See annotations and note under Coon v. Jones (10 Iowa 131) Vol. 1, p. 657.

MASON v. RICHARDS, 12 IOWA 73.

1. Replevin—Judgment in—Erroneous Judgment—Liability of Surety on Bond.—In an action of replevin, where the plaintiff fails to maintain his action, the judgment should be for a return of the property; but where such a judgment adjudges the value of the property against the plaintiff it is, although erroneous, binding upon him and, also upon his surety, in an action on the bond, unless it be reversed or set aside, pp. 74, 75.

Cited in Finch v. Hollinger, 47 Iowa 176, holding that where a court has jurisdiction of the parties and of the subject-matter, an erroneous order or judgment is valid until reversed or set aside.

Cross references.

"Verdict and judgment in replevin—Liabilities and rights of sureties on bond"—See annotations under Jansen v. Effey (10 Iowa 227); Hall v. Smith (10 Iowa 245) Vol. I, pp. 674, and 640.

"Judgment in replevin—Conclusiveness of"—See annotations and cross references under Hawley v. Warner (12 Iowa 42), ante. p. 7.

WHITE v. TISDALE, 12 IOWA 75.

1. Boats—Actions Against Under the Statute—Bond for Discharge of—Effect—Procedure.—Where, under chapter 120 of the Code of 1851, an action is brought against the boat, and, after its seizure, a bond is executed as provided by sec. 2124 (Code of 1851), such bond discharges the boat, and judgment may (under sec. 2125, Code of 1851) be had and execution may issue against the principal and sureties, without an order discharging the boat, p. 76.

Reaffirmed in Ogden v. Ogden, 13 Iowa 176, 177.

MCCLURE, ADM'R, v. BATES, 12 IOWA 77.

1. Foreign Administrator—Right to Sue Under Code of 1851.—Before a foreign administrator could sue in the courts of this State under the Code of 1851, he must have first taken out letters of administration here, p. 78.

Cited doubtfully in Chamberlin v. Wilson, 45 Iowa 151, 152, holding that a foreign administrator (appointed in the state and county of a decedent's residence) who reports a note as part of his inventory, may recover the proceeds thereof from an attorney of this state, to whom it was sent by him for collection, without taking out letters of administration in this state; and that such an administrator appointed for such decedent by a court of this state has no right thereto.

TOWN OF MCGREGOR v. MCGREGOR BRANCH OF STATE BANK, 12 IOWA 79.

1. Cities and Towns—Revenue and Taxation—Bank Stock.—A branch of the state bank located and doing business in a city or town authorized to assess and collect taxes for municipal purposes, must pay taxes therefor, on its capital stock, p. 80.

Reaffirmed and extended in Hubbard v. Board of Supervisors of Johnson County; Davenport Nat'l Bank v. Scott County, etc., 23 Iowa 150, holding further (on a question of state and county taxation) that taxes are to be levied upon the capital stock of a national bank and paid by it, and that the owners of shares therein are not liable to assessment thereon.

WAHL v. PHILLIPS, 12 IOWA 81.

1. **Mortgages—Actions—Rights of Mortgagee.**—A mortgagee may sue at law on his note secured, and then proceed in equity for foreclosure, and to adjudicate priorities of himself and other incumbrancers of the mortgaged property, p. 82.

Cited and extended in Dubuque County v. Koch, 17 Iowa 231, holding further that a mortgagee may sue the mortgagor in equity, foreclose and sell the mortgaged property, and thereafter sue a surety on the mortgage note for the residue of the note remaining unpaid after sale of such property.

Cited and extended in Moores v. Ellsworth, 22 Iowa 300, 301, holding further that a mortgage lien is not extinguished until the debt is paid; and that the fact that a mortgage creditor, or lienholder, presents his claim against a decedent (mortgagor) and has it approved and allowed, does not bar his right to sue in equity and foreclose the lien.

Cited and extended in Jordan v. Smith, 30 Iowa 501, 502, holding further that a judgment at law against the principal and surety on a mortgage note, does not extinguish the mortgage lien.—And to the same effect is Morrison v. Morrison and Berry, 38 Iowa 77, 78, (citing the text).

Cited and qualified in State v. Lake, 17 Iowa 217-219; Morrison v. Morrison and Berry, 38 Iowa 78, holding (as does the court in *dictum* in the present case) that where a party sues at law and recovers on a mortgage note, he is entitled to the rights and remedies provided by law for judgments at law, and that such a judgment is a lien only from its rendition, *as against third persons*, unless it specially recites the fact of its being for a lien note, describes the property, and orders a special execution: But as between the parties, a mortgage lien is not extinguished by such a judgment, or by anything other than the satisfaction of the debt.

Cited in Patterson v. Lindner, 14 Iowa 416, holding that a purchaser at an execution sale under a judgment at law for the balance of purchase money of land, may sue in equity to quiet his title as against the vendee of a purchaser (with notice) of the interest of the latter.

Cross reference.

"Discharge of mortgage—What does not operate as"—See annotations under Packard v. Kingman (11 Iowa 219) Vol. 1, p. 806.

FARR v. FULLER, 12 IOWA 83.

1. **Change of Venue—Unconditional Order for—Effect on Jurisdiction.**—Where an unconditional order for a change of venue is made by a district court of one county to that of another, the former loses jurisdiction of the action, and any subsequent orders or judgments therein entered are without authority and will be reversed on appeal, p. 84.

Reaffirmed in Brown v. Thompson, 14 Iowa 597, 598 (abstract); Carroll County v. American Em. Co., 37 Iowa 374.

Distinguished in Picket v. Hawes, 13 Iowa 601 (abstract), holding that where an order for change of venue is conditional, and the condition is not complied with by the party to whom it is granted, the district court so granting it, may re-docket and try the action.

Unreported citation, 124 N. W. 201.

Cross references. See further annotations under State v. Ensley (10 Iowa 149); Eckles v. Kinney (4 Iowa 539) Vol. I, pp. 662 and 334.

JEWETT & LOVEJOY v. MILLER & FULLER, 12 IOWA 85.

1. **New Trial—Discretion of Trial Court—Reversal on Appeal—Prejudice to Appellant.**—A wide latitude is given to the discretion of the district court in granting and refusing a new trial, which will not be cause for reversal, unless it is shown to have been abused, resulting in manifest injustice to the appellant, p. 87.

Reaffirmed in Shepherd v. Brenton, 15 Iowa 90; Barnes v. McDaniels, 35 Iowa 381, 382.

Reaffirmed and extended in Gantz v. Clark, 31 Iowa 259, holding further that the ruling of the trial court will, on appeal, be presumed correct, unless the record affirmatively shows error.

Cross references. See further sustaining, explaining and qualifying the text, annotations, notes and cross references under Caffrey v. Groome (10 Iowa 548); Newell v. Sanford (10 Iowa 396) Vol. I, pp. 745, and 712.

SABIN & MOON v. HARRIS, 12 IOWA 87.

1. **Negotiable Instruments—Indorsement—Guaranty—Notice of Dishonor, etc.**—A guarantor of the *payment* of a negotiable instrument, by indorsement, where the indorsement is not in blank, is liable in an action by the payee, without proof of demand and notice of non-payment, or the use of diligence against the maker; but if in such action, the guarantor shows that he has been damaged from the want of such notice, or diligence, it is a defense *pro tanto* to the plaintiff's (payee's) action: But where an indorsement is in blank by a person who is not a party to the instrument, then, under Secs. 953, 954 of the Code of 1851, the indorsement constitutes a guaranty of the performance of the contract, but notice of non-payment by the maker must be given such guarantor (blank indorser) within a reasonable time, and there must be due diligence used to collect from the maker, and the burden of proof as to diligence, etc., is on the payee (holder) and not the guarantor (blank indorser), p. 92.

Reaffirmed in Griffin v. Seymour, 15 Iowa 33, 83 Am. Dec. 396; Martyn v. Lamar, 75 Iowa 236, 39 N. W. 285.

Reaffirmed and explained in Picket v. Hawes, 14 Iowa 461, 462, holding that the blank indorsement of an instrument for the payment of

money by a person not a payee, indorsee or assignee thereof, constitutes a guaranty of the performance of the contract; but that in order to charge such guarantor, notice of non-payment must be given within a reasonable time, unless the holder of the instrument affirmatively shows that such indorser or guarantor was not injured by failure to give the notice, in which case it is not a condition precedent to recovery.

Reaffirmed and narrowed in Hoyt v. Quint, 105 Iowa 443, 444, 75 N. W. 343, holding that one who guarantees the payment of a note and expressly waives "demand, protest, and notice of protest," is liable absolutely thereon, without allegation or proof of such facts.

Cited in Sibley v. Van Horn, 13 Iowa 209, 210, holding that one who indorses a promissory note in blank and who is not a payee or an assignee thereof, is liable as guarantor thereon, without allegation or proof of demand on and refusal to pay by the maker, and reasonable notice thereof, when the allegation is made and the proof shows that he was not injured thereby.

LYON v. METCALF, 12 IOWA 93.

1. **Husband and Wife—Conveyance by—Joinder of Wife to Release Dower—Breach of Covenant.**—Where a wife joins in a conveyance of real estate by her husband, for no other purpose than to release her dower therein, she is not liable for breach of covenants thereof, p. 93.

Reaffirmed and qualified in Richmond v. Tibbles, 26 Iowa 477, 478, 482, holding that a wife is liable (under Code of 1860) for breach of covenants contained in a deed to her own land.

Cited in Sharp v. Bailey, 14 Iowa 389, 81 Am. Dec. 489, on the effect of relinquishment of dower, at the end of a deed, on the homestead.

(Note.—See further specially, sustaining and explaining the text, Westfall v. Lee, 7 Iowa 12; Schaffner v. Grutzmacher, 6 Iowa 137.—Ed.)

MARVIN v. TARBELL, 12 IOWA 93.

1. **Judgment—Confession of—Sufficiency of Statement for.**—Where a statement for a confession of judgment recites that the consideration of the demand is for "borrowed money" as evidenced by promissory note, and sets out the note, it is sufficient, p. 94.

Special cross reference. See annotations under Vanfleet v. Phillips (11 Iowa 558) Vol. I, p. 860, where cases citing the text, and many more will be found.

BATES v. KEMP, 12 IOWA 99.

(Later Appeal, 13 Iowa 223.)

1. **Pleadings — Amendments — When Subsequent Pleadings Substitutes One Previously Filed.**—Where a subsequently filed plead-

ing contains substantially the same allegations as one previously filed and, also, states that it is an amendment, it will be taken as *substituting* the previous one, and not as an amendment to it, pp. 99, 100.

Reaffirmed and extended in Lauman v. Des Moines County, 29 Iowa 311, holding further that where the defendant files an amended answer, and not an *amendment to* the original, the court will look to the *substituted* answer in determining the issue joined.

Cited and qualified in Thayer v. Smoky Hollow Coal Co., 129 Iowa 553, 105 N. W. 1025, holding that where a party files a substitute to a pleading, he may, thereafter, by leave of court, withdraw it, and file an amendment to the original pleading setting up additional facts supporting his cause of action or defense.

(Note.—See further sustaining, explaining, qualifying and analogous to, but not citing, the text, Redhead v. Iowa National Bank, 123 Iowa 336, 98 N. W. 806; Van Patten v. Waugh, Adm'r, 122 Iowa 302, 98 N. W. 119; Marshall Field Co. v. O. Ruffcorn Co., 117 Iowa 157, 90 N. W. 618; Williams v. Williams, 115 Iowa 520, 88 N. W. 1057; Longley, Adm'r v. McVey, 109 Iowa 666, 81 N. W. 150; Ludwig v. Blackshere, 102 Iowa 366, 71 N. W. 356; Mowry v. Wareham, 101 Iowa 28, 69 N. W. 1128; Leach v. Hill, 97 Iowa 81, 66 N. W. 69; Shipley v. Reasoner, 87 Iowa 555, 54 N. W. 470; State v. Simpkins, 77 Iowa 677, 42 N. W. 516; Kuhns v. Wis. I. & N. Ry. Co., 76 Iowa 67, 40 N. W. 92; Mulligan v. Ill. Cent. Ry. Co., 36 Iowa 181; Brenner & Co. v. Gundershiemer, 14 Iowa 82; Lee v. Keister, 11 Iowa 480.—ED.)

2. Promissory Note—Assignment of After Maturity—Defenses.—Where a promissory note is transferred or assigned after its maturity, the transferee or assignee takes it as a dishonored instrument and as subject to all defenses of the maker against the payee and indorsee, p. 100.

Reaffirmed in Barlow and Townsend v. Scott's Adm'r, 12 Iowa 63.

JONES v. HOCKMAN, 12 IOWA 101.

(Later Appeal, 16 Iowa 487.)

1. Lands—Adverse Possession—Limitation of Actions.—In order to constitute adverse possession of land, there must be an actual possession for the statutory period, under a claim or color of title, and under which the party claiming the right has in good faith and continuously held as against the owner for such time, p. 108.

Reaffirmed in Clagett v. Conlee, and Jones v. Hockman, 16 Iowa 489, 490; Grube v. Wells, 34 Iowa, 149, 150; Tracy v. Newton, 57 Iowa 212, 10 N. W. 637; Sater v. Meadows, 68 Iowa 509, 27 N. W. 482; Wickham v. Henthorn, 91 Iowa 245, 59 N. W. 277; Van Ormer v. Harley, 102 Iowa 157, 71 N. W. 243.

Reaffirmed and extended in Robinson v. Lake, 14 Iowa 424, holding further that adverse possession must be actual, continuous, visible, notorious, distinct and hostile to the owner of the land

Reaffirmed and extended in Burdick v. Heivly, 23 Iowa 514, holding further that the declarations and acts of the party in possession of land, are admissible on the question of adverse possession, and to show the extent of the interest claimed by him; that a claim of ownership, and use and occupation of land for the statutory period of ten years, bars the owner thereof.

Reaffirmed and extended in Schmidt v. Zohensdorf, 30 Iowa 499, holding further that where (in an action for the recovery of real property) defendant interposes a plea of adverse possession, and the plaintiff replies claiming that the defendant took possession of the land without any claim of title, but expressly recognizing the title to be in another, and there is *some* evidence to support the judgment of the trial court in favor of plaintiff, it will not be reversed on appeal.

Reaffirmed and extended in American Em. Co. v. Fuller, 83 Iowa 609, 50 N. W. 50, holding further that the transfer of title to land carries with it the legal possession thereof, which remains until it is disturbed by a hostile possession under color of title or claim of right by another.

Reaffirmed and qualified in Booth & Graham v. Small and Small, 25 Iowa 180, 181, holding, however, that actual residence upon, or inclosure or cultivation of land, is not necessary to constitute adverse possession thereof: That acts of a person under a claim of title, though not amounting to *actual possession*, if they are equal thereto, equivalent in the conditions necessary, and are continued for the statutory time, are sufficient.

Reaffirmed and qualified in Hamilton v. Wright, 30 Iowa 486, holding that *color of title* must be evidenced by writing, but *claim of title* may exist by parol, and that either is sufficient, when attended with the other necessary facts, to support title to land by adverse possession.

Reaffirmed and qualified in Litchfield v. Sewell, 97 Iowa 250, 251, 66 N. W. 106, holding that a void deed, or, even a deed void on its face, may constitute such color of title as will support a claim of adverse possession: Provided the claimant acts in good faith believing he has title, but not otherwise.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, Smith v. Young, 89 Iowa 338, 56 N. W. 506; McCarty v. Rochel, 85 Iowa 427, 52 N. W. 361; Snell v. Mehan, 80 Iowa 53, 45 N. W. 398; Ch. R. I. & P. Ry. Co. v. Allfree, 64 Iowa 500, 20 N. W. 779; Skinner v. Crawford, 54 Iowa 119, 6 N. W. 144; Moore v. Antill, 53 Iowa 612, 6 N. W. 14; Davenport v. Sebring, 52 Iowa 364, 3 N. W. 403; Tuttle v. Becker, 47 Iowa 487; Burns v. Byrne, 45 Iowa 285; Hughes v. Lindsey, 31 Iowa 329; Brown v. Bridges, 31 Iowa 138; Close v. Samm, 27 Iowa 503; McNamee v. Moreland, 26 Iowa 97; Campbell v. Long, 20 Iowa 382; Wright v. Keithler, 7 Iowa 92; Langworthy v. Myers, 4 Iowa 18.—Ed.)

2. Appeal—Bill of Exceptions—Signing and Approving—Practice.—The time when a bill of exceptions was signed by the clerk is immaterial, on appeal, where the record shows that it was properly ordered to be made part of the record by the trial court, p. 108.

Reaffirmed and qualified in Cobb v. Chase, 54 Iowa 198, 6 N. W. 265, holding that where, by agreement of parties, time is extended beyond the term at which a bill of exceptions is presented, to "settle and file" it, that unless it is both *settled and filed* within the time fixed by the order and agreement, it will not be considered on appeal; that an order by the trial court in vacation making such bill part of the record and contrary to the agreement, is of no effect: Holding further that where time is given beyond the term at which a bill of exceptions is presented to "settle and file" it, the order not showing an agreement of the parties, then in the absence of proof to the contrary, such agreement will be presumed on appeal.

Distinguished in Hahn v. Miller, 60 Iowa 98, 14 N. W. 120, holding that under the Code of 1873 (sec. 283) that a bill of exceptions must be filed during the term at which the verdict or judgment is rendered or within such time thereafter as the court may fix; but in no case shall the time extend more than thirty days beyond the term, except by consent of the parties, or by order of court: Holding further that extension of time for the settling of a bill of exceptions correspondingly extends the time for its filing.

Unreported citation, 128 N. W. 852.

(Note.—See further specially on this question, Manning v. Irish, 47 Iowa 650; Parmenter v. Elliott, 45 Iowa 317; Lloyd v. Beadle, 43 Iowa 659; Harrison v. Charlton, 42 Iowa 573; Lynch v. Kennedy, 42 Iowa 220; St. John v. Wallace, 25 Iowa 21.—ED.)

HATTENBACK v. HOSKINS, 12 IOWA 109.

1. Judgment in Vacation by Agreement of Parties—Practice.—A judgment may, by written agreement of the parties, be rendered and entered by the district court in vacation and execution may issue thereon forthwith, unless otherwise agreed on by the parties: Where a party agrees to such a judgment in open court, then the agreement need not be in writing, p. 111.

Reaffirmed in O'Hagan v. O'Hagan, 14 Iowa 267.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, Balm v. Nunn, 63 Iowa 641, 19 N. W. 811; Spear v. Fitchpatrick, 37 Iowa 128; Rowley & Co. v. Baugh, 33 Iowa 201; Luse v. City of Des Moines, 22 Iowa 590; McClure v. Owens, 21 Iowa 133; Townsley v. Morehead, 9 Iowa 565; Smiths v. Dubuque County, 1 Iowa 492; Chapman v. Morgan, 2 G. Greene 374; Davidson v. Wheeler. Morris, 238.—ED.)

BURLINGTON & MISSOURI RIVER R. R. CO. v. SPEARMAN, AND CITY OF MT. PLEASANT, 12 IOWA 112.

1. Cities and Towns—Street and Sidewalk Improvements—Depot Grounds—City Limits of Mount Pleasant.—Although the depot grounds of the Burlington & Missouri River R. R. Co. at Mount Pleasant are not a part of any addition or subdivision of that city and are not designated on the map referred to in the Act of July 16, 1856 (incorporating such a city), as a lot, still, as they are within the city, receive its advantages and protection, and are used for business purposes, are surrounded by streets and alleys, and lots are laid out adjoining thereto, they are liable for assessment and taxation for the purpose of constructing a sidewalk adjoining them, pp. 115, 116.

Cited with approval in City of Muscatine v. Ch. R. I. & P. Ry. Co., 79 Iowa 650, 44 N. W. 910, holding that the holder of an exclusive and perpetual easement and occupancy of land in a city, is liable to assessment and taxation for grading and macadamizing a street on which it abuts.—But in C. R. I. & P. Ry. Co. v. City of Ottumwa, 112 Iowa 308, 316, 83 N. W. 1077, 1088, 51 L. R. A. 763 (citing and distinguishing text) the court holds that the Right of Way of a railroad (not held in fee, but condemned as required by law therefor), is not subject to assessment and taxation for street improvements and sidewalks: That the owner of lots or lands abutting on streets, and not the mere owner of an easement thereover, is the party liable therefor.

Cited in City of Davenport v. M. & M. R. R. Co., 16 Iowa 360, on the general liability of a railroad company for city taxes.

Cited in Buell v. Ball, 20 Iowa 288, on the exemption of agricultural land from taxation.

2. Cities and Towns—Improvements—Streets and Sidewalks—Power of City or Town Concerning.—An authority in the charter of a city to cause its streets to be "paved, graded or macadamized," authorizes it to require a plank or other kind of walk, in its discretion, to be made. The character and value of such improvements (under such a charter) are matters peculiarly within the discretion of the city authorities, p. 116.

Reaffirmed and extended in Warren v. Henly, 31 Iowa 35-37, holding further that authority to a city to cause its streets and alleys "to be paved, and pavements to be repaired," authorizes their improvement by macadamizing, and the construction of gutters and the putting in of curbstone: Holding further that a sidewalk is a part of a street.—And to the same effect is Buell v. Ball, 20 Iowa 290.

Cited in Cassady v. Hammer, 62 Iowa 360, 17 N. W. 588, holding that the word "Taxes" includes assessments for street improvements, within a stipulation of a lease whereby the lessee agrees "to pay all taxes on the lot, etc.," during the continuance thereof.

Distinguished and narrowed in Hartrick v. Town of Farmington, 108 Iowa 33, 34, 78 N. W. 834, 75 Am. St. Rep. 206, holding that a city

has no authority to construct a temporary plank sidewalk above the natural surface of abutting lands, where no permanent grade has been established, and that, in such case, a mandatory injunction to remove such sidewalk, may issue upon complaint of any such abutting land owner.

3. Cities and Towns—Street Improvements—Sale for Tax—Advertisement Vague as to Description—Effect.—Although the description of the land in an advertisement for its sale for a street improvement tax, be so vague that a sale thereunder will confer no title on the purchaser, yet, such insufficient description is not a ground for injunction by the land owner to restrain the sale, pp. 116, 117.

Reaffirmed and extended in Shaw v. Orr, 30 Iowa 360, holding further that an indefinite description of land in an assessment will not relieve the owner from liability for taxes thereunder, when it appears that it is otherwise subject thereto.

Cited in Buell v. Ball, 20 Iowa 290, where the description of the lots, in an ordinance for a sidewalk tax, was concise and reasonably certain, and with the aid of the city map, was held definite and sufficient.

4. Taxation and Revenue—Railroad Companies—Liability for Taxes.—A railroad company is liable to taxation on all its property; and this includes its depot grounds, p. 117.

Reaffirmed in City of Davenport v. M. & M. R. R. Co., 16 Iowa 365, 366; Warren v. Henly, 31 Iowa 44.

Cross reference. See further other rules hereof.

MONROE v. WEST, 12 IOWA 119, 79 AM. DEC. 524.

1. Mechanic's or Materialman's Lien—When Lien Attaches.—A mechanic or materialman has a lien on the realty for work done or materials furnished to erect a building or make other improvements thereon, from the *commencement* of the work or the furnishing of the first materials; and this lien is superior to the rights of a mortgagee or purchaser subsequent to such time, and includes all work done or materials furnished, pp. 121, 122.

Reaffirmed in Shields v. Keys, 24 Iowa 307.

Reaffirmed and extended in Jones v. Swan & Co., 21 Iowa 185, holding further that where there is a continuous, open, current account for materials furnished, that the materialman has ninety days from the date of the last item in which to file his claim with the clerk, and his lien continues, without such filing, until such time.

Cited and narrowed in Neilson v. Iowa Eastern Ry. Co., 44 Iowa 73, holding that the lien of the mechanic or materialman (under the Code of 1873) attaches at the time of the *commencement* of "the building, erection, or other improvement."

2. Mechanic's or Materialman's Lien—Contract with Owner of Land Necessary—Who is "Owner."—In order for a mechanic or materialman to have a lien on realty for work done or materials furnished in the erection of a building or making improvements thereon, he must have a contract therefor with the owner of the realty: But "owner" includes any person who has an *estate or interest* in the land, and the lien extends to the whole of such person's *estate or interest*. *A priori*, the purchaser of real estate in possession under a title bond, is such an "owner," pp. 123, 125.

Reaffirmed in Jameson & Son v. Gile and Ellsworth, 98 Iowa 493, 67 N. W. 397.

Cited with approval in Severin v. Cole and B. C. R. & M. Ry. Co., 38 Iowa 464, on a question of condemnation of land for railroad purposes, involving a similar construction of "owner" in the statute.

(Note.—See further specially, Estabrook v. Riley & Armin, 81 Iowa 479, 46 N. W. 1072; Oliver & Miller v. Davis, 81 Iowa 287, 46 N. W. 1000; Stockwell v. Carpenter, 27 Iowa 119.—Ed.)

Cross reference. See further annotations, notes and cross references under Reed & Downs v. Houston & Hunt (12 Iowa 35) ante p. 5.

KEENAN v. MISSOURI STATE MUTUAL INSURANCE CO.; RIDER v. MISSOURI STATE MUTUAL INSURANCE CO., 12 IOWA 126.

1. Trial—Instructions—Assuming Facts as True.—Instructions to the jury must not assume as true any fact that it is the province of the jury to determine, p. 130.

Reaffirmed and extended in Muldowney v. Ill. Cent. R. R. Co., 32 Iowa 178, holding further that where there is no evidence, or where essential or integral elements of a cause of action or defense are wholly without proof, the trial court may refuse to allow the case to go to the jury, or direct the jury as to their verdict; but where there is evidence tending in any degree to establish the cause of action or defense, it is error for the court to take the case from the jury or pronounce an opinion upon the sufficiency or weight of the evidence, except where the proof is documentary: That it is the peculiar province of the jury to decide questions of fact, the weight of evidence, and the credibility of witnesses; and instructions must state rules of law only.

Cross references. See further annotations and cross references under Rules 3 and 4 of Potter et al v. Wooster et al (10 Iowa 334) Vol. 1, p. 697.

2. Principal and Agent—Special Agent—Principal Holding out as General Agent—Effect—Insurance Company.—Where a principal holds his special agent out to the public as possessing the powers of a general agent in the transaction of his (the principal's) business, he is bound, as to third persons who deal with such agent without knowledge of his actual authority, as if the agent's powers and authority were not

limited or special. In such case it is the duty of the agent to act for and on behalf of his principal as if he were a general agent; but his failure so to do, does not prejudice the rights of such a third person.

A priori actual notice to such an agent of an insurance company of anything of which it is entitled to notice under a policy of insurance, is notice to the company; but such notice must be communicated to such agent *as agent*, and the company will not be bound by information to him by rumors and talk upon the street, pp. 132, 133.

Reaffirmed and explained in Viele v. Germania Ins. Co., 26 Iowa 58, 64, 65, 96 Am. Dec. 83; Alman, Miller & Co. v. Phoenix Ins. Co., 27 Iowa 207, 1 Am. Rep. 262, holding that agents of insurance companies are considered general agents, and corporations represented by them are bound by their acts which are within the scope of the general authority they possess, although in violation of limitations upon that authority, when such limitation thereon is not brought to the knowledge of a party dealing with them.

(Note.—See further specially, City of Davenport v. Peoria M. & F. Ins. Co., 17 Iowa 276.—ED.)

3. Mutual or Assessment Insurance Companies—Forfeiture of Policy—Effect on Premium Notes.—Where a policy of insurance in a mutual or assessment company is forfeited to the extent of releasing the insurer from liability thereon, it would seem, considered as an equitable question, that the insured should no longer be held liable on premium notes given therefor; this question is to be determined from the language of the policy, pp. 133, 134.

Reaffirmed and extended in Watrous v. Miss. Val. Ins. Co., 35 Iowa 584, holding further that a provision in a policy of insurance that the insurer is not to be liable for loss occurring when the note given for the premium is due and unpaid, is binding.

Cross reference. See Rule 4 below.

4. Insurance Companies—Waiver of Stipulation in Policy Concerning Forfeiture.—Where a policy of insurance provides that upon the happening of a particular thing or a certain kind of use of the insured property, the policy shall be forfeited, and after such thing has happened, or property has been so used, the insurer, with full knowledge, does any act recognizing the policy as in force, and which is inconsistent with the hypothesis of forfeiture and which would naturally and justly influence the conduct of the insured, such stipulation as to forfeiture is thereby waived, p. 134.

Reaffirmed and extended in Keenan v. Dubuque Mut. F. Ins. Co., 13 Iowa 380, 381, holding further that the assessment and collection of a portion of a premium note by a mutual insurance company, after it is advised of a violation by insured of the provisions of the policy, thereby waives forfeiture by reason thereof.

Reaffirmed and extended in Viele v. Germania Ins. Co., 26 Iowa 52, 53 (and in note p. 70), 96 Am. Dec. 83, holding further that a for-

feiture of a policy of insurance on account of breach of conditions thereof may be waived by the insured; and that such waiver need not be in writing, but may be by parol, or by the acts of the insurer inconsistent with a claim of forfeiture.

Reaffirmed and extended in Padnos v. Century F. Ins. Co., 142 Iowa 205, 206, 119 N. W. 136, holding further that where an insurance company, with full knowledge of a breach of the conditions of a policy rendering it void, retains cash paid by insured and a premium note therefor, and does not offer to return same and pay it back, it is estopped from claiming invalidity by reason thereof.

(Note.—See further sustaining text and above cases, but not citing the text, Hollis v. State Ins. Co., 65 Iowa 454, 21 N. W. 774; Mershon v. Nat'l Ins. Co., 34 Iowa 87.—Ed.)

Cross references. See rules 3 and 5 hereof in connection herewith.

5. Insurance Companies—Waiver of Conditions in Policy—What Constitutes—Proofs of Loss.—Where a contract of insurance provides that a condition is to be performed by insured before the insurer is to be liable for loss thereunder, and the insured complies with the condition in an insufficient manner, the failure of the insurer to object thereto, or his mere silence, does not amount to a waiver thereof: More than mere silence or a failure to object to the sufficiency of the performance of such a condition is necessary, in order to constitute a waiver thereof. The above rule applies where the insured fails to comply with the furnishing of proofs of loss and the bill of particulars, as provided by a policy of insurance, pp. 136-138.

Reaffirmed and extended in Ervay v. Fire Ass'n of Phil., 119 Iowa 307, 93 N. W. 292, holding further that a mere proposition of an insurance adjuster to visit the insured on a certain day in regard to the loss or to "fix it up with him," does not constitute a waiver of failure to furnish proofs of loss.

Reaffirmed and extended in Rundell & Hough v. Anchor F. Ins. Co., 128 Iowa 577, 105 N. W. 112, holding further that in order to constitute a waiver, there must be some affirmative act on the part of the insurer, which induces the insured to rest on the well founded belief that strict performance, or performance, (as the case may be) of a condition in the policy will not be insisted upon.

Reaffirmed and narrowed in Boyd v. Cedar Rapids Ins. Co., 70 Iowa 329, 30 N. W. 586; Boom v. State Ins. Co., 94 Iowa 363, 62 N. W. 812; Smith v. Continental Ins. Co., 108 Iowa 390, 79 N. W. 129, holding that an unqualified refusal to pay a loss under a policy of insurance, which refusal is based upon facts within the insurance company's own knowledge, and on other grounds, constitutes a waiver of the failure of insured to furnish proofs of loss; and that this is true whether the proofs are required by the policy or by the statute: That

- a party may waive what is solely for his, or its, benefit, whether it is provided by contract or by statute.

Unreported citation, 105 N. W. 112.

(Note.—See further specially on this subject, *Lake v. Farmers' Ins. Co.*, 110 Iowa 473, 81 N. W. 710; *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.*, 110 Iowa 423, 81 N. W. 707, 80 Am. St. Rep. 311; *Huesinkveld v. St. P. F. & M. Ins. Co.*, 106 Iowa 229, 76 N. W. 696; *Brock v. Des M. Ins. Co.*, 106 Iowa 30, 75 N. W. 683; *Hart v. Nat'l Mas. Acc. Ass'n*, 105 Iowa 717, 75 N. W. 508; *Dee & Sons Co. v. Key City F. Ins. Co.*, 104 Iowa 167, 73 N. W. 594; *Dyer v. Des M. Ins. Co.*, 103 Iowa 524, 72 N. W. 681; *Ruthvon Bros. v. Amer. F. Ins. Co.*, 102 Iowa 550, 71 N. W. 574; *Broch v. Des M. Ins. Co.*, 96 Iowa 39, 64 N. W. 685; *Ruthven Bros. v. Amer. F. Ins. Co.*, 92 Iowa 316, 60 N. W. 663; *Harris v. Phoenix Ins. Co.*, 85 Iowa 238, 52 N. W. 128; *Green v. Des M. F. Ins. Co.*, 84 Iowa 135, 50 N. W. 558; *Welsh v. Des M. Ins. Co.*, 71 Iowa 337, 32 N. W. 369; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444; *Bach v. State Ins. Co.*, 64 Iowa 595, 21 N. W. 99; *Carson v. German Ins. Co.*, 62 Iowa 433, 17 N. W. 650, important cases not citing, but sustaining, explaining and qualifying the text.—Ed.)

MOSES v. CLERK OF DALLAS DISTRICT COURT, 12 IOWA 139.

1. Executions—Stay of By Purchaser of Mortgaged Property Who Assumes Debt.—Where a purchaser of mortgaged property assumes or agrees to pay the mortgage debt, he becomes as between himself and his vendor, the principal debtor; and when sued jointly with his vendor (mortgagor) thereon, may stay an execution on a judgment in such action without the consent of his co-defendant, although the execution, so stayed, is against the property of the vendor (mortgagor) only, p. 140.

Reaffirmed and extended in *Thompson v. Bertram*, 14 Iowa 479; *Scott's Adm'rs v. Gill*, 19 Iowa 188, 189, holding further that a purchaser of mortgaged real estate who assumes and agrees to pay the mortgage debt, may be joined with his vendor (mortgagor) in an action for foreclosure, and a personal judgment may therein be rendered against such purchaser and, also, a special decree of foreclosure against the property.

Reaffirmed and extended in *Massie v. Mann*, 17 Iowa 135, 137; *Foster v. Marsh*, 25 Iowa 304, holding further that a purchaser of mortgaged realty who assumes the debt, or covenants to pay it, is, as between him and his vendor (mortgagor) a principal, and upon such vendor paying the debt, he is entitled to be subrogated to all the rights of the mortgagee.

Reaffirmed and extended in *Ross v. Kennison*, 38 Iowa 397; *Lamb v. Tucker*, 42 Iowa 119, holding further that the assumption of the mortgage debt by the purchaser of mortgaged property, in order to

render him liable as principal to the mortgagee and allow a personal judgment therefor, need not be in writing.

Reaffirmed and extended in Beeson v. Green, 103 Iowa 408, 409, 72 N. W. 555, holding further that where a purchaser of mortgaged property assumes to pay the debt, or covenants to pay it, the mortgagee may sue him at law for the interest due on a note so secured, without foreclosing the mortgage; that in such case the mortgagee may sue both the vendor (mortgagor) and the purchaser, or either, at law for the debt and interest, or, may proceed in equity to foreclose the mortgage, unless the mortgagee has, by a valid agreement, released the vendor (mortgagor) as principal.

Distinguished and narrowed in Messenger v. Votaw, 75 Iowa 226, 39 N. W. 281, holding that where plaintiff sold to the defendant a part of a certain town lot, and received in payment one hundred and fifteen acres of land, and that at the time of the sale there was a mortgage of \$3,500 on the lot, on which there was then due interest to the amount of \$150, and the taxes, in all in the sum of \$210, due as a lien on the lot, which the defendant by a verbal agreement assumed to pay, in consideration of a note executed by plaintiff for such last sum, that upon the plaintiff paying the note and defendant failing to pay such interest and taxes, he is entitled to recover against defendant therefor, as for breach of contract and damages, upon the verbal contract, it not appearing to be part of the contract of sale of the land.

Cross reference. See further annotations under Corbett v. Waterman (11 Iowa 86) Vol. 1, p. 778.

BRANCH OF STATE BANK v. WHITE, 12 IOWA 141.

1. Attachment—Grounds for—Disposing of or Removing Property from State—Pleadings—Intention to Defraud Creditors.—Where under sec. 3174 of the Revision of 1860, the plaintiff asks an attachment upon the ground that the defendant is "about to dispose of or remove his property out of the State, without leaving sufficient remaining for the payment of his debts," it is not necessary to aver an *intention to defraud creditors*, in the affidavit or petition for the writ, p. 141.

Reaffirmed in Sherrill v. Fay, 14 Iowa 293, 294.

Cited in Mingus v. McLeod, 25 Iowa 455, holding that a petition for an attachment on the ground "that the defendant is in some manner about to dispose of his property without leaving sufficient remaining for the payment of his debts," must further allege an intention to defraud on the part of the defendant (debtor): "The writ," says the court, "has never been allowed unless the defendant (debtor) was either beyond the reach of process or about to abscond, or had disposed of, or was about to dispose of his property under such circumstances as amount to actual or constructive fraud."

HULL & ARGALLS *v.* MARSHALL COUNTY, AND WELLS & CHRISTIE *v.* MARSHALL COUNTY, 12 IOWA 142.

1. Court-houses, Jails and Other County Buildings—Erection of Under Code of 1851—Implied Powers of County Judge—Bonds for—Vote by People—How Money of County to Be Paid.—Under the Code of 1851 it is made the duty of the county judge to provide for the erection of a court-house, jail and other county buildings, and this gives him the implied power to enter into contracts therefor, subject to the restrictions as to the mode of payment provided by statute. Such a building can only be paid for in two ways, viz:

1. Where the costs and charges of such an undertaking are to be defrayed out of the ordinary revenue of the county, the money necessary therefor, may be drawn upon the warrant of the county judge in the manner prescribed by statute, and be paid by the county treasurer.

2. If an extraordinary expenditure is contemplated for such a purpose, which the ordinary revenue of the county would not likely meet as fast as it should fall due, then the county judge must obtain authority to borrow money on the bonds of the county, by a majority vote of the people of the county, the people at the same election to provide for their payment out of a special fund to be raised by taxation.

The first of the above methods is for the drawing of money from the county treasury only on a claim already subsisting, and in the payment of which the county gets an equivalent in advance.

A fortiori, bonds issued by the county judge in the form of negotiable paper, binding the county for the future payment of money, (for the erection of such a building) without authority of the people as above, are void even in the hands of *bona fide* holders, pp. 154-156, 159, 160.

Reaffirmed in Casady *v.* Woodbury County, 13 Iowa 117, where a county judge contracted to issue bonds in payment of a site for a court-house and county offices, without submission of the question to or authority from the people and the court refused to compel specific performance of the contract.

Reaffirmed and extended in Iowa Railroad L. Co. *v.* Sac County, 39 Iowa 149 (Opinion on Rehearing), holding further that where a proposition to levy an additional tax to pay off the indebtedness of a county failed to submit for *what year* it was to be levied, that, upon its carrying, the board of supervisors of the county had no authority to levy it as of a particular year; and the election is of no effect: That where a power is conferred by law, and the manner of its exercise is also prescribed, the power can only be exercised in the prescribed mode.

Cross reference. See further Iowa Railroad Land Co. *v.* Carroll County, 39 Iowa 162, below.

Reaffirmed and extended in McPherson *v.* Foster Bros., 43 Iowa 60, 61, 22 Am. Rep. 215; Swanson *v.* City of Ottumwa, 131 Iowa 546,

547, 106 N. W. 12, 5 L. R. A. (New Series) 860, holding further that negotiable bonds issued by a city, county, or other municipal corporation without authority are void, even in the hands of *bona fide* holders.

Reaffirmed and extended in Witter v. Board of Supervisors of Polk County, 112 Iowa 391, 392, 83 N. W. 1045, holding further that a county has no implied power to issue negotiable bonds for a debt created in the purchase of a court-house site, and that (under sec. 423 of the Code of 1897) when such a site costs more than Two Thousand Dollars, the question must be submitted to a vote of the people.

Cited and qualified in Iowa Railroad Land Co. v. Carroll County, 39 Iowa 162, 165, 166, holding that counties and other municipal corporations, (school districts, cities, etc.) may, (under chapter 87, laws of 1872, amendment to sec. 3275 of the Revision of 1860), issue bonds in payment of a judgment, without submission of the question to a vote of the people.

Cited in Polk County v. District Court, and Brennan, judge, 133 Iowa 713, 110 N. W. 1055, holding that a county cannot invoke *Certiorari* to test the legality of the setting aside of a jury list.

(Note.—See further specially, Heins v. Lincoln, mayor, 102 Iowa 69, 71 N. W. 189; Sioux City v. Weare, 59 Iowa 95, 12 N. W. 786; Williamson v. City of Keokuk, 44 Iowa 88; Nat'l State Bank of Mount Pleasant v. Indep. Dist. of Marshall, 39 Iowa 490; Dively v. City of Cedar Falls, 21 Iowa 565; Clark v. Polk County, 19 Iowa 248; Clark v. City of Des Moines, 19 Iowa 199, important cases on this question.—Ed.)

Cross references. See Rule 2 hereof in connection herewith.

"Directory laws"—See annotations under Rule 2 of Dishon v. Smith, county judge, (10 Iowa 212) Vol. 1, p. 671.

2. Municipal Corporations—Officers and Agents of—Authority of—Duties of Persons Dealing with.—Persons dealing with municipal officers, or other public agents acting under delegated powers must, at their peril, ascertain for themselves whether in fact and law the authority being exercised exists, p. 162.

Reaffirmed and extended in Clark v. City of Des Moines, 19 Iowa 210, 211, 215, 87 Am. Dec. 423; Reichard v. Warren County, 31 Iowa 392, 393; McPherson v. Foster Bros., 43 Iowa 60, 61, 22 Am. Rep. 215.

Distinguished in Bradley & Sherman v. Delaware County, 57 Iowa 553, 10 N. W. 898, holding that where a claim for medical attendance upon the poor of a township upon the order of the trustees thereof, is filed before the board of supervisors, without a certificate of the township trustees as provided by statute, which board allows a portion of such claim, that such action waives objection to the failure to have it certified by the trustees, in an action against the county for the disallowed portion thereof.

Cross reference. See Rule 1 hereof in connection herewith.

MUNSON v. SEARS, 12 IOWA 172.

(Later Appeal, 23 Iowa 380.)

1. Partnership—What Constitutes as Between Parties to.—In order to constitute a partnership as between the parties there must be an agreement whereby two or more persons are to share in any *profits and losses*, arising from their engaging in a business, undertaking, or transaction, pp. 177, 178.

Reaffirmed in Ruddick v. Otis & Snow, 33 Iowa 404; Clark v. Barnes & Sons, 72 Iowa 566, 34 N. W. 420; Winter v. Pipher & Co., 96 Iowa 22, 64 N. W. 664; Porter v. Curtis, Morris & Diver, 96 Iowa 540, 65 N. W. 824.

(Note.—See further sustaining and explaining, but not citing, the text, Johnson Bros. v. Carter & Co., 120 Iowa 355, 94 N. W. 850; Holbrook & Bro. v. Oberne, 56 Iowa 324, 9 N. W. 291; Williams v. Soutter, 7 Iowa 435; Stanchfield v. Palmer, 4 G. Greene 23; Reed v. Murphy, 2 G. Greene 574; Price & Co. v. Alexander & Co., 2 G. Greene 427, 52 Am. Dec. 526.—ED.)

LYON v. THOMPSON, 12 IOWA 183.

1. Actions—Original Notice—Service by Leaving at Defendant's Residence—Return—Sufficiency of.—Where an original notice is served on the defendant by leaving a copy thereof at his usual place of residence, the return thereon must show that such notice was left at the defendant's usual place of residence, with some person over fourteen years of age, who was a member of his family, or of the family where he had his residence, and that defendant was not found in the county; and a return failing to so state, is defective, p. 184.

Reaffirmed in Spencer v. Berns, 114 Iowa 128, 86 N. W. 210, holding that a return failing to show the facts set out in the text, is insufficient to confer jurisdiction.

Cited in Hakes v. Shupe, 27 Iowa 467, holding that a strict compliance with the statute in relation to the service of an original notice is required, and that the return must show such compliance.

(Note.—See further specially, Hoitt and Merchants Sav. Bank v. Skinner, 99 Iowa 360, 68 N. W. 788; Henkle v. Holmes, 97 Iowa 695, 66 N. W. 910; LeGrand v. Fairall, 86 Iowa 211, 53 N. W. 115; Arnold v. Hawley, 67 Iowa 313, 25 N. W. 259; Harmon v. See, 6 Iowa 171.—ED.)

Cross reference. See further annotations and cross references under Farris v. Powell (10 Iowa 553) Vol. 1, p. 747.

ROBINSON, ADM'R v. FOSTER, 12 IOWA 186.

1. Actions—Service of Original Notice—Time to be Served before Term of Court—Sunday.—Under sec. 2815 of the Revision of 1860, a defendant, if served with original notice, other than by publication, in the county wherein an action is brought, must be so served

ten days between the first day of the next term of court and the day of service, not counting the day of service and the first day of such term, or the defendant will not be held to answer or the action stand for trial thereat.

When the last day of such ten days expires on Sunday, such day will not be excluded in the computation and the next day included; as it is only when some act is to be done on the last day after the service of a notice that the rule of sec. 4121 of the Revision of 1860 (as to such exclusion) applies, pp. 188-190.

Reaffirmed as to last paragraph in Conklin v. City of Marshalltown, 66 Iowa 123, 124, 23 N. W. 295, holding that Sunday is included in the ten days in which a petition is required to be filed before a term of court.

Reaffirmed as to last paragraph in German Sav. Bank v. Cady, 114 Iowa 230, 231, 86 N. W. 278, holding that where a party, without leave of court extending time therefor, fails to file his motion for a new trial within three days after verdict, because the last day thereof was Decoration Day or other Legal Holiday and the clerk's office was not open, does not allow him to file such motion on the following day, and a motion to strike such a motion from the files will be sustained.

SKINNER v. CHICAGO & R. I. R. R. Co., 12 IOWA 191.

1. Railroad Companies—Receipt for Goods Delivered.—Upon the delivery of goods or freight to the owner, or consignee, a railroad company has a right to demand a receipt therefor stating that delivery was made in good order, and such owner, or consignee, has an equal right to examine the goods or freight before paying the freight or signing the receipt, which examination, unless otherwise allowed, should be made at the place of delivery and before removal thereof, p. 194.

Reaffirmed and narrowed in Porter v. Ch. & N. W. Ry. Co., 20 Iowa 78, 79, holding that a receipt for the delivery of freight is not conclusive, and is only *prima facie* evidence of the facts therein recited and of the condition thereof at such time.

Cited with approval in Alvers v. Wes. Un. Tel. Co., 98 Iowa 54, 66 N. W. 1041, holding that a telegraph company may release itself from liability for damages for negligently failing to transmit a message, by a stipulation on a telegram that "the company will not be liable for damages or statutory penalties, in any case, where the claim is not presented in writing, within sixty days after the message is filed with the company, for transmission," and that the sender of a telegram failing to comply therewith, cannot recover for such negligence.

JENKINS v. JENKINS, 12 IOWA 195.

1. Infancy—Contracts and Deeds by Infant—Validity—Disaffirmance by Infant—When and How—Reasonable Time.—Contracts and deeds of an infant are voidable and not void; and unless the infant,

within a reasonable time after attaining his majority, disaffirms such contract or deed, and restores to the other party the consideration therefor remaining within his control at any time after his attaining his majority, he is bound thereby: What constitutes a reasonable time depends upon the circumstances of each case, pp. 198, 199.

Reaffirmed in Wright v. Germain, 21 Iowa 587, 588; Stout v. Merrill, 35 Iowa 56; Weaver v. Carpenter, 42 Iowa 347; Gates v. Carpenter, 43 Iowa 155; Jones v. Jones, 46 Iowa 473; Green v. Wilding, 59 Iowa 681, 13 N. W. 762, 44 Am. Rep. 696; Seeley v. Seeley-Howe-Le Van Co., 128 Iowa 302, 103 N. W. 964.

Reaffirmed and extended in Hawes v. B., C. R. & N. Ry. Co., 64 Iowa 320, 20 N. W. 719; Lencox v. Griffith, 76 Iowa 94, 95, 40 N. W. 112, holding further that an infant is bound to restore to the other contracting party only the identical money, or property received by the contract and in his control after he attains majority, and where he has parted with the property, or spent the money during his minority, he can disaffirm the contract, without restoring other money or property equivalent thereto.

Cross reference. See rule 2 hereof.

2. Infant's Contracts and Deeds—Rights of Third Persons.—

The right of an infant to avoid his contract upon arriving at majority as set out in Rule 1 hereof, is absolute, and is paramount to all equities of third persons, including purchasers without notice, p. 200.

Reaffirmed in Gates v. Carpenter, 43 Iowa 155; Seeley v. Seeley-Howe-Le Van Co., 128 Iowa 302, 103 N. W. 964.

BOKER V. CHAPLINE, 12 IOWA 204.

1. Courts of General Jurisdiction—Presumption as to Jurisdiction and Regularity of Proceedings—When Judgment Void.—A court of general jurisdiction is presumed to have jurisdiction of the subject-matter and of the parties of an action pending therein, and every presumption is in favor of the regularity and validity of its proceedings: But if it affirmatively appears from the record in an action in such a court that no jurisdiction was acquired over the subject-matter or of the parties, a judgment rendered therein is void, either on direct or collateral attack, p. 206.

Reaffirmed in Prince v. Griffin, 16 Iowa 554; Gregg v. Thompson, 17 Iowa 109, 85 Am. Dec. 546; Hunger v. Barlow, 39 Iowa 541; Koehler & Lange v. Hill, 60 Iowa 565, 14 N. W. 749.

Reaffirmed and extended in Bonsall v. Isett, 14 Iowa 312, 313; Ballinger v. Tarbell, 16 Iowa 493, 95 Am. Dec. 527; Gregg v. Thompson, 17 Iowa 109, 85 Am. Dec. 546; Muscatine Turn Verein v. Funck, 18 Iowa 473; Pursley v. Hayes, 22 Iowa 36, 37, 92 Am. Dec. 350; Lyon v. Vanatta, 35 Iowa 525; Woodbury v. McGuire, 42 Iowa 342; Koehler & Lange v. Hill, 60 Iowa 564, 565, 14 N. W. 749; Longueville v. May, 115 Iowa 712, 87 N. W. 432; Thornily v. Prentice, 121 Iowa

92, 96 N. W. 729, 100 Am. St. Rep. 317, holding further that in order for a judgment to be void by reason of the manner of service of notice, there must be such a service as to amount to *no notice*, and that *defective service* is insufficient therefor, as the latter must be corrected by motion and appeal.

Reaffirmed and extended in Ballinger v. Tarbell, 16 Iowa 493, 95 Am. Dec. 527, holding further that where a judgment is rendered by a justice of the peace when the defendant does not have service the number of days required by statute, it is erroneous, but will not be treated as void in a collateral proceeding.—And to the same effect is Bennett v. Hetherington, 41 Iowa 150, (reaffirming text) on the question of the action of a board of supervisors on a petition for an election.

Reaffirmed and extended in Pursley v. Hayes, 22 Iowa 36, 92 Am. Dec. 350, holding further that a court will not presume facts inconsistent with the return of a writ in order to divest rights acquired thereunder, nor to defeat a judgment of a court of competent jurisdiction.

Reaffirmed and qualified in Lyon v. Vanatta, 35 Iowa 525; Longueville v. May, 115 Iowa 712, 87 N. W. 432; Thornily v. Prentice, 121 Iowa 92, 96 N. W. 729, 100 Am. St. Rep. 317, holding that where there is *no notice* served on defendant, or the service or notice served is so defective that it amounts to *no notice*, a judgment rendered thereon is void, and may be attacked either directly or collaterally.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a direct attack of a judgment.

Unreported citation, 126 N. W. 958.

Cross references. See further sustaining, explaining and qualifying the text, annotations, notes and cross references under Weil, et al v. Lowenthal, (10 Iowa 575); Rule 3 of Suiter v. Turner (10 Iowa 517); Turris v. Withrow (10 Iowa 305); Coon v. Jones (10 Iowa 131); Morrow v. Weed (4 Iowa 77); Cooper v. Sunderland (3 Iowa 114) Vol. I, pp. 751, 740, 688, 657, 300, and 253, respectively.

EX PARTE GRACE, 12 IOWA 208, 79 AM. DEC. 529.

I. Constitutional Law—Imprisonment for Debt—Examination of Judgment Debtor to Discover Property—Contempt—Right to Jury Trial—Constitution and Statute Construed.—The provisions of the Revision of 1860, Chap. 126, as to the examination of a judgment debtor to discover and subject property to an execution, and his arrest and punishment for contempt for failure to appear, or failure to make full answer to interrogatories, are not in violation of Article 1, Sec. 19, of the Constitution prohibiting imprisonment for debt in a civil action, etc.: But such provisions are in violation of secs. 9 and 10 of the Constitution, (as to the right of trial by jury, and being deprived of property without due process of law, etc.), and a county judge cannot determine questions thereunder and punish for contempt without the intervention of a jury, pp. 212, 213, 216.

Distinguished in Eikenberry & Co. v. Edwards, 67 Iowa 623, 624, (cited in dissenting opinion, 626, 627), 25 N. W. 834, 835, 56 Am. Rep. 360, upholding sec. 3145 of the Code of 1873, in reference to this subject.

2. Contempts—Inherent Power of Court to Punish—Constitutional Law.—It is an inherent power of every court to punish for contempt, and this power extends to the enforcement of every order which the court may make, in the exercise of its legitimate authority. Such power is not in violation of Article I, secs. 9 and 10 of the Constitution, p. 215.

Reaffirmed in Robb v. McDonald, 29 Iowa 333, 4 Am. Rep. 211; Grady v. Given, 126 Iowa 353, 102 N. W. 118.

Cross reference. See further Rules 1 and 3 hereof.

3. Actions at Law—Jury Trial—Contempt—Constitutional Law.—In all actions at law a party has a right to a trial by a jury, and the legislature cannot change a matter essentially such an action to contempt proceedings triable by a judge or court, and thus deprive him of such right, p. 216.

Cited in Stewart v. Board of Supervisors of Polk County, 30 Iowa 28, 1 Am. Rep. 238, holding that "due process of law" means ordinary proceedings in court; and that the provision of the Constitution relating to the taking of private property, without due process of law and compensation therefor, does not apply to the taxing power vested in the General Assembly.

FIFIELD v. GASTON, 12 IOWA 218.

1. Conveyances—Fraud—Fraudulent Intent.—In order to invalidate a conveyance of real estate on the ground of fraud, a fraudulent intention must exist on the part of both the grantor and grantee, p. 220.

Reaffirmed in Brainard v. Van Kuran, 22 Iowa 267; Starker & Co. v. Luse and Mahana, 33 Iowa 596.

Reaffirmed and extended in Rock Island Stove Co. v. Walrod, 75 Iowa 480, 39 N. W. 812, holding further that where, at the time of a conveyance to his daughter without valuable consideration therefor, the grantor owed no debts and had no intention of contracting any, that such conveyance is not fraudulent as to subsequent creditors of such grantor.

Reaffirmed and extended in Witham v. Blood, and Lawrence, 124 Iowa 703, 100 N. W. 558, holding further that where a fraudulent intention of the grantor is not participated in by the grantee to a conveyance, it is not fraudulent, and the grantee and all claiming through him, will be protected thereunder.

Reaffirmed and qualified in Barhydt & Co. v. Perry, 57 Iowa 419, 10 N. W. 821, holding that where one member of a partnership conveys his entire individual real estate, without consideration, to a third person, such conveyance is constructively fraudulent and void as against

the partnership creditors, although the conveyance was made in good faith: And further holding that where a debtor borrows money with which he directly or indirectly satisfies creditors existing at the time of a fraudulent conveyance, such subsequent creditor has the same rights as the prior creditors so satisfied.

(Note.—See further sustaining but not citing the text, *Bixby v. Carskaddon*, 55 Iowa 533, 8 N. W. 354; *Kellogg & Harris v. Aherin and McGann*, 48 Iowa 299; *Steele, Adm'r v. Ward*, 25 Iowa 535.—ED.)

Cross reference. See rules 2 and 3 hereof and cross references there found.

2. Fraudulent Conveyances—Rights of Creditors—Prior and Subsequent.—It is *prior* and not *subsequent* creditors who, as a general rule, are protected and can take advantage of the fraudulent purpose of the parties to a conveyance, p. 220.

Reaffirmed in *Rollins v. Shaver, Wagon & C. Co.*, 80 Iowa 390, 45 N. W. 1040, 20 Am. St. Rep. 427.

Reaffirmed and qualified in *Brundage v. Cheneworth*, 101 Iowa 263, 70 N. W. 211, 63 Am. St. Rep. 382, holding that where a conveyance is merely voluntary and the grantor had no fraudulent intent, it cannot be set aside by a subsequent creditor: That a conveyance actually and intentionally fraudulent as to existing creditors as a general rule is not fraudulent as to subsequent creditors, but that this rule admits of exceptions, such as when the conveyance is made by the grantor with the express intent and view of defrauding those who may thereafter become creditors, or cases wherein the grantor makes the conveyance with the express intent of thereafter becoming indebted, or cases of voluntary conveyances where the grantor pays existing creditors by contracting other indebtedness in a like amount, when the subsequent creditors are subrogated to the rights of the creditors whose debts their money has paid, or cases in which one makes a conveyance to avoid the risks, or the losses, likely to result from new business ventures: And that if a conveyance is actually fraudulent as to existing creditors, and is merely colorable, and the property is held in secret trust for the grantor who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors.

Cited and extended in *Barhydt & Co. v. Perry*, 57 Iowa 419, 10 N. W. 821, holding that where one member of a partnership conveys his entire individual real estate, without consideration, to a third person, such conveyance is constructively fraudulent and void as against the partnership creditors, although the conveyance was made in good faith: And further holding that where a debtor borrows money with which he directly or indirectly satisfies creditors existing at the time of a fraudulent conveyance, such subsequent creditor has the same rights as the prior creditors so satisfied.

Cited and qualified in *Hook v. Mowre*, 17 Iowa 200, holding that a subsequent creditor cannot assail a prior conveyance on the mere

ground that it was voluntary, where there is no proof of a fraudulent intent on the part of the grantor; but that where the fraudulent conveyance is actually fraudulent, and the property is held in secret trust for the grantor who is permitted to obtain credit or draw in creditors, on the faith of his possession and apparent and asserted ownership, such creditor may have relief against such conveyance for no other reason than that he has been defrauded.

Cited and narrowed in Bonnell v. Allerton, 51 Iowa 176, holding that a deed intentionally made to defraud existing creditors is void as to subsequent creditors. (Note. And see to the same effect Gardner v. Baker, 25 Iowa 343; Hook v. Mowre, 17 Iowa 195; Harrison v. Kramer, 3 Iowa 543.—Ed.)

Cross reference. See further sustaining, explaining and qualifying, but not citing, the text, annotations and note under Whitescarver v. Bonney (9 Iowa 480), Vol. I, p. 611. See also other rules hereof.

3. Fraudulent Conveyances—Evidence—Burden of Proof.—Where a deed is *prima facie* valid and vests the legal title in the grantee, a creditor who attacks it as fraudulent, which is denied, must prove such fact by clear and satisfactory evidence, p. 220.

Reaffirmed in Wright & White v. Wheeler, 14 Iowa 13, 14; Mitchell & Sons v. Sawyer and Wife, 21 Iowa 584, 585; Key v. McCleary, 25 Iowa 192, 193; Lewis v. Arbuckle, 85 Iowa 343, 52 N. W. 227.

Reaffirmed and extended in Conry v. Benedict and Bowers, 108 Iowa 667, 77 N. W. 332, holding further that where a transaction between relatives is attacked for fraud, such fact will not be imputed on account of the relationship, but it must be proven.

Cross reference. See further, annotations under Johnson v. McGrew, (11 Iowa 151) Vol. I, p. 792. See also other rules hereof.

4. Evidence—Admissions—Conversations of Parties.—Evidence of what a party should have said, made up of loose and random conversations, is unsatisfactory, and should be received with great caution, pp. 220, 221.

Cited in Trout v. Trout, 44 Iowa 474, holding that where a witness attempts to repeat conversations occurring several years before he testifies, that his evidence relating thereto should be closely scrutinized and received with great caution.

OLESON v. HENDRICKSON, 12 IOWA 222.

1. Pleadings—Demurrer.—Where an answer denies the allegations of the petition, and then sets up a defense inconsistent with the cause of action of the plaintiff, it is good on demurrer, pp. 225, 226.

Reaffirmed and explained in Stuart v. Aumiller, 37 Iowa 102, holding that so far as an answer amounts to a denial of the petition, it cannot be assailed by demurrer.

Cross references.

"Demurrer to whole of petition of several counts"—See annotations under *Jarvis v. Worwick* (10 Iowa 29) Vol. 1, p. 637.

"Answer—When may be stricken from files"—See annotations under *Keeney v. Lyon* (10 Iowa 546), Vol. 1, p. 744.

"Answer—When sufficiency of cause of action admitted by"—See annotations under *Frentress v. Mobley* (10 Iowa 450) Vol. 1, p. 727.

"Pleadings—Amendments"—See annotations, note and cross references under *Glick v. Hartman* (10 Iowa 410) Vol. 1, p. 717.

"Pleadings—Admissions in"—See annotations under Rule 4 of *Potter, et al v. Wooster, et al* (10 Iowa 334) Vol. 1, p. 697.

2. Forcible Entry and Detainer—Defenses—Entry Under Special Contract.—Where in an action of forcible entry and detainer, the defendant denies the allegations of the petition, and pleads that he entered into the possession of the premises with the consent of the owner and under a contract of purchase, such answer is a complete defense to the action, p. 226.

Reaffirmed in *Jordan v. Walker*, 52 Iowa 651, 652, 3 N. W. 682; *Hall v. Jackson*, 77 Iowa 202, 41 N. W. 621.

3. Justice's Court—Appeal From—Demurrer therein may be Disregarded—Procedure.—Where a judgment is appealed from a justice's court, that court's ruling on a demurrer may be reviewed and, if erroneous, disregarded by the district court, p. 225.

Reaffirmed and qualified in *Belding v. Torrence*, 39 Iowa 517, holding further that errors of law committed in a proceeding in a justice's court which result in a final judgment, may be reviewed on appeal, unless they be regarded as waived: But if such errors be upon decisions not resulting in a final judgment they are to be reviewed upon writ of error.

Cross references. See further specially, in this connection, annotations and cross references under *Craine v. Fulton* (10 Iowa 457); *Dicks v. Hatch* (10 Iowa 380) Vol. 1, pp. 728, and 707, respectively.

4. Forcible Entry and Detainer—Trial—Instructions—Province of Court and Jury.—Before the plaintiff can recover in a forcible entry and detainer proceeding, he must prove the substance of his complaint against the defendant; and whether or not he has done this it is the province of the jury to determine: It is, therefore, error in such a proceeding for the court to instruct the jury to find a verdict against the defendant, pp. 226, 227.

Reaffirmed and extended in *Robinson v. Ill. Cent. R. R. Co.*, 30 Iowa 404, holding further that where there is any evidence to support a cause of action, or defense, it is the exclusive province of the jury to determine its sufficiency.

Unreported citation, 123 N. W. 1003.

Cross references. See annotations under Rules 3 and 4 of Potter et al v. Wooster, et al (10 Iowa 334); Rule 2 of Fannon v. Robinson (10 Iowa 272); and Russ v. Steamboat War Eagle (9 Iowa 374) Vol. 1, pp. 698, 697, 683, 682, 592.

McKEEVER v. HORINE, 12 IOWA 227.

1. Justice's Court—Appeal From—Effect of Appeal Bond.—Whenever an appeal bond or recognizance with approved sureties, is filed in the office of a justice of the peace, within the time limited for taking appeals, the magistrate's jurisdiction and power over the cause of action in which it is filed, is suspended, except for what is necessary to send up a transcript of the proceedings, p. 229.

Reaffirmed and extended in Hahn v. Lumpa, 131 Iowa 723, 724, 109 N. W. 310, holding that where a party desiring to appeal from a judgment in a justice's court fails to file the bond within the twenty days from the date of the judgment, he loses his right of appeal, and that such a bond filed after such a time is of no effect—Applying the rule in case of an appeal from a decision of fence viewers.

(Note.—See further specially, Martin & Sellers v. Crocker, 62 Iowa 328, 17 N. W. 533; Brown v. Beesett, 13 Iowa 185.—ED.)

HORSEMAN v. TODHUNTER, 12 IOWA 230.

1. Evidence—Writings—Parol or Secondary Evidence, When Admissible to Prove.—The contents of a written instrument cannot be proved by parol or secondary evidence until its absence is sufficiently accounted for. So, where the contents of a recorded mortgage is in issue, the mortgagee (or his assignee, if any) should be notified to produce it, or a duly authenticated copy thereof be produced, and parol evidence thereof, is inadmissible, pp. 233, 234.

Reaffirmed and extended in Patterson v. Linder, 14 Iowa 417; Howe Machine Co. v. Stiles, 53 Iowa 425, 5 N. W. 578, holding further that parol evidence of the contents of a writing, (not the subject of record, such as a title bond, letter, etc.) is inadmissible without notice to the party in whose possession it should be, to produce it, or proof that it is lost or destroyed.

Distinguished and qualified in Postel v. Palmer, 71 Iowa 159, 32 N. W. 258, holding that where the custodian of a writing testifies that, within his knowledge, it is lost or destroyed, parol or secondary evidence of its contents is admissible, without proof of a search having been made therefor.

(Note.—See further sustaining, qualifying and explaining, but not citing, the text, Higgins v. Reed, 8 Iowa 298, 74 Am. Dec. 305; Greenough, Cook & Co. v. Shelden, 9 Iowa 503; Gafford v. Amer. Mort. & Inv. Co., 77 Iowa 736, 42 N. W. 526, and there are many others to the same effect.—ED.)

2. Mortgage—Failure to Record—Fraud.—Where, in the absence of proof of actual fraud, or a stipulation therefor, the mortgagee fails to record a mortgage within a reasonable time after its execution, such failure will not amount to fraud as against a surety of the mortgagor for the secured debt, p. 236.

Cited in Bremer County v. Barrick, 18 Iowa 392, not in point.

Cited and extended in Hendryx v. Evans, 120 Iowa 318, 94 N. W. 855, holding that where a lienholder is guilty of such negligence as releases his lien, it, also, releases a surety for the payment of the debt.

MILBURN v. CITY OF CEDAR RAPIDS, AND CHICAGO, IOWA & NEB. R. R. Co., 12 IOWA 246.

1. Cities and Towns—Streets and Alleys—Title to.—Land laid out, platted and recorded under the act of January 25, 1839, and the Code of 1851, showing certain streets, alleys and ways as part of a city, vests the fee simple title to such streets, etc., in the city: Owners of lots abutting thereon have only a right of user thereof in common with the rest of the public, pp. 251, 252, 255.

Reaffirmed in Yost v. Leonard, 34 Iowa 15 (under Revision of 1860).

Reaffirmed and extended in City of Des Moines v. Hall, 24 Iowa 238, 244, holding further that where a street is dedicated according to secs. 632, 633, 634, and 637 of the Code of 1851, the city takes the fee simple title and is entitled to the minerals under the surface.—The court further holding that an acceptance of such dedication by the city will be presumed after a lapse of ten years—And see and compare City of Dubuque v. Benson, 23 Iowa 248.

Reaffirmed and extended in Cook v. City of Burlington, 30 Iowa 101, 104, 6 Am. Rep. 649, holding further that where accretions are caused by a river to the soil of a street, etc., dedicated under the acts of Congress of July 2, 1836, and March 3, 1837, it is held by the city for public use and cannot be conveyed by the city for private purposes, but that a railroad may be granted a right of way over such land acquired by accretion, by the city, and this without payment of damages to the adjoining lot owner: That land becoming part of a street or other public way by accretion partakes of the same nature and is held by the same tenure as the land of which it becomes a part.

Reaffirmed and extended in Brown v. Taber, 103 Iowa 5, 72 N. W. 717, holding further that a vacated street does not pass as incident or appurtenant to a lot conveyed according to the plat dedicating it.

Reaffirmed and qualified in Fleming v. Ch. D. & M. R. R. Co., 34 Iowa 359, holding that streets and alleys in cities and towns of this state are public highways; and that a railroad company may, by authority of such a city or town, construct its road over and across them, being liable in damages to a person aggrieved, for negligently failing

to keep its road and crossings in good condition, or for obstructing them.

Reaffirmed and qualified in *Blennerhassett v. Town of Forest City*, 117 Iowa 683, 91 N. W. 1045, holding that where a city allows a person to occupy and claim the title to an unused alley, for a long period of time, and make valuable improvements thereon, it is estopped as against such person, from claiming the title—But see and compare *Lake City v. Fulkerson*, 122 Iowa 571, 98 N. W. 377, (reaffirming the text) qualifying this doctrine of estoppel.

Reaffirmed and qualified in *Coe College v. City of Cedar Rapids*, 120 Iowa 544, 95 N. W. 269, a case wherein the description of the street and plat thereof was so indefinite that it did not constitute a dedication under the statute.

Cited in *Tomlin v. Dub. B. & Miss. R. R. Co.*, 32 Iowa 115, 7 Am. Rep. 176 (dissenting opinion), the majority court reaffirming the principle of the text, and holding further that the owner of land along the bank of a navigable river is entitled to no compensation for damages occasioned by being deprived of free access thereto, by reason of the construction of a railroad between high and low water marks.

Cited with approval in *McMahon v. City of Council Bluffs*, 12 Iowa 269.

Distinguished in *Williams v. Carey*, mayor, 73 Iowa 196, 197, 34 N. W. 814, 5 Am. St. Rep. 672, holding that injunction will not lie in favor of an abutting owner against a city to prevent it from vacating twelve feet of a street, where the street so vacated or narrowed is forty-one feet wide, and no material damage is shown as resulting to such abutting lot owner.

(Note.—See further *Palmer v. Osborne and Fuller*, 115 Iowa 714, 87 N. W. 712; *Spitzer v. Runyan*, 113 Iowa 619, 85 N. W. 782; *Hull and Liddle, Ex'rs v. City of Cedar Rapids*, 111 Iowa 466, 83 N. W. 28; *Uptagraff v. Smith*, 106 Iowa 385, 76 N. W. 733; *M. & St. L. R. R. Co. v. Town of Britt*, 105 Iowa 198, 74 N. W. 933; *Town of Cambridge v. Cook*, 97 Iowa 599, 66 N. W. 884; *Ch. Lum. Co. v. Des M. Driv. Park*, 97 Iowa 25, 65 N. W. 1017; *Taraldson v. Town of Lime Springs*, 92 Iowa 188, 60 N. W. 658; *Orr v. O'Brien*, 77 Iowa 253, 42 N. W. 183, 14 Am. St. Rep. 277; *City of Waterloo v. Un. Mill Co.*, 72 Iowa 437, 34 N. W. 197; *Dempsey v. City of Burlington*, 66 Iowa 687, 24 N. W. 508; *Montgomery County v. Severson*, 64 Iowa 326, 17 N. W. 197 and 20 N. W. 458; *Marshalltown v. Forney*, 61 Iowa 578, 16 N. W. 740; *Tracy v. Newton*, 57 Iowa 210, 10 N. W. 636; *Day v. Schroeder & Lindblom*, 46 Iowa 546; *Pettingill v. Devin*, 35 Iowa 344; *McDunn v. City of Des Moines*, 34 Iowa 467, important cases on this subject, not citing the text.—ED.)

Cross references. See further in this connection, annotations under *City of Dubuque v. Maloney* (9 Iowa 450), Vol. 1, p. 606. See also Rule 2 hereof.

2. Cities and Towns—Streets and Alleys—Railroad Right of Way Over.—Under the statute law of this state a railroad company has a right to construct its railroad upon and over the streets and alleys of a city, upon obtaining authority from the city so to do; and the construction thereof is not a nuisance, and will not be enjoined, at the instance of owners of lots abutting thereon, pp. 259-261.

Reaffirmed in Hughes v. M. & M. R. R. Co., 12 Iowa 266.

Reaffirmed and extended in Slatten v. Des Moines Val. R. R. Co., 29 Iowa 152, 153, 4 Am. Rep. 205, holding further that a grant by a city of the right to a railroad company to build and operate its railroad bridge on a certain street, over and across a certain river, carries with it all the incidental rights and powers requisite to the efficacious and beneficial exercise and enjoyment thereof: And that, therefore, such a railroad has the right, thereunder, to build its road upon the grade of the street, or any other grade agreed upon, and to build the bridge and all necessary and proper approaches thereto.

Reaffirmed and extended in Cook v. City of Burlington, 30 Iowa 105, 6 Am. Rep. 649; 36 Iowa 364, holding further that where accretions are caused by a river to the soil of the street, etc., dedicated under the acts of Congress of July 2, 1836, and March 3, 1837, it is held by the city for public use and cannot be conveyed by the city for private purposes, but that a railroad may be granted a right of way over such land acquired by accretion, by the city, and this without payment of damages to the adjoining lot owner: That land becoming part of a street or other public way by accretion partakes of the same nature and is held by the same tenure as the land of which it becomes a part.

Reaffirmed and extended in Ingraham, Kenedy & Day v. Ch. D. & M. R. R. Co., 34 Iowa 252, holding further that the fact that land which is part of a street, or which lies between a street and a navigable slough, separates a lot from such slough, does not give the lot owner the right to enjoin the construction of a railroad thereon, when it is being done with consent of the city.

Reaffirmed and extended in Gear v. C. C. & D. R. R. Co., 39 Iowa 25, holding further that a railroad has a right to construct its road over and along any public highway; and the fact that a road is a public highway may be proven by more than ten years use by the public, and mere acquiescence therein by the owner of the land over which it runs.

Reaffirmed and extended in C. R. & St. P. R. R. Co. v. Spafford, 41 Iowa 296, holding further that an agreement by a land owner over whose land several lines of a railroad has been surveyed, to pay the railroad a certain sum if it will adopt the line nearest a highway, is binding.

Reaffirmed and extended in Davis v. C. & N. W. R. R. Co., 46 Iowa 394, 397, holding further that where a city constructs a railroad track along the street of a city according to the provisions of the

statute, that its laying an additional track thereon, is not, of itself, a nuisance—But see *Cain v. C. R. I. & P. R. R. Co.*, 54 Iowa 262, 3 N. W. 736 and 6 N. W. 268, (citing text) holding that the city council may, in granting the right of way to a railroad company, make reasonable restrictions upon its use by it; and that a violation thereof is a nuisance for which any person damaged may sue.

Reaffirmed and qualified in *Fleming v. Ch. D. & M. R. R. Co.*, 34 Iowa 357-359, holding, however, that a railroad company is liable in damages to the person aggrieved, for obstructing a highway, or for negligently failing to keep its public crossings in good condition—And see *Gear v. C. C. & D. R. R. Co.*, 43 Iowa 84, 85; *State v. D. & St. P. R. R. Co.*, 47 Iowa 508, (citing text) on the question of the civil and criminal liability of a railroad company for obstructing a highway, and its failure to place it in as good condition as it was before the railroad was constructed, abatement of such obstruction as a nuisance, etc.

Cited in *Prosser v. Wapello County*, 18 Iowa 341, holding that the location of a county road along the banks of a river does not deprive the land owner of his riparian right to establish a ferry.

Cited in *Williams v. Carey, mayor*, 73 Iowa 196, 197, 34 N. W. 814, holding that injunction will not lie in favor of an abutting owner against a city to prevent it from vacating twelve feet of its street, where the street as so vacated or narrowed is forty-one feet wide, and no material damage is shown as resulting to such abutting lot owner.

Cited in *C. M. & St. P. Ry. Co. v. Starkweather*, 97 Iowa 161, 66 N. W. 88, 59 Am. St. Rep. 404, 31 L. R. A. 183, holding that a city may extend a street across the depot grounds of a railroad company, where it does not interfere with the use for railroad purposes, and upon statutory procedure, and assessment of damages to such company.

Cited in *Chamberlain v. I. Telephone Co.*, 119 Iowa 625, 93 N. W. 598, holding that a statute authorizing the construction of telegraph and telephone lines along the "public highways" of the state, etc., gives such a company the right to construct such lines along the streets and alleys of a city or town, without authority from such municipal corporation.

Cited and narrowed in *City of Clinton v. Cedar R. & M. Riv. R. Co.*, 24 Iowa 470, 471, holding that the Legislature may authorize the construction of a railroad over the streets of a city without its consent, and that under such an act a railroad company may so proceed without the consent of the city and cannot be enjoined by such city from so doing: That an act for such purpose not requiring such consent, gives the right to proceed without it.

Distinguished in *Kucherman and Hinke v. C. C. & D. Ry. Co.*, 46 Iowa 367, (cited in dissenting opinion 379, 382) where an adjoining lot owner owned the fee simple title to the middle of a street in a city laid out under act of Congress of July 2, 1836, and was allowed com-

pensation from the railroad for the use of his side of the street in the construction of a railroad track.

Distinguished and Partially overruled in Stanley v. City of Davenport, 54 Iowa 466, 472, 2 N. W. 1064, and 6 N. W. 706, 707, 37 Am. Rep. 216, holding that under Chap. 47, Laws of Fifteenth General Assembly, a city is liable in damages caused by a horse becoming frightened at a motor car operated on a single horse railway track with its permission, as it has no authority thereunder, to so permit.

Distinguished and Partially Overruled in Drady v. D. M. & Ft. D. R. R. Co., 57 Iowa 403, 10 N. W. 759, holding that under Chap. 47, Laws of Fifteenth General Assembly, a railroad cannot use a street of a city for the purpose of constructing a railroad, without first compensating the owners of lots or land abutting thereon, resulting therefrom: And this Act applies to a railroad company who is a successor of one who constructed its track under the law in force at the time of the deciding of the text, when the former or successor attempts to lay additional tracks after the enactment of the above act.

Distinguished and Partially overruled in Sears v. Marshalltown Street Railway Co., 65 Iowa 743, 23 N. W. 151, holding that Chap. 47, Laws of Fifteenth General Assembly, (relative to compensation of abutting owners for use of street for "railway track") does not apply to the use of a street for a street railway operated by horse power; and a city may grant permission for such purpose, without compensation to such owners in such last case.

Distinguished and Partially overruled in Rinard v. B. & W. Ry. Co., 66 Iowa 442, 23 N. W. 915; *Cook v. C. M. & St. P. Ry. Co.*, 83 Iowa 281, 49 N. W. 93, holding that before the owner of a lot abutting on a street can recover damages (under sec. 464, Code of 1873, Chap. 47, Laws of Fifteenth General Assembly) for the construction of railroad tracks along such streets, he must show that the encroachment upon the street deprives him of some right, or is an injury or damage to his property.

HUGHES v. MISSISSIPPI & MISSOURI RAILROAD CO., 12 IOWA 261.

Special cross reference. As this case involves the same questions annotated in the next preceding one of *Milburn v. Cedar Rapids*, and *Ch. I. & N. R. R. Co.*, see that case, where all cases citing this case, and many others, will be found.

STATE v. INNSKEEP, 12 IOWA 266.

1. Actions Commenced Under Code of 1851—Proceedings in, After Taking Effect of Code of 1860—Submission to Referees.—Where an action was commenced under Code of 1851, and after the taking effect of the Code of 1860, was referred to a referee under sec. 3090 of the Code of 1860 against the consent of one of the parties, such order and proceeding were erroneous. Such action was governed

by the Code of 1851, which forbids submission to referees, except by consent of parties, p. 267.

Reaffirmed and extended in Bristow v. Guess, 12 Iowa 405, holding further that (under sec. 4172 of the Revision of 1860) actions commenced before the taking effect of the Revision of 1860 are governed, until finally adjudicated, by the provisions of the Code of 1851.

Distinguished and narrowed in Gray v. Iliff, 30 Iowa 196, holding that where an action was commenced and judgment rendered therein before the taking effect of the Code of 1860, that the provisions of the Code of 1860 govern the time and manner of issuing execution thereon.

McMAHON v. CITY OF COUNCIL BLUFFS, 12 IOWA 268.

Special cross reference. As the decisions citing this case and many more will be found under Milburn v. City of Cedar Rapids, and Ch. I. & N. R. R. Co. (12 Iowa 246), ante. p. 40, the practitioner is referred to it for them.

The principal question in this case, viz:—Injunction, has not been cited; but see annotations under Cotes & Patchin v. City of Davenport (9 Iowa 227) Vol. 1, p. 568.

CHANDLER v. HOCKETT'S ADM'R, 12 IOWA 269.

1. **Decedent's Estate—Filing Claim within Six Months—Effect—Precedence in Payment.**—Claims against a decedent's estate filed within six months after the notice given by the administrator of his appointment, are payable by him before those filed after that time, although the former are not admitted by the administrator or passed upon by the county court, until after the six months, p. 270.

Reaffirmed and extended in Braught v. Griffith and McCleary, 16 Iowa 32, holding further that where a creditor of a decedent files his note in the county court within six months after notice of the appointment of an administrator, he does not waive or abandon his claim, or rights thereunder, by withdrawing the note for the purpose of suing others liable thereon: Holding further that the sureties on such note who pay it, are entitled to be subrogated to the rights of such creditor as against the estate.

Cited with approval in Noble v. Morrey, Adm'r, 19 Iowa 510, a case wherein the question of priority was raised in the appellate court by a creditor who filed his claim *after* the six months and was allowed to be paid *pro rata* with one who filed his claim within six months after notice of the appointment of an administrator.—The court holding that the former could not complain on appeal.

Cross reference. See further, annotations under Hart v. Jewett (11 Iowa 276) Vol. 1, p. 815.

ROMANS v. HAY'S ADM'R, 12 IOWA 270.

1. **Evidence—Actions Against Personal Representative—Witnesses—Competency.**—In an action against a personal representative,

no one who is a party, or in whose behalf the action is brought, may testify to facts which transpired before the death of decedent, (under secs. 3980, 3982, of Code of 1860); but such provisions only apply as to the competency of such persons, p. 271.

Reaffirmed in Shafer v. Dean, Adm'r, 29 Iowa 145, 146.

Reaffirmed and extended in Terhune v. Henry & Carmichael, 13 Iowa 100, holding further that in a proceeding to establish a claim against a decedent in the probate court, the executor may testify as to facts occurring after the death of his decedent.

Reaffirmed and extended in Quick v. Brooks, Adm'r, 29 Iowa 485-487, holding further that where the plaintiff gives his deposition in an action during the lifetime of the defendant and relative to transactions between them, and thereafter (pending the action) the defendant dies and his administrator is substituted as defendant, such deposition is inadmissible—The decedent defendant not having given his deposition therein before his death.

(Note.—See further specially, Bradley v. Kavanagh, 12 Iowa 273; Stiles & Winter v. Estate of Botkin, 30 Iowa 60.—Ed.)

Cross reference. See Rule 2 hereof in connection herewith.

2. Evidence—Husband and Wife—Communications Between—Incompetency—To What the Rule Does not Apply.—The rule excluding as a witness the husband or wife (under Sec. 3984 of the Code of 1860) applies to communications made by the one to the other while married, which inhibition continues after the relation ceases: But this rule does not render the wife incompetent to testify as to matters within her own knowledge, which she knows independent of her husband, pp. 271, 272.

Reaffirmed in Shafer v. Dean, Adm'r, 29 Iowa 146.

BRADLEY v. KAVANAGH, 12 IOWA 273.

1. Evidence—Actions Against Personal Representative—Competency as Witness.—In an action by, or against, a personal representative, he is a competent witness: Secs. 3980, 3982 of the Code of 1860 does not render him incompetent to testify therein. The fact that such personal representative is the wife of decedent, does not change the rule, pp. 275, 276.

Reaffirmed in Stiles & Winter v. Estate of Botkin, 30 Iowa 62.

Special cross reference. See next preceding case of Romans v. Hay's Adm'r, for other cases citing the text.

2. Appeal—Record—Sufficiency of Record—Incompetent Evidence.—Although the record of appeal shows that the testimony of an incompetent witness was received in evidence on the trial, still, where it fails to show that such evidence was material to the issue, it will not be cause for reversal, p. 274.

Reaffirmed and extended in Mosier v. Vincent, 34 Iowa 480, holding further that before appellant can obtain a reversal, he must show error to his prejudice on the trial below.

Cross reference.

"Appeal—Harmless error—Want of prejudice to appellant"—See annotations under *Fletcher v. Burroughs* (10 Iowa 557) Vol. 1, p. 748.

NOEL v. TEMPLE, 12 IOWA 276.

1. Mechanic's and Materialman's Lien—Failure to File Statement Within Thirty Days—Effect—Subsequent Purchasers and Incumbrancers Without Actual Notice.—Whenever a mechanic or materialman fails to file the statement as required by act of Jan. 29, 1857, within thirty days after the completion of the work done or materials furnished in the erection of a house or other improvement on real estate, he thereby loses his priority, as against *bona fide* purchasers and mortgagees without actual notice, who become such between the expiration of the thirty days and the time he thereafter files such statement: But such lien, notwithstanding such failure, is valid and subsisting, as to the owner of the realty, and is superior to the rights of all purchasers and incumbrancers, with actual notice thereof, pp. 281, 282.

Reaffirmed and extended in Jones v. Swan & Co., 21 Iowa 185; *Evans v. Tripp*, 35 Iowa 372, 373; *Gilcrest v. Gotschalk*, 39 Iowa 315, holding further that, under the Code of 1851, as amended by Chapter III, laws of 1862, a mechanic or materialman has a lien as against the owner, purchasers and incumbrancers on the premises on which work is done, or materials are furnished in the erection of a house or other improvements, for ninety days after the completion of the work, or furnishing of the last materials, and a lien on the premises from the expiration of such ninety days until he files his statement, as against the owner, and purchasers or incumbrancers with actual notice of his lien.

Reaffirmed and extended in Kidd v. Wilson, 21 Iowa 466, holding further that although no statement or claim be filed, that the mechanic's or materialman's lien is good against the owner of the realty on which the building or improvements were made: and that the fact that a statement filed is defective, is immaterial as affecting them.

Reaffirmed and extended in Nat'l Loan Co. v. Bowman, 77 Iowa 709, 42 N. W. 558, holding further that the fact that a statement for a mechanic's or materialman's lien, misdescribes the property on which it is claimed, is immaterial as to one dealing with and concerning the premises, with actual knowledge of the lien thereon.

Cross references. See further annotations under *Monroe v. Wilson*, (12 Iowa 110) ante, p. 27; *Cotes & Davies v. Perry*, 12 Iowa 456, Vol. 1, p. 522.

HOLLOWAY v. SHERMAN, 12 IOWA 282, 79 AM. DEC. 537.

1. Constitutional Law—Retrospective Statutes—Statutes Impairing Obligation of Contracts—Statutes Affecting Remedy.—Retrospective statutes affecting remedies are not in violation of the Constitution (prohibiting statutes from being retrospective where they impair the obligations arising under a contract) so long as the ordinary and regular course of justice, and existing remedies are in substance preserved, p. 284.

Reaffirmed and qualified in McCormick v. Rusch, 15 Iowa 138, 83 Am. Dec. 401; Watts v. Everett, 47 Iowa 271, 272, holding that an act affecting or changing a remedy, or procedure, and which does not impair the substantial rights of parties under contracts, may be retrospective and does not violate the Constitution.

Cross references. See further on this question, annotations under Rosier v. Hale (10 Iowa 470); Santo v. State (2 Iowa 165) Vol. 1, pp. 732, and 224.

CLAFLIN, MELLEN & Co. v. IOWA CITY, 12 IOWA 284.

1. Garnishment—How Effected—Sufficiency of Service of Notice on City.—An attachment by garnishment is effected by informing the supposed debtor or person holding the property, that he is attached as garnishee.

A notice of garnishment directed to the mayor, recorder, and treasurer of a city by name and official capacity, which purports to summon them as garnishees individually, and which does not name the city as a garnishee, is insufficient to give the court jurisdiction of the city, p. 286.

Distinguished and explained in McCartney v. City of Washington, 124 Iowa 383, 100 N. W. 81, holding that where a notice is directed to the city, it may be served on the mayor or clerk (under sec. 3531 of the Code of 1897); and that the mayor thereof may accept service of such notice.

(Note.—See further specially, Conklin v. City of Keokuk, 73 Iowa 343, 35 N. W. 453.—Ed.)

CARTER v. HUMBOLT FIRE INS. CO., 12 IOWA 287.

1. Insurance Policies—Insurable Interest—What Constitutes—Mechanic's and Materialman's Lien.—Any interest in property may be insured, when the peril against which the policy is issued, would bring upon the insured, by its direct effect, pecuniary loss. Any person having a lien upon, or a special interest or property in any property, has an insurable interest therein.

A priori a mechanic or materialman has an insurable interest in the building or other improvements on which he has a lien as provided by statute, pp. 291, 292.

Reaffirmed in Reynolds v. Iowa & Neb. Ins. Co., 80 Iowa 567, 46 N. W. 660, holding that the right to occupy a house as a homestead, is an insurable interest.

Reaffirmed as to first paragraph in Dalton v. Milwaukee Mech. Ins. Co., 126 Iowa 385, 102 N. W. 124.

Reaffirmed in Schaeffer v. Anchor Mut. F. Ins. Co., 113 Iowa 653, 85 N. W. 985, holding that a tenant at will in possession of a dwelling, or other building, has an insurable interest therein.

Reaffirmed and extended in Longhurst v. Star Ins. Co., 19 Iowa 371, holding further that where an insurance company grants a policy on a mechanic's lien on a house, or other improvements, it does so subject to the unavoidable delay in the judicial ascertainment of the value of the interest if a loss occur; and waives, for such purpose, a provision in such a policy limiting the right of action thereon to twelve months.

Cited in Shields v. Keys, 24 Iowa 307, on the general rights of mechanics and materialmen, and when the lien attaches.

(Note.—See further on the question of what constitutes an "insurable interest," Carey v. Home Ins. Co., 97 Iowa 619, 66 N. W. 920; Fox v. Capital Ins. Co., 93 Iowa 7, 61 N. W. 211; Merrett v. Farmers' Ins. Co., 42 Iowa 11; Stout v. City F. Ins. Co. of New Haven, 12 Iowa 371, 79 Am. Dec. 539.—Ed.)

Cross references. See further, annotations under Stout v. City Fire Ins. Co. of New Haven (12 Iowa 371), *Infra*, p. 62. See Rule 2 hereof.

See also, Strong v. Insurance Co., 20 Am. Dec. 516; Roberts v. Ins. Co., 44 Am. St. Rep. 642; Riggs v. Ins. Co., 21 Am. St. Rep. 720, 10 L. R. A. 684.

2. Insurance Companies—Policies of Insurance—Limitation in As to Time of Commencing Action.—A stipulation made part of a policy of insurance that, in case of loss, action must be commenced within a stated period, or it will be barred, is valid, p. 294.

Reaffirmed in Moore v. State Ins. Co., 72 Iowa 415, 416, 34 N. W. 184; Harrison v. Hartford F. Ins. Co., 102 Iowa 115, 71 N. W. 221, 47 L. R. A. 709.

Reaffirmed and varied in Albers v. Western Un. Tel. Co., 98 Iowa 53, 66 N. W. 1041, holding that a stipulation on the back of a telegram that the telegraph company is not to be liable for negligence, etc., unless claim therefor is presented in writing within sixty days after the message is filed with the company, is valid.

(Note.—See further sustaining, extending and explaining, but not citing, the text, Heusinkveld v. Capital Ins. Co. of Des M., 95 Iowa 504, 64 N. W. 594; Vore v. Hawkeye Ins. Co., 76 Iowa 548, 41 N. W. 309; Bish v. Hawkeye Ins. Co., 69 Iowa 184, 28 N. W. 553; Cornett v. Phoenix Ins. Co., 67 Iowa 388, 25 N. W. 673; Garretson v. Hawkeye Ins. Co., 65 Iowa 468, 21 N. W. 781; Eggleston v. Council B. Ins.

Co., 65 Iowa 308, 21 N. W. 652; Ellis v. Council B. Ins. Co., 64 Iowa 507, 20 N. W. 782; Mickey v. Burlington Ins. Co., 35 Iowa 174; Longhurst v. Star Ins. Co., 19 Iowa 370; Stout v. City F. Ins. Co. of New Haven, 12 Iowa 371.—Ed.)

Cross reference. See further Rule 3 hereof.

3. Policy of Insurance—Limitation in As to Time to Sue—Pleadings.—In an action on an insurance policy commenced after the time therein stipulated for such purpose, such question must (under Code of 1851) be specially pleaded by the company, and cannot be taken advantage of by demurrer; the rule is different under the Code of 1860, p. 294.

Reaffirmed and extended in Moore v. State Ins. Co., 72 Iowa 416, 34 N. W. 184, holding further that, under the Code of 1873, where the petition and exhibits therewith filed, shows that an action on an insurance policy was commenced after the time limited therein therefor, the petition is bad on demurrer.

McCoid v. BEATTY, 12 IOWA 299.

1. Garnishment—Non-Negotiable Note—Negotiable Note Assigned after Maturity—Garnishment of Maker—Duty of Assignee.—Where the maker of a promissory note which has been assigned after maturity is attached as a garnishee, the assignee thereof must give such maker notice of the assignment in time for him to set it up in his answer, or at least before judgment against him: If the assignee fails to give such notice, and judgment is rendered against the garnishee (maker), it is a bar to an action on the note, p. 300.

Reaffirmed and extended in Stevens v. Pugh, 12 Iowa 432, holding further that where a creditor of the payee of a promissory note overdue, attaches the debt by garnishment in the hands of the maker, and between the service of garnishment and the answer, the note is assigned, with the knowledge of the garnishee (maker), such note is subject to the demand of the creditor, and the garnishee is liable therefor to him.

Reaffirmed and extended in Allison v. Barrett, 16 Iowa 283, 284, 85 Am. Dec. 516, holding further that where a note is assigned and afterwards seized and sold under execution for a debt of the payee, but before the sale thereunder the maker promises to pay the assignee thereof, he is liable to him for its amount.

Reaffirmed and extended in McPhail & Co. v. Hyatt, 29 Iowa 141, 142, holding further that where a garnishee, in ample time to interpose plea, is notified of a matter sufficient to remove his liability to pay in the garnishment proceedings, he must interpose the defense, or he will be liable to his debtor for his negligence.

Reaffirmed and qualified in Fowler v. Doyle, 16 Iowa 536, holding that the rights of the assignee of a note which is transferred in good

faith, are not affected by the subsequent garnishment of the debt in the hands of the maker thereof.

Reaffirmed and qualified in McGuire v. Pitts' Sons, 42 Iowa 537, holding, however, that as between the attaching creditor and the assignee of a judgment, the former obtains no more rights than the debtor, although the assignment be not filed of record, or the garnishee (judgment debtor) may not have notice thereof: It is the duty of the court to protect the garnishee.

Reaffirmed and qualified in Steltzer v. Condon, 139 Iowa 756, 118 N. W. 40, holding that where a garnishee has notice of the assignment of a debt attached, at any time before judgment against him, he must interpose the defense, or he is liable to the assignee therefor: That process of garnishment can reach nothing more than is owing or belonging to the debtor at the time of its service.

Cited in Yocum & Robb v. White, 36 Iowa 290, holding that where the maker of a negotiable or assignable paper is attached as garnishee after the note or paper has been assigned, such proceedings do not affect the assignee thereof or relieve the garnishee (maker) from liability to him: That in such case it is the duty of the garnishee to protect himself by demanding the delivery of the paper, or indemnity therefor, before he allows judgment or satisfies it therein.

Cross references. See further specially, annotations under Smith, et al, v. Clark, et al (9 Iowa 241); Fifield v. Wood (9 Iowa 249); Burton & Stapleton v. District Township of Warren (11 Iowa 166) Vol. 1, pp. 271, and 795.

NICHOLS v. SKEEL, 12 IOWA 300.

1. Usury—Recovery for Usury Which is Paid, Forbidden.—A party who voluntarily pays usurious interest, cannot maintain an action therefor, p. 303.

Reaffirmed in Quinn v. Boynton, 40 Iowa 306.

(Note.—See further, Kinser v. Farmers' Nat'l Bank of Centerville, 58 Iowa 728, 13 N. W. 62.—Ed.)

Cross references.

"What contracts are usurious and proceedings when plea is interposed"—See annotations under Campbell v. McHarg (9 Iowa 354); Smith, et al, v. Cooper, et al (9 Iowa 376) Vol. 1, pp. 588, and 593.

"Usury—Who to interpose plea"—See annotations under Hollingsworth v. Swickard (10 Iowa 385) Vol. 1, p. 709.

THATCHER v. HAUN, 12 IOWA 303.

1. Judgment by Default—Motion to Set Aside—Negligence of Party Applying—Defense—Judicial Discretion.—An application to set aside a judgment by default will never be granted where the default was the result of the negligence of the applicant: Such a motion

must be accompanied by an answer, or an affidavit showing a sufficient excuse for not answering in time.

A motion to set aside a judgment by default is addressed to the sound judicial discretion of the trial court, and his ruling thereon will not be reversed, except in case of abuse thereof, p. 308.

Reaffirmed in Gilbert, Hedge & Co. v. Wilcox, 33 Iowa 594, 595 (abstract).

Reaffirmed and extended in Worth v. Wetmore, 87 Iowa 66, 54 N. W. 57, holding further that a motion to set aside a judgment by default must be made at the term of court at which it is rendered, and must be accompanied by an answer.

Unreported citation, 110 N. W. 26.

(Note.—See further specially Brunson v. Nichols, Shepard & Co., 72 Iowa 763, 34 N. W. 289; King v. Stewart, 48 Iowa 334.—Ed.)

Cross references. See further sustaining and explaining the text, annotations under Clarke v. Hedge & Heaton (10 Iowa 528); Rule 1 of Taylor v. Lusk (9 Iowa 444) Vol. 1, pp. 741, and 604.

2. Mortgage on Realty—Action to Foreclose by Assignee of Note—Parties—Pleadings—Joinder of Causes of Action.—Where a note secured by a mortgage on realty and the mortgage, is assigned by the mortgagee, and such assignee proceeds by statutory foreclosure to sell thereunder, becomes purchaser at the sale, and thereafter reassigns the note and mortgage and agrees to convey under the foreclosure sale to his assignee, in an action to foreclose such mortgage by such last assignee against the mortgagor, his assignee, and other incumbrancers, the plaintiff may allege in his petition facts for and ask a foreclosure, and in an amended petition set out the fact of the foreclosure sale, and pray for a specific performance of the contract to convey, the correction of a mistake in such contract, that his title be quieted, and other equitable relief, pp. 308, 309.

Reaffirmed and extended in White v. Hampton, 13 Iowa 265; Martin v. Jones and Hildebrand, 15 Iowa 241, holding further that where in an equitable action complainant is entitled to equitable relief the court may award such process as is necessary to execute it: That in a proper case, to order the surrender of the possession of the lands sued for, is an ordinary exercise of the power of the chancellor.

Cited in Pursley v. Hayes, 22 Iowa 20, 92 Am. Dec. 350.

3. Statutes—Repeal of By Implication Are Not Favored—Construction.—The repeal of a statute by implication is not favored; and where a statute permits of two or more constructions, by one of which a prior statute may be made effective, the construction giving effect to both, will be adopted, p. 312.

Reaffirmed in City of Dubuque v. Harrison, 34 Iowa 167, 168.

Reaffirmed and extended in Patterson v. Spearman, Clark and Seeley, 37 Iowa 41, holding further that the whole of a statute is to

be construed together, and effect be given to each part if a construction can be found to do it.

Reaffirmed and extended in State v. Brandt, 41 Iowa 614, holding further that any reasonable or allowable construction will be adopted in order to avoid a repeal by implication.

(Note.—See further sustaining and explaining, but not citing, the text, Prisdon v. Shank, 37 Iowa 82; Morrison v. Hershire, treas., 32 Iowa 271; Burke v. Jeffries, 20 Iowa 145; Allen v. Pegram, 16 Iowa 163; Baker & Griffin v. Steamboat Milwaukee, 14 Iowa 214; Robertson v. Young, 10 Iowa 291; Casey v. Harned, county judge, 5 Iowa 1, and there are many others to the same effect.—Ed.)

Cross reference. See further, annotations and cross references under Robertson v. Young (10 Iowa 291) Vol. 1, p. 685. See Rule 4 and 5 hereof.

4. Action Under Statute—Repeal of Statute Pending—Effect.—In the absence of a saving clause, if a statute is repealed while an action thereunder is pending, the jurisdiction of the court thereover is taken away, p. 311.

Reaffirmed in Gray v. Iliff, 30 Iowa 197; Wadsworth v. Wadsworth, 40 Iowa 449.

Cross reference. See Rules 3 and 5 hereof.

5. Statutes—Meaning of word “Hereafter” in.—The word “hereafter” as used in the act of February 25, 1858, has reference to the date of its taking effect, and not to the date of its passage or approval, p. 311.

Distinguished and narrowed in Kendig v. Knight, 60 Iowa 31, 32, 14 N. W. 79, holding that the word “hereafter” as used in a statute or in an ordinance of a city, may mean either the time of its taking effect, or the time of passage or approval, and that its object, intent and purpose is to be considered in determining which is meant.

DRAPER v. ELLIS, 12 IOWA 316.

1. Replevin—Petition—Failure to Allege Wrongful Detention—Effect—How Taken Advantage of.—The gist of the action of replevin is the wrongful detention of the property by the defendant; and where the plaintiff fails to allege such fact in his petition, the defendant may take advantage of the defect on demurrer, by arrest of judgment, or upon appeal, p. 318.

Reaffirmed and extended in Glover v. Narey, sheriff, 92 Iowa 287, 60 N. W. 531, holding further that where plaintiff sues in replevin for personalty taken by a sheriff under an execution and an attachment, he is not obliged to set out in separate counts the facts regarding each taking.

Distinguished and qualified in Kennedy v. Roberts, 105 Iowa 525, 75 N. W. 365, holding that an allegation of wrongful detention of the property in a petition of replevin, is not absolutely necessary under the Revision of 1897.—But that even if it is, it is waived by failure

to raise the question in the trial court, and cannot be raised for the first time on appeal to the Supreme Court.

Cross references. See Rule 2 hereof.

"Defects in pleading cured by verdict—Defective pleadings—Appeal—Prejudice"—See annotations under Rules 3 and 4 of Cotes & Patchin v. City of Davenport (9 Iowa 227) Vol. 1, p. 568.

2. Replevin—Pleadings—Defective Petition — Waiver — Practice.—Where a petition in an action of replevin in a justice's court was substantially defective, and the defendant went to trial without objection thereto, he cannot raise such objection except on motion in arrest of judgment upon appeal and trial in the district court, p. 318.

Reaffirmed and extended in Rea v. Flathers, Adm'r, 31 Iowa 546, holding further that by filing an answer and going to trial, the defendant waives his exception to the ruling of the court on his motion to dismiss.

Reaffirmed and extended in Linden v. Green, sheriff, 81 Iowa 369, 46 N. W. 1109, holding further that where a party joins issue on a defective pleading, proceeds to trial, and fails to move in arrest of judgment, such defect is waived.

Cross references. See Rule 1 hereof and cross reference there found. See further, annotations and notes under Nollen v. Wisner and Van Vark, (11 Iowa 190) Vol. 1, p. 800.

3. Trial—Instructions—Pertinency.—Instructions must be pertinent to the issue joined, and to the evidence, p. 319.

Reaffirmed and extended in Pride v. Wormwood, 27 Iowa 260, 262, holding further that an objection to a pleading cannot be raised by the instructions.

Cross references. See Rules 1 and 2 hereof. See further, annotations under Nollen v. Wisner and Van Vark (11 Iowa 190); Moffit v. Cressler (8 Iowa 116) Vol. 1, pp. 800, and 499.

COLLAMER v. KELLEY, 12 IOWA 319.

1. Lands—Lease—Sub-Lease.—Where a lessee for a term of years at a certain sum per year delivers over the leased premises to a third person who agrees to pay him more per year than the price stipulated in the lease and who is to occupy the premises during the period of the lease, and on the last day of the term of the lease to deliver possession to the lessee, such contract or transaction constitutes a sub-lease and not an assignment of the original lease, pp. 322, 323.

Reaffirmed and extended in Dassance v. Cold, 101 Iowa 612, 70 N. W. 719, holding further that where a lessee delivers the possession and occupancy of the leased premises to a third person under a contract with him, and the contract does not allow such person to have the advantage of provisions in the lease in favor of the lessee, but is independent thereof, such contract is a sub-lease and not an assignment of the original lease.

BORDER v. BENGE, 12 IOWA 330.**1. Executions — Levy — Sufficiency of — What Constitutes.—**

Where a constable levies upon personal property to satisfy an execution, and leaves the property in the possession of the judgment debtor, without taking any delivery bond, such levy is insufficient and ineffective as against the rights of another constable and creditor who subsequently levies thereon and takes it into custody under another execution, without knowledge of the prior levy, p. 330.

Reaffirmed and extended in Crawford v. Newell, 23 Iowa 455, 456; Nockles v. Eggspieler, 47 Iowa 402, holding further that to constitute a valid levy under an attachment, the officer must do that which amounts to a change of possession, or which is equivalent to a claim of dominion, coupled with a power to exercise it, over the property sought to be levied upon.

(Note.—See further specially, Crawford v. Newell, 23 Iowa 453; Ralston v. Black, 15 Iowa 47.—Ed.)

WATTS v. WHITE, 12 IOWA 330.

(Later Appeal, 18 Iowa 74.)

1. Mortgages—Action to Foreclose—Parties—Junior Incumbrancer—Redemption.—Where an action to foreclose a mortgage on real estate was commenced against the mortgagor and a junior incumbrancer and service had and decree entered against the mortgagor before the taking effect of the Act of April 2, 1860 (relative to the redemption of real estate sold on foreclosure) the junior incumbrancer defendant, cannot claim nine months after service of notice in which to answer (as provided in such act), although he was so served after the taking effect thereof. A decree in such action cutting off such junior incumbrancer's lien as against the superior mortgage lien does not affect his right to redeem under the above act, pp. 333, 334.

Reaffirmed and qualified in White v. Watts, 18 Iowa 78, holding that unless a junior incumbrancer is a party to an action by a senior incumbrancer to foreclose, he is not bound by anything done therein; but that where he is made a party he must assert his rights therein, or he will be concluded thereto by such proceedings, decree and sale.

2. Actions—Original Notice—Service—Return.—A service of an original notice is sufficient if it is read to the defendant, unless he demands a copy, in which case it is the duty of the officer to deliver it to him: It is not necessary that the return thereon show whether a copy thereof was demanded or served upon the defendant, p. 334.

Reaffirmed and extended in Budd v. Durall & Searcy, 36 Iowa 318, 319, holding further that where a levy of an attachment is made by a sheriff on property which has been removed from his county, it is not necessary that the return show that the levy was made within

twenty-four hours after its removal: That in the absence of issue and proof to the contrary an officer is presumed to have done his duty.

Cross reference.

"Return on original notice—Sufficiency"—See further, annotations and cross references under *Farris v. Powell* (10 Iowa 553) Vol. I, p. 747.

STATE EX REL. CLARK, DODGE & CO. v. CITY OF DAVENPORT, 12 IOWA 335.

1. Municipal Corporations—Judgments Against—Mandamus to Levy and Collect Tax to Pay—When Lies.—Where a judgment is obtained against a city on bonds issued under special law, or for some special purpose, and the law or contract makes it obligatory upon the city council to levy, collect and place in the treasury the funds to meet the interest thereon and their ultimate redemption, mandamus will lie to compel the levy of the tax and collection thereof to pay the judgment, as well before as after the issuance of execution thereon, p. 340.

Reaffirmed in *Clark, Dodge & Co. v. City of Davenport*, 14 Iowa 497, 499, 500.

Cited with approval in *Brown v. Crego*, 32 Iowa 501, holding that Mandamus will lie to compel an officer to perform an imperative duty imposed on him by law.

Cross reference.

"Mandamus—When lies"—See further annotations and note under Rule 2 of State ex rel *Hiatt and Harbin v. City of Keokuk* (9 Iowa 438) Vol. I, p. 604.

2. Cities and Towns—Judgment Creditors—Corporation Scrip.—A judgment creditor of a city, is not compelled to take scrip, or the ordinary evidences of indebtedness issued by the city, for or in payment of his judgment, but he may elect to do this if he so desires, p. 342.

Reaffirmed and extended in *Oswald v. Thedinga*, 17 Iowa 14, 15, holding further that after an execution has been issued and returned "no property found" on a judgment against a city, that upon the failure of the officers thereof, upon demand, to levy a tax, as soon as practicable thereafter, to pay off the judgment, interest and costs, they are individually liable therefor to the judgment creditor.

Reaffirmed and extended in *Iowa R. R. Land Co. v. Carroll County*, 39 Iowa 163, holding further that counties, cities and other municipal corporations, may (under Chap. 87, Laws of 1872, amendment to sec. 3275 of the Code of 1860) issue bonds in payment of a judgment without submission of the question to a vote of the people.

Cross references. See Rule 1 hereof. See further, in this connection, annotations under *Hull & Argalls v. Marshall County, et al*, (12 Iowa 142), ante. p. 29.

3. Contracts and Judgments—Extension of Time—When Agreement For is Valid.—A contract to extend the time of payment and to forbear to sue on or collect a contract or judgment for a certain period, must be based upon a valuable consideration: Part payment thereon is insufficient, p. 344.

Reaffirmed and extended in Van Dusen v. Parley, 40 Iowa 72, holding further that an agreement by the holder of a note past due to extend the time of payment if the maker will pay the interest due, is without consideration.

Reaffirmed and extended in Runkle & Fouse v. Kettering, 127 Iowa 8, 102 N. W. 143, holding further that fulfilling an obligation under an existing contract, does not constitute a consideration on which to base a contract or conveyance.

(Note.—See further sustaining, explaining, qualifying and analogous to, but not citing, the text, Marshall Field Co. v. Oren Ruffcorn Co., 117 Iowa 157, 90 N. W. 618; Hensler v. Watts, 113 Iowa 741, 84 N. W. 666; Kelly v. Ch. M. & St. P. Ry. Co., 93 Iowa 437, 61 N. W. 957; Hunt v. Postlewait, 28 Iowa 427; Pomroy & Co. v. Parmlee, 9 Iowa 140, 74 Am. Dec. 328; Tomlinson v. Smith, 2 Iowa 39, and there are many others to the same effect.—ED.)

ROBERTS v. HOYT, 12 IOWA 345.

1. Action at Law—Trial by Court—Finding of Facts—Motion for New Trial, etc.—Review on Appeal.—When in an action at law, a jury is waived and a trial had by the court, and no finding of the facts is made by the court, and no motion for new trial presents the ground that the judgment is contrary to the evidence, it will not be reviewed on appeal, unless the finding of the trial court on the evidence be presented as a matter of law, p. 345.

Reaffirmed in Reynolds' Heirs v. Miller, 14 Iowa 99; Shaw, Johnson, Wood & Co. v. Stranding, 17 Iowa 585.

Cited in Commercial Nat'l Bank of Council Bluffs v. Gilinsky, 142 Iowa 186, 120 N. W. 479.

Cross reference. See further sustaining and explaining, but not citing, the text, annotations and note under Warner, Adm'r v. Pace (10 Iowa 391) Vol. 1, p. 710.

BRAYTON v. TOWN, 12 IOWA 346.

1. Officers—Sheriff—Liability of Sheriff and His Sureties for Acts of Deputy.—The sheriff is liable for the acts of his deputy, and where a deputy sheriff collects money under an execution and refuses or neglects to pay it over, the remedy of the party aggrieved is against the sheriff and the sureties on his official bond, and not against the deputy and his sureties: The bond of the deputy is for the protection of the sheriff and his sureties, pp. 347, 348.

Reaffirmed and extended in Headington v. Langland, 65 Iowa 278, 21 N. W. 651, holding further that in the execution of a writ or

process the deputy acts for the sheriff, who is responsible for his acts; and that a notice by a third person claiming property levied on by a deputy sheriff under an execution (as provided by sec. 3055 of the Code of 1873) is properly served on the sheriff.

DE CAMP v. MISSISSIPPI & MISSOURI R. R. Co., 12 IOWA 348.

1. Trial—Instructions—Pertinency.—Where there is some evidence to sustain an instruction asked, it is reversible error for the court to refuse to give it; the weight and sufficiency of the evidence is for the jury to determine, p. 349.

Reaffirmed and extended in Potter v. C. R. I. & P. R. R. Co., 46 Iowa 402, holding further that where the charge of the trial court states the issues, it must do so fully, and must give the jury such instructions in reference to all issues supported by any evidence, as will enable them to apply the evidence to the principles of law given.

Reaffirmed and qualified in Benton v. C. R. I. & P. R. R. Co., 55 Iowa 498, 8 N. W. 331, holding that instructions must be pertinent to the issue.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, Cooke v. Ill. Cent. R. R. Co., 30 Iowa 202; Cole v. Cole, 23 Iowa 433; Brink v. Morton, 2 Iowa 411.—Ed.)

Cross reference. See further, annotations under Rule 4 of Moffitt v. Cressler (8 Iowa 121) Vol. 1, p. 499.

2. Railroad Companies—Liability for Negligence of Agent or Employee—Torts of Employee.—A railroad company is liable for the negligent acts of its agents or employees in the course of their employment, but not for their willful or criminal acts, pp. 348, 349.

Reaffirmed in Cooke v. Ill. Cent. R. R. Co., 30 Iowa 203; Porter v. C. R. I. & P. R. R. Co., 41 Iowa 361, 362.

Distinguished and narrowed in McKinley v. C. & N. W. R. R. Co., 44 Iowa 317, 24 Am. Rep. 748, holding a railroad company liable for an assault and battery of a brakeman on a passenger on a train, committed by the brakeman under the belief that he was executing the orders of the company in preventing the passenger from re-entering the car.

Overruled in Marion v. Ch. R. I. & P. Ry. Co., 64 Iowa 571, 572, 21 N. W. 87, holding that (under sec. 1307 of the Code of 1873) a railroad company is liable for the willful wrong of any employee in the course of his employment, and in any manner connected with the operation of its railroad, irrespective of the motive, of such employee, actuating its commission.

MATHER v. CONVERSE, COUNTY JUDGE, 12 IOWA 352.

1. County Seats—Removal of—Electon for—When Held—Statutes—Construction—Repeal by Implication not Favored.—Chapter 21, Article 2, Revision of 1860 (in reference to the time and

manner of holding elections for the removal of county seats), was not repealed by the general election law provided by chap. 31 of the Revision of 1860: And elections for the removal of county seats are to be held on the first Monday in April.

The repeal of a statute by implication is not favored, and, where possible, courts will give effect to several statutes on the same subject. A statute will be declared repealed by implication only when it is plainly repugnant to the provisions of a subsequent statute, pp. 352, 353.

Reaffirmed as to last paragraph in Garber v. Clayton County, 19 Iowa 31.

Cross references. See further sustaining the text, annotations under Cole v. Board of Supervisors of Jackson County (11 Iowa 552) Vol. 1, p. 859; Rule 3 of Thatcher v. Haun (12 Iowa 303), ante. p. 51.

DICKERSON v. DAVIS, 12 IOWA 353.

1. Conveyances—Acknowledgment—Sufficiency of Certificate.

—A certificate of acknowledgment of a deed or other conveyance may show that the grantor acknowledged it to be his voluntary act and deed, without the use of the very words, and all the words of the statute: It is sufficient if the tenor and form of the certificate shows such fact, p. 355.

Reaffirmed and narrowed in Kreuger v. Walker, 80 Iowa 736, 45 N. W. 872, holding that where a certificate of acknowledgment fails to show that the deed was the *voluntary* act of the grantor, such deed imparts no constructive notice, when recorded, to a subsequent purchaser, and is inadmissible in evidence for plaintiff in an action by the grantee against such a purchaser: That the omission of the word "voluntary" or its equivalent, in reference to the act of the grantor in such a certificate, is fatal.

Cross reference. See further sustaining, explaining and qualifying, but not citing, the text, annotations under Rule 2 of Bell v. Evans (10 Iowa 353) Vol. 1, p. 703.

REDFIELD v. HART, 12 IOWA 355.

1. Mortgage on Land—Judgment on Note Secured by—Lien.

—Where a mortgagee of a mortgage on realty sues on the note secured, and obtains a general judgment thereon, his lien, as against a third person who is not a party to the action, dates from the rendition of the judgment. In order for the lien of such judgment to date from the execution of the mortgage, as against third persons, the property must be specified in the judgment, and a special execution be directed against it, p. 357.

Reaffirmed and qualified in Christy v. Dyer, 14 Iowa 443, 81 Am. Dec. 493, holding that as between the parties, the lien of a judgment on a note secured by a mortgage dates as of the date of the recording of such conveyance.

Reaffirmed and qualified in State v. Lake, 17 Iowa 218, 219; Morrison v. Morrison and Berry, 38 Iowa 78, holding that as between the parties to a mortgage the lien thereof is not extinguished by a general judgment on the note secured; that as between the parties nothing extinguishes the lien of the mortgage, other than the satisfaction of the debt.

Reaffirmed and qualified in Delevan v. Pratt, 19 Iowa 432, holding that as between a judgment creditor and the judgment debtor and his heirs, the former may show that his judgment is a lien on land and that it is subject thereto, by other proof than the record.

Distinguished and qualified in Mayer v. Farmers' Bank, 44 Iowa 217, holding that where a judgment at law on a note secured by mortgage on land recites that the judgment shall "operate, and be a lien upon the real estate of defendant" from a stated date, that such judgment is *voidable only* and not *void* as to the lien on the mortgaged property: That the fact that the lien of the judgment relates to a period anterior to the judgment, does not necessitate a special execution to enforce it—The court saying: "It is exceedingly doubtful whether Redfield v. Hart, 12 Iowa 355, applies to a person (in this case a junior incumbrancer) seeking to redeem, but if it does, so much of that decision as refers to the form of the execution is mere *dictum*, and has no force as a precedent."

Cross reference. See further, annotations and cross references under Wahl v. Phillips (12 Iowa 81), ante, p. 16.

WEIMER v. LINHARD, 12 IOWA 359.

1. Justice's Court—Issue and Pleadings in—Prior Lien—Appeal—Issue Presumed on.—Where there is a trial on the merits in a justice's court, and the judgment therein is appealed to the district court, the transcript of the justice failing to show that there were any pleadings below, issue will be presumed to have been joined in the inferior tribunal, and plaintiff's demand will be treated as denied on the appeal, pp. 359, 360.

Reaffirmed and extended in Clay v. Alcock, 23 Iowa 593, holding further that where a party proceeds to a trial upon the merits as if his pleading were denied, and does not raise the question during the trial, he cannot after trial take advantage of the fact that his pleading is undenied.

Cross references. See further sustaining, but not citing, the text, annotations under Brock v. Manatt (5 Iowa 270) Vol. 1, p. 352.

"Defects cured by verdict"—See annotations under Rule 3 of Cotes & Patchin v. City of Davenport (9 Iowa 227) Vol. 1, p. 568.

"Justice's court—Appeal from—Amendments—Trial *de novo*"—See annotations under Rule 2 of Craine v. Fulton (10 Iowa 457); Dicks v. Hatch (10 Iowa 380) Vol. 1, pp. 728, and 707.

"Justice's court—Appeal—Judgment—Costs"—See annotations and cross reference under *Trayer v. Filkins* (10 Iowa 563) Vol. 1, p. 749.

CRUMLEY v. ADKINS, 12 IOWA 363.

1. **Trial—Verdict—Manner of Jurors Determining—Jurors not to be Compelled to Disclose.**—The trial court has no authority to compel jurors to disclose the manner in which they arrived at their verdict, p. 364.

Reaffirmed in *Wright v. Ill. & Miss. Telegraph Co.*, 20 Iowa 201.

(Note.—See further, *State v. Grady*, 4 Iowa 461; *Forshee v. Abrams*, 2 Iowa 571.—ED.)

Cross reference. See further, in this connection, annotations under *Stewart v. B. & M. Riv. R. R. Co.*, (11 Iowa 62) Vol. 1, p. 771.

GARTH v. COOPER & SMITH, 12 IOWA 364.

1. **Contracts and Notes—Usury.**—When usury is established in an action on a contract or note, the plaintiff shall have judgment for the principal sum, without either interest or costs, and a judgment shall be rendered against the defendant for the forfeited interest in favor of the State for the benefit of the school fund, pp. 365, 366.

Reaffirmed in *Edworthy v. Iowa Sav. & L. Ass'n*, 114 Iowa 221, 86 N. W. 315.

Reaffirmed and extended in *Callanan v. Shaw*, 24 Iowa 448, holding further that when money is borrowed at usurious interest, and a part is paid, together with the usury, and a note given at a legal rate of interest for the balance, the note is tainted with usury.

Reaffirmed and qualified in *Mason v. Searles*, 56 Iowa 536, 9 N. W. 371, holding that where the agent of a creditor whose debt is tainted with usury, lends the debtor money with which to pay the usurious debt, such last transaction is not usurious.

Distinguished and qualified in *Kinser v. Farmers' Nat'l Bank of Centerville*, 58 Iowa 734, 13 N. W. 62, holding that a debtor may recover of a national bank usurious interest paid; and that in such case the usurious transaction occurs when the usurious interest is paid.

Cross reference. See further sustaining, explaining and qualifying, but not citing, the text, annotations under *Campbell v. McHarg* (9 Iowa 354); *Smith, et al, v. Coopers, et al*, (9 Iowa 376) Vol. 1, pp. 588, and 592.

"Usury paid cannot be recovered"—See annotations under *Nichols v. Skeel* (12 Iowa 300), ante. p. 51.

"Usury—Who can interpose plea"—See annotations under *Hollingsworth v. Swickard* (10 Iowa 385) Vol. 1, p. 709.

CLARK v. SAMMONS & VAN PELT, 12 IOWA 368.

1. **Pleadings—Res Adjudicata—When Applies.**—In order to support the plea of former adjudication, it must be made fully ap-

parent that the same matter in issue has been previously decided. So, where two notes are given as a consideration for the purchase of property, and in an action on one of them the maker pleads a breach of warranty and also a failure of the entire consideration, recovering damages therein for such breach, then in an action on the second note, the plea of *res adjudicata* is effective against the claim for damages for breach of warranty, but not as to a plea of failure of consideration for the second note, pp. 369, 370.

Reaffirmed and extended in Whitaker v. Johnson County, 12 Iowa 597, holding further that where plaintiff sues a county on coupons of certain bonds and the defendant pleads failure of consideration, which is determined against it, that in an action by the same plaintiff against such defendant on other coupons, issued by the defendant at the same time and for the same purpose, it cannot plead failure of consideration therefor, and that a plea of *res adjudicata* in the second action by the plaintiff in response to such defense, is good.

Reaffirmed and extended in City of Davenport v. C. R. I. & P. R. Co., 38 Iowa 640, holding further that taxes for several years constitute a cause of action as to each year, and that a judgment in an injunction action to restrain the collection of taxes for two-several years, is no bar to an action to recover taxes for other, or subsequent years.

Cited in Fairfield v. McNany, 37 Iowa 77, 78, holding that a defendant need not set up legal or equitable defenses he may have against a demand sued on, but may suffer judgment on the latter, and bring an independent action on the former: That when a defendant has a legal or equitable defense to an action, which exceeds plaintiff's demand and suffers judgment therein, he cannot be compelled as garnishee to pay the judgment, to a creditor of the judgment creditor.

Cross reference. See further, annotations under Whitaker v. Johnson County (12 Iowa 595) *Infra*. p. 102.

STOUT v. CITY FIRE INS. CO. OF NEW HAVEN, 12 IOWA 371, 79 AM. DEC. 539.

1. Insurance Policies—Recitals in—Warranties.—Where a policy of fire insurance recites that the building insured is "occupied for stores below, the upper portion to remain unoccupied, during the continuance of this policy," it amounts to a warranty that the lower portion is occupied for stores, and if it is not so occupied *at the time of the issuance*, it will avoid the policy: Such recital is, also, a warranty that the upper portion is to be so vacant, and if it is occupied during the continuance of the policy, it will avoid it. The acceptance of such policy by the insured constituted such warranties, irrespective of whether or not they were material to the risk. Such first warranty, however, is not continuous, and if the lower portion after the issuance of the

policy is otherwise occupied than by stores, it will not affect its validity, pp. 382-384.

Reaffirmed and extended in Stewart and Godwin v. Eq. Mut. L. Ass'n of Waterloo, Iowa, 110 Iowa 531, 81 N. W. 782, holding further (in actions on a life insurance policy) that where, by its terms, an application for a life insurance policy becomes part of the policy or contract which is to be void if any answers therein are untrue, then if any such answers are untrue, the policy will be void, irrespective of their importance or materiality.

Reaffirmed and qualified in Wilkinson v. Conn. Mut. L. Ins. Co., 30 Iowa 125-127, 6 Am. Rep. 663, holding that where a policy of life insurance provides that the policy is issued "upon the faith of the statements in the application" and that if they "shall be found in any respect untrue" the policy shall be void, one of the questions of the application, which was answered in the negative, being "has the party ever met with any accidental or serious personal injury?" that in an action on such policy where the jury return a special verdict finding, among other things, that the insured had not, before the issuance of the policy, met with any serious personal injury, but had fallen from a tree, and was sick for a time in consequence, but that such fall caused no permanent injury or disease, the plaintiff is entitled to recover—The court holding that the language of the question in the application (as to accidental or serious personal injury) must have a reasonable construction, in view of the purposes for which it was asked, and had reference to such accidental injury as probably would or might possibly have influenced the subsequent health or longevity of the insured.

Reaffirmed and narrowed in Martin v. Capital Ins. Co., 85 Iowa 651, 52 N. W. 537, holding that where a building is used for purposes other than those provided in, or forbidden by, a policy of insurance thereon, and such unauthorized use increases the risk, it is immaterial whether such use caused or contributed to the loss, and the policy will be avoided.

Distinguished and narrowed in Carter v. Humbolt F. Ins. Co., 17 Iowa 457, 459, holding that where a policy of insurance on a building recites that it is "occupied as stores on first floor," that if *any* of the rooms on the first floor thereof were occupied as stores at the time of the issuance of the policy, insured can recover thereon for loss.

Cross references. See Rule 2 hereof. See further, annotations under Hygum v. Aetna F. Ins. Co. (11 Iowa 21) Vol. 1, p. 763.

2. Insurance Policies—Limitation on Time to Sue.—Where a by-law or condition attached to and made part of a policy of insurance limits the time in which action is to be commenced in case of loss, it is, in the absence of qualifying circumstances, valid.

But where a policy of fire insurance insuring the interest of a mechanic or materialman in a building, contains such a provision, and he uses all diligence to obtain a judgment for his lien, and makes his

proof of loss and the value of his interest, and pursues his remedy against the company with ordinary diligence, such provision limiting the time to commence action, is inoperative, pp. 384-387.

Reaffirmed as to second paragraph in Longhurst v. Star Ins. Co., 19 Iowa 370-372.

Reaffirmed and extended in Moore v. State Ins. Co., 72 Iowa 415, 416, 34 N. W. 184, holding further that where the petition and the policy attached thereto and made part thereof, in an action on an insurance policy shows that the action was not commenced within the time limited by the policy, it is bad on demurrer.

Reaffirmed and narrowed in Ellis v. City of Council Bluffs Ins. Co., 64 Iowa 510, 20 N. W. 783, holding that where a policy of insurance limits the time within which action is to be commenced to "within six months next after the loss shall occur" and further stipulates that the company will pay any loss that may occur "sixty days after due notice and proofs of same shall have been made by the assured and received at the home office," that the right of action of insured for loss thereon, does not accrue until the expiration of sixty days from the time proofs of loss were furnished.

Cross references. See Rule 1 hereof. See further, annotations under *Carter v. Humboldt F. Ins. Co.* (12 Iowa 287), ante. p. 48.

SWEET v. PORTER, 12 IOWA 387.

1. Actions—Time of Filing Petition—Notice for—Filing After Time Stated in.—The fact of filing the petition after the time fixed in the notice therefor, is not cause for dismissal, p. 389.

Cited in Owens v. City of Marion, 127 Iowa 474, 103 N. W. 382, holding that where a statute fixes a time within which after notice, parties may do certain acts, that the fact that the notice fixes a different or less period, renders it irregular or defective, *voidable*, not void: In such a case a party cannot set aside, or enjoin acts of a board, or municipal body, because of insufficiency of notice.

Overruled in Hudson v. Blaufus, 22 Iowa 325, holding that, under the Code of 1860, if the petition is not filed by the time named in the notice and ten days before the commencement of the term of the court, wherein the action is pending, next succeeding, the action will be discontinued.—(Note.—And see *Decatur County v. Clements*, 18 Iowa 536; *Des Moines B. of State Bank v. Van*, 12 Iowa 523.—ED.)

Cross reference. See further, annotations under Rule 1 of *Des Moines Branch of State Bank v. Van*, (12 Iowa 523) *Infra.* p. 88. See also, annotations under *Pigman v. Denney* (12 Iowa 396) *Infra.* p. 66.

BRINTON v. SEEVERS, 12 IOWA 389.

1. Conveyances—Recording—Acknowledgment—Sufficiency of Certificate of—Effect of Insufficient.—Where a deed or other con-

veyance is recorded, but the certificate of acknowledgment fails to set out the facts required by statute, such instrument imparts no constructive notice to subsequent *bona fide* purchasers and mortgagees, without actual notice. So, where such a certificate fails to state that the grantor is personally known to the officer taking the acknowledgment, it is defective, and the recorded deed or conveyance to which it is attached imparts no constructive notice, pp. 391, 392.

Reaffirmed in Reynolds, Ely & Co. v. Kingsbury, 15 Iowa 239.

Reaffirmed and extended in Woods v. Banks, 34 Iowa 600 (abstract), holding further that a deed or other conveyance which is recorded, without a certificate of acknowledgment, imparts no constructive notice—(Note. In this case the style of the present case is incorrect.—Ed.)

Reaffirmed and qualified in Lake v. Gray, 30 Iowa 419, holding that a deed is valid as between the parties, although not acknowledged.

Cross reference. See further on this question, annotations under Rule 2 of Bell v. Evans (10 Iowa 353) Vol. I, p. 703.

2. Constitutional Law—Retrospective Statutes—Constitutionality—Curative Acts.—A curative statute, retrospective in character, is unconstitutional only in so far as it interferes with vested rights. So, the Act of 1858 (Chap. 30 Laws of that Year), curing defects in acknowledgments to deeds before its taking effect, is not unconstitutional as impairing the obligation of contracts, but is invalid as affecting rights vested before its passage, p. 393.

Reaffirmed in Newman v. Samuels, 17 Iowa 549, 553; Scharfenburg v. Bishop, 35 Iowa 62; Ferguson v. Williams, 58 Iowa 718, 13 N. W. 49; Collins v. Valleau, 79 Iowa 630, 43 N. W. 285, and 44 N. W. 904; Bresser v. Saarman, 112 Iowa 727, 84 N. W. 921; Blackman v. Henderson, 116 Iowa 581, 87 N. W. 656, 56 L. R. A. 902; Swartz v. Andrews, 137 Iowa 266, 114 N. W. 890.

Reaffirmed and extended in Bennet v. Fisher, 26 Iowa 500, holding further that retrospective statutes are valid, except where they interfere with vested rights, or violate some provision of the State or National Constitutions.

Reaffirmed and extended in Tilton v. Swift & Co., 40 Iowa 79-81, holding further that retrospective laws which cure defects in acts done, or which authorize the exercise of powers which operate retrospectively, are valid, if they do not interfere with vested rights, and if the Legislature had the right to confer the power, and the act would have been valid under a prior enactment: That legislation operating retrospectively and rendering acts effective, as between the parties thereto, are valid—Holding further that the Legislature has power to change the remedy for the enforcement of a right, add a new remedy, or grant a remedy for the enforcement of a right, such law to operate retrospectively, provided it does not interfere with vested rights.

Reaffirmed and extended in Bresser v. Saarman, 112 Iowa 727, 84 N. W. 921; Parriott v. City of Hampton, 134 Iowa 162, 111 N. W. 442, holding further (as does the present case) that the words "duly recorded" in an act curing defective acknowledgments of recorded deeds, etc., means *actually recorded* and not *legally recorded*.

Reaffirmed and qualified in State v. Squires, 26 Iowa 347, holding that statutes will be construed as having a prospective operation, unless a clear retrospective intention is thereby shown: Holding further that the General Assembly may by law cure a defect in irregular proceedings, although such proceedings may be void, but for the curative act—Provided no vested rights are thereby disturbed.

Reaffirmed and narrowed in Edworthy v. Iowa Sav. & L. Ass'n, 114 Iowa 223, 86 N. W. 316, holding that where the General Assembly passed a law legalizing contracts of building and loan associations and allowing them to collect 12 per cent. per annum interest, that the repeal of the law did not take away any such right of such a company as to contracts in existence at the time of such repeal.

Reaffirmed and narrowed in Greenwood v. Jenswold, 69 Iowa 56, 28 N. W. 434, holding (as does the present case) that an act legalizing all conveyances defectively acknowledged, which were "duly recorded" prior to a given date, means such as were so *actually recorded*; that in order for an instrument to be recorded it must appear from the record that "every material part" thereof has been copied into the record, and that such an act does not apply to a deed where it shows, as recorded, that it lacks a substantial element of a conveyance.

Cross reference. See further on this subject, annotations under Rosier v. Hale (10 Iowa 470) Vol. 1, p. 732.

PIGMAN v. DENNEY, 12 IOWA 396.

1. Judgment by Default Erroneously Entered—Motion to Set Aside Necessary Before Appeal—Erroneous Judgments and Orders of District Court—Necessity for Motion to Correct before Appeal.—Where a judgment or order of the district court is irregular or erroneous, a motion to set it aside or to correct it, must (under Revision of 1860) be made before an appeal is taken therefrom to the Supreme Court. So, where, under such Code, a judgment by default is erroneously entered in the district court on a notice not served the statutory period, a motion to set it aside must be made and overruled therein, before it will be cause for reversal on appeal, pp. 396, 397.

Reaffirmed in McKinley v. Betchtel, 12 Iowa 562; Downing v. Harmon, 13 Iowa 536; Barnes v. Hayick, 15 Iowa 602 (abstract); Decatur County v. Clements, 18 Iowa 537; Berryhill v. Jacobs, 19 Iowa 348, 349; Webster v. Cedar R. & St. P. R. R. Co., 27 Iowa 318.

Reaffirmed and extended in Van Vark v. Van Dam, 14 Iowa 233, holding further that a defective service of original notice is waived by the defendant entering his appearance.

Reaffirmed and extended in Leonard v. Hallem, 17 Iowa 566, holding further that before a party may have a writ of error to a justice's court from the district court, for an order, judgment or ruling of a justice's court, he must move for a vacation or modification of such ruling, order or judgment in the justice's court.

Reaffirmed and extended in Webster v. Cedar Rapids & St. P. R. Co., 27 Iowa 318, holding further that objection to a pleading so defective that it does not state a cause of action, or defense, cannot be taken for the first time on appeal to the Supreme Court.

Reaffirmed and qualified in Robison v. Saunders, Kibben & Co., 14 Iowa 541; Hunt v. Stevens, and Alverson, 25 Iowa 262; Sanders v. Lowe, 25 Iowa 599 (abstract), holding that in an action at law, unless exception is taken to a ruling or an order of the trial court, or a motion is made to set it aside, or modify it, as the case may be, it will not be considered on appeal, by the Supreme Court.

Reaffirmed and qualified in Carleton v. Byington, 17 Iowa 580 (abstract); Eason v. Gester, 31 Iowa 476; Heaton v. Fryberger, 38 Iowa 207, holding that in an action at law where the action is tried by the district court, a motion for a new trial must be made setting out the errors, or a motion be made to set aside or modify an erroneous order or judgment, or the errors therein will not be reviewed on appeal: That specific objection and exception must, in actions at law, be made and taken in the district court, in order that that court may correct errors without an appeal.

(Note.—See further specially, Pratt v. Western Stage Co., 27 Iowa 365.—ED.)

Cross references.

"Action at law—Trial by court—Finding of facts—Motion for new trial, etc." See annotations under Warner, Adm'r v. Pace (10 Iowa 391) Vol. I, p. 710.

"Equity action—Appeal—Trial de novo"—See annotations under Garner v. Pomroy (11 Iowa 149) Vol. I, p. 791.

REYNOLDS v. NICHOLS & Co., 12 IOWA 398.

1. Corporations—Post Notes—Trust Deed to Secure—Validity—Contracts Contrary to Statute or the Common Law—Effect.—Contracts or agreements which have for their object anything repugnant to the policy of the Common Law or contrary to the provisions of a statute, are void. Hence, post notes given by a corporation to circulate as money, are void; and a trust deed executed to secure the payment of any such notes, is of no effect, and its collection will be enjoined, p. 403.

Reaffirmed in Dively v. City of Cedar Falls, 21 Iowa 569, and 27 Iowa 230; Smith v. Sherman, 113 Iowa 609, 85 N. W. 750; Lindt v. Uihlein, and Schlitz Brew. Co., 116 Iowa 56, 89 N. W. 217.

Reaffirmed and extended in Boardman & Brown v. Thompson, 25 Iowa 504, holding further that a contract between an attorney and his

client whereby the former is to institute an action, to advance money for court costs, etc., and to receive payment therefor out of the amount recovered, together with a certain per cent. of the recovery for his services, all to be paid out of the amount recovered, the action not to be settled without the attorney's consent, is champertous and void.

Reaffirmed and extended in Gilman & Cowdrey v. D. V. R. Co., 40 Iowa 204, holding further that a contract to pay higher fees to an officer than those fixed by statute, is void; and that where, by such contract, it is uncertain whether the fees will be greater or less than those allowed by statute, the contract is void.

Reaffirmed and extended in McIntosh, Adm'r, v. Wilson, sheriff, 81 Iowa 343, 46 N. W. 1004, holding further that one who transfers property to another to be held and treated by the latter as its ostensible owner, loses the right to reclaim it by law, and such property is subject to process in favor of the creditors of the transferee—Where the transfer is made to accomplish a purpose prohibited by law.

Reaffirmed and extended in Gipps Brew. Co. v. De France, 91 Iowa 113, 58 N. W. 1089, 51 Am. St. Rep. 329, 28 L. R. A. 386, holding further that where a foreign brewing company offers to sell beer for a stated time to a resident of this State, the purchaser to return the kegs or pay a certain price therefor, and such offer is accepted in this State, that it is a contract made in and governed by the laws of this State, and entirely void, and an action cannot be maintained thereon: Money paid thereunder may be recovered from the brewery company.

Cross reference. See Green v. Schoenhofen Brew. Co., below.

Reaffirmed and extended in Barngrover v. Pettigrew, 128 Iowa 535, 95 N. W. 183, holding further that where plaintiff sues for a claim based upon a contract contrary to statute or to public policy, the contract being void, he cannot recover thereon on a *quantum meruit*.

Reaffirmed and qualified in Muscatine County v. Carpenter, 33 Iowa 43, 44, holding further that although money of a county which has been regularly appropriated, be illegally paid by the board of supervisors, clerk and treasurer thereof, such fact is no defense to an action on the bond of the person to whom it is paid.

Cited in Correll v. B. C. R. & M. R. R. Co., 38 Iowa 124, 18 Am. Rep. 22, not in point.

Distinguished in Green v. Schoenhofen Brew Co., 103 Iowa 257, 72 N. W. 657, in a case involving a lawful contract for the sale of beer in original packages.

Cross reference. See and compare with this last case, Gipps Brew. Co. v. De France, above.

Unreported citation, 124 N. W. 366.

(Note.—See further, Corey v. Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 490; Kinney v. McDermot, 55 Iowa 674, 8 N. W. 656, 39 Am. Rep. 191; Pike v. King, 16 Iowa 49; Caldwell v. Bridal, 48 Iowa 15; Adye v. Hanna, 47 Iowa 264; Dillon v. Allen, 46 Iowa 299; Pang-

born v. Westlake, 36 Iowa 546; Marionthal, Lehman & Co. v. Shafer, 6 Iowa 223, some important cases sustaining, explaining, extending and qualifying, but not citing the text.—ED.)

Cross references. See further specially, annotations, note and cross references under Guenther v. Dewein (11 Iowa 133) Vol. 1, p. 786.

See also, McNulty v. Bank, 56 Am. St. Rep. 203; Gas Co. v. Sims, 43 Am. St. Rep. 105.

BRISTOW v. GUESS, 12 IOWA 404.

1. Actions—Service of Original Notice by Publication—Proof Necessary.—Where service of the original notice is made by publication, the plaintiff must (under Code of 1851) prove that copies of the notice and petition were sent to defendant at his usual place of residence; and a judgment entered in such case, under such Code, without such proof is defective and will be reversed, pp. 404, 405.

Cited generally in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350.

Cross references. See further, annotations, notes and cross references under Robertson v. Young (10 Iowa 291) Vol. 1, p. 685; Tunis v. Withrow (10 Iowa 305) Vol. 1, p. 688.

2. Revision of 1860—Actions Commenced Before its Taking Effect—What Code Governs.—The Code of 1851 controls to final adjudication, the actions commenced before the taking effect of the revision of 1860, p. 405.

Distinguished and narrowed in Gray v. Iliff, 30 Iowa 196, holding that where an action was commenced and judgment rendered therein before the taking effect of the Code of 1860, that the provisions of that Code govern the time and manner of issuing execution thereon.

(Note.—See further, State v. Innskeep, 12 Iowa 266.—ED.)

GATES v. DELAWARE COUNTY, 12 IOWA 405.

1. Office and Officer—Tendering Resignation—Effect.—When an officer tenders his resignation in writing to the officer having authority to accept it, and the latter marks it "Resignation" and files it, such acts vacate the office, which can only be filled by appointment or election as provided by law, pp. 408, 409.

Distinguished and narrowed in Curttright v. Indep. Sch. Dist. of Center Junc., 111 Iowa 23, 24, 82 N. W. 445, holding that a teacher may withdraw his tender of resignation at any time before it is acted on and accepted by the board of education; that the board acting thereon after withdrawal, is of no effect; and that in such case the fact that the teacher thereafter delivers the key of the school-house to the president of such board, upon his demanding it, does not constitute an abandonment of his contract to teach the school term.

MILLER v. WETHERBY, 12 IOWA 415.

1. Husband and Wife—Real Estate of Wife—Conveyance of By—Failure of Husband to Join In—Effect.—A deed of a wife (who is not a *feme sole*) to her land in which the husband does not join, as provided by sec. 4, Chap. 5, laws of 1846, is void *ab initio*, pp. 421, 422.

Distinguished and narrowed in Pursley v. Hayes, 22 Iowa 16, 17 92 Am. Dec. 350, holding that where a husband signs and receives the consideration for a deed to a wife's land, with her knowledge and consent, and after his death the wife signs, acknowledges and delivers the deed, it not having been delivered to the grantee until then, such conveyance is valid.

Cross references. See further in this connection, annotations and note under Rule 4 of Suiter v. Turner (10 Iowa 517) Vol. 1, p. 739.

"Conveyance of homestead by husband—Failure of wife to join in—Effect"—See annotations under Rule 2 of Williams v. Swetland (10 Iowa 51) Vol. 1, p. 642; Alley v. Bay (9 Iowa 509) Vol. 1, p. 615.

STATE v. WILSON, 12 IOWA 424.

1. County Court—Trial in—Appeal—Certiorari.—An appeal lies to the district court from a final order in the county court; and a party who feels himself aggrieved by the rulings of the county court on a trial therein has his redress by appeal, and not by *Certiorari*. *Certiorari* is only allowed when there is no other plain, speedy and adequate remedy, p. 435.

Reaffirmed in O'Hare, Adm'r, v. Hemstead, county judge, 21 Iowa 35, 36.

Cross references. See further specially, annotations, notes and cross references under Fagg v. Parker, (11 Iowa 18); Craine v. Fulton (10 Iowa 457) Vol. 1, pp. 762 and 728.

STEVENS v. PUGH, 12 IOWA 430.

1. Garnishment—Assignment of Note After Maturity—Notice to Garnishee, Maker, before Answer—Effect.—Where a creditor of the payee of a promissory note overdue, attaches the debt by garnishment in the hands of the maker, and between the service of garnishment and answer, by the garnishee, the note is assigned with the knowledge of the garnishee (maker), such note is subject to the demand of the creditor, and the garnishee is liable therefor to him, p. 432.

Special cross reference. See annotations under McCoid v. Beaty (12 Iowa 299) ante. p. 50, where all cases citing the text, and others will be found.

DALZELL v. CITY OF DAVENPORT, 12 IOWA 437.

1. Cities and Towns—Streets—Change of Grade—Damages—Measure of—Evidence.—In an action by an abutting owner of a lot

with improvements thereon, to recover damages from a city (under Chap. 90, sec. 8, laws of 1857) by reason of the changing or altering an established grade of a street, the plaintiff may recover for injury to both the lot *and* the improvements, or in other words damages to the entire abutting, improved, realty.

In such action evidence of the value of the property before and after the change of grade, is competent; but not opinions as to the effect of such a change on the value thereof, pp. 440, 441.

Reaffirmed in Richardson v. Sioux City, 136 Iowa 439, 113 N. W. 930.

Reaffirmed as to first paragraph in Hempstead v. City of Des Moines, 52 Iowa 305, 306, 3 N. W. 126; Farmer v. City of Cedar Rapids, 116 Iowa 324, 89 N. W. 1105.

Reaffirmed, explained, and qualified as to last paragraph in Prosser v. Wapello County, 18 Iowa 330; Hartley v. K. & N. W. Ry. Co., 85 Iowa 467, 52 N. W. 356, holding that in a condemnation proceeding *value* can be proved by the opinions of witnesses, but not *damages*: That opinions as to how much a land owner is damaged by reason thereof, are inadmissible.

Reaffirmed and varied as to last paragraph in Sadler v. Bean, 37 Iowa 440, 441, holding that under an issue involving the value of accounts kept in a certain book, a witness familiar therewith may testify as to their value.

Reaffirmed and varied as to last paragraph in Croft v. Ch. R. I. & P. Ry. Co., 134 Iowa 419, 109 N. W. 726, holding that an opinion of a married man in a similar station in life with that of plaintiff as to the value per year of the services of plaintiff's wife, is competent.

Reaffirmed and qualified as to last paragraph in Richardson v. Webster City, 111 Iowa 431, 82 N. W. 922, holding that in a condemnation proceeding any form of question to a witness the answer to which will call for an expression of opinion as to the *damages* to the land owner, will make the answer thereto reversible error.

(Note.—See further, Blanden v. City of Ft. Dodge, 102 Iowa 441, 71 N. W. 411; Stewart v. City of Council Bluffs, 84 Iowa 61, 50 N. W. 219; Trustees of D. of I. v. City of Anamosa, 76 Iowa 538, 41 N. W. 313, 2 L. R. A. 606; Noyes v. Mason City, 53 Iowa 418, 5 N. W. 593; Renwick, Shaw & Prossett v. D. & N. W. R. R. Co., 49 Iowa 664; Finley v. Hershey, 41 Iowa 389; Russell v. City of Burlington, 30 Iowa 262, important cases on this subject, not citing the text.—Ed.)

Cross reference. See further, annotations under Cotes & Patchin v. City of Davenport (9 Iowa 227) Vol. 1, p. 568.

BURLINGTON UNIVERSITY v. STEWART'S EXECUTORS, 12 IOWA 442

1. **County Judge—When County Clerk May Act as.**—Before the county clerk can discharge any of the judicial duties of the county judge, the record must affirmatively show that the judge was absent

or disqualified, and that the prosecuting attorney could not act, and the reason therefor: Unless the record shows such facts, a judgment by the county clerk as acting county judge, is void *ab initio*, p. 443.

Reaffirmed and varied in State v. C. R. I. & P. R. R. Co., 50 Iowa 693, holding that unless the record affirmatively shows the disqualification, or other inability to act, of the county judge and the cause thereof, the prosecuting attorney has no power to act, and all the acts of the latter of a judicial character in such case, are void.

2. County Court—County Clerk Acting as Judge Without Authority—Effect—Jurisdiction.—Where the county clerk renders a judgment as judge of the county court without the record affirmatively showing the fact of the absence or disqualification of the judge and that the prosecuting attorney could not act, and the reason therefor, it is void *ab initio*: And in such case there is no jurisdiction of the subject-matter, and advantage may be taken thereof at any stage of the proceedings, or on appeal, p. 444.

Reaffirmed and explained in State v. Belvel, 89 Iowa 409, 56 N. W. 547, 27 L. R. A. 846; Porter v. Welsh, 117 Iowa 146, 90 N. W. 582, holding that where the law does not confer jurisdiction on a court as to the subject-matter of an action, or proceeding, no agreement, or acts of the parties thereto, will have such an effect: But want of jurisdiction as to parties, and defects in proceedings, where the court has jurisdiction of the subject-matter can be waived by consent or by the acts of the parties.

Cross reference. See further sustaining and explaining the text and above cases, but not citing the text, annotations, notes and cross references under Rule 2 of Dicks v. Hatch (10 Iowa 380) Vol. 1, p. 707.

SWIFT v. CONBOY, 12 IOWA 444.

1. Judgment Lien on Real Estate—Effect of Appeal on—New Judgment in Supreme Court—Effect.—Where a judgment awarding a lien on land is affirmed on appeal to the Supreme Court, and the appellee takes a new judgment therein, the former judgment is merged in the new one, and the lien of the former is extinguished when the lien of the latter commences: In such case the remedy of the appellee is by enforcement of the latter judgment, pp. 448, 449.

Reaffirmed in Hamsmith v. Espy, Barker and Robinson, 19 Iowa 446.

Cited with approval in Oberholtzer v. Hazen, sheriff, 101 Iowa 342, 70 N. W. 207, holding that the district court cannot restrain proceedings under a judgment of the Supreme Court.

NAPPER v. YOUNG, 12 IOWA 450.

1. Trial—Instructions—Province of Court and Jury—Weight of Evidence for Jury—Misconduct of Trial Court.—It is the prov-

ince of the jury to determine the weight of the evidence; and instructions must not assume facts which are in issue, as true. So, when the trial court says to the jury that "they are left in the dark as to the ordinance under which the defendant held his lease (involved in the issue)," it is an assumption of the province of the jury and reversible error, p. 453.

Reaffirmed in Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404, holding that where there is any evidence to support an issue, its sufficiency is for the jury to determine.

Reaffirmed and explained in Muldowney v. Ill. Cent. R. R. Co., 32 Iowa 178, holding that where there is no evidence, or where essential or integral elements of a cause of action, or defense, are entirely without proof, the trial court may properly give a peremptory instruction, or direct the jury as to the kind of verdict to be rendered; but that where there is evidence tending in any degree to establish the cause of action, or defense, the trial court must not take the case from the jury, or pronounce an opinion as to the sufficiency or weight of the evidence, except in cases where the proof is documentary: That it is the peculiar province of the jury to decide questions of fact, the weight and sufficiency of evidence, and the credibility of witnesses, and instructions must be confined to rules of law only.

Reaffirmed and extended in In re Knox's Will, 123 Iowa 29, 98 N. W. 470, holding that it is reversible error for the trial court to instruct the jury on the degree or importance to be attached to any part of oral evidence, or any circumstance involved in a trial.

Cross references. See further sustaining, extending, explaining and qualifying the text, annotations and notes under Russ v. Steamboat War Eagle (9 Iowa 374); Rule 2 of Fannon v. Robinson (10 Iowa 272), and Rules 3 and 4 of Potter, et al, v. Wooster, et al, (10 Iowa 334) Vol. 1, pp. 592, 682, and 697.

See also, annotations under Rule 2 of State v. Delong (12 Iowa 453), next succeeding.

STATE v. DELONG, 12 IOWA 453.

1. Grand Jury—Selection of—When List to Be Made.—Under the Revision of 1860, the list for the selection of the grand jury shall be made for the year commencing the first day of January annually, and a grand jury is properly selected in February from lists returned in the October previous thereto, pp. 454, 455.

Reaffirmed in State v. Schilling, 14 Iowa 457.

Overruled in State v. Winebrenner, 67 Iowa 232, 25 N. W. 147, holding that under the Code of 1873, the rule of the text is no longer applicable, and that thereunder grand jurors shall be selected for the first term in the year at which jurors are required, commencing after the first day of January of each year; that such jurors so selected cannot act until that time or term, and that they serve for one year, or

until the corresponding term in the succeeding year: Holding further that a grand jury selected for the year 1884, could return an indictment on the 7th day of January, 1885, where the term of court at which it was found, commenced in December 1884, and the record failed to show an adjournment *sine die* before the indictment was returned.

2. Trial—Instructions—Province of Court and Jury—Instructions As to Effect of Title Papers.—The trial court may instruct the jury as to who holds the title to real estate from deeds introduced, or when the question of title is one of law, from the testimony, p. 455.

Reaffirmed and extended in Rohrabacher v. Ware, 37 Iowa 88, holding further that where a contract involved in an action, is in writing, its construction is a question of law for the court and not one of fact for the jury.

Reaffirmed and extended in Warren, Adm'r, v. Chandler, 98 Iowa 240, 67 N. W. 243, holding further that where evidence of title is documentary, it is the province of the court to determine its effect and sufficiency, and to instruct the jury in relation thereto.

Cross reference. See further, annotations and cross references under Napper v. Young (12 Iowa 450), next preceding.

BOSTWICK v. POWERS, 12 IOWA 456.

1. Conveyance — Record of — Index Entry — Sufficiency of — Constructive Notice.—Whether a subsequent purchaser, or incumbrancer, examines the record entry of a conveyance of real estate or not, he is constructively notified of the facts disclosed by the index entries; and if their recitals are of such a character as that they would necessarily put a cautious and prudent person upon inquiry, he (the subsequent purchaser or incumbrancer) is bound to make such inquiry, and upon finding one or more prior incumbrancers shall be held to notice. So, where an index entry of a mortgage on real estate recites the names of the parties thereto, the date of the filing, the date and nature of the instrument, the book and page where recorded, and, in the column for the description of the property, that it is on "certain lots of land," it is sufficient to impart constructive notice, pp. 457, 458.

Reaffirmed in Thomas v. Kennedy, 24 Iowa 407, 95 Am. Dec. 740.

Reaffirmed and explained in Barney v. Little, 15 Iowa 535, 536; Hodgson, Adm'r, v. Lovell, 25 Iowa 98, 95 Am. Dec. 775, holding that the index entry need not contain a description of the land conveyed: It is sufficient if it points to the record with reasonable certainty.

Reaffirmed and extended in White v. Hampton, 13 Iowa 261, holding further that an index entry, in other ways perfect, which has in the column intended for the description of the realty conveyed, the words "see record," is sufficient, and imparts constructive notice.

Reaffirmed and extended in Jones v. Berkshire, 15 Iowa 251, 83 Am. Dec. 412, holding further that where an index entry of a mortgage is in every other way correct, but recites the name of the mortgagor as "W. H. B.", instead of "W. T. B.", it is sufficient to impart constructive notice.

Cross references. See further sustaining, explaining, extending and qualifying, but not citing, the text, annotations, notes and cross references under Scoles v. Wiltsey (11 Iowa 261); Calvin v. Bowman and Neal (10 Iowa 529), Vol. 1, pp. 812 and 741.

McGAUGHLIN v. O'ROURKE, 12 IOWA 459.

1. Appeal to Supreme Court—Effect on Powers of District Court Over Action.—When a judgment is appealed, the district court loses jurisdiction of the cause during its pendency, and has no power to entertain a motion, or to enter an order therein, until it, or some part of it, is remanded, pp. 460, 461.

Reaffirmed in Carmichael v. Vandebur, 51 Iowa 226, 227, 1 N. W. 519; Stillman v. Rosenberg, 111 Iowa 374, 82 N. W. 769; Dunton v. McCook, 120 Iowa 447, 100 N. W. 345, 104 Am. St. Rep. 354; Guinn v. Iowa & St. L. Ry. Co., 131 Iowa 683, 109 N. W. 210, all reaffirming the rule on appeals in actions both in chancery and at law.

Cited with approval in Turner v. First Nat'l Bank of Keokuk, 30 Iowa 194, a case turning on other questions.

Unreported citation, 78 N. W. 915.

(Note.—See further, Levi v. Karrick, 15 Iowa 444; Jamison v. B. & W. Ry. Co., 87 Iowa 265, 54 N. W. 242.—ED.)

2. Equity Actions—Pleadings—Relief.—In an action in chancery, the plaintiff is not entitled to greater relief than that for which he prays, p. 461.

Unreported citation, 124 N. W. 355.

3. Husband and Wife—Mortgage to Secure Husband's Debt—Action to Foreclose—Judgment Against Wife.—In an action to foreclose a mortgage on land executed by husband and wife to secure a note signed by the former only, no personal judgment can be rendered against the wife, without an allegation that it was a debt for which her separate property is liable, p. 461.

Cited in Chittenden & Co. v. Gossage, 18 Iowa 159, not in point.

(Note.—See further, Knox v. Moser, 69 Iowa 343, 28 N. W. 630; Reed v. King, 23 Iowa 500; Wolf v. Van Metre, 23 Iowa 397; Johnson County v. Rugg, 18 Iowa 137; Anderson v. Reed, 11 Iowa 177.—ED.)

TRUSTEES OF IOWA COLLEGE v. HILL, 12 IOWA 462.

1. Commercial Paper—Blank Accommodation Paper—Indorsement Before Maturity—Rights of Bona Fide Holder.—The facts

that a note was signed in blank, was accommodation paper, or was misused by the person for whom it was made, do not affect the rights of a *bona fide* holder for value to whom it was indorsed before maturity, p. 473.

Reaffirmed and extended in Winters v. Home Ins. Co., 30 Iowa 174, 7 Am. Rep. 112, holding further that fraud in the obtaining the signature to an accommodation paper, cannot be pleaded as a defense to an action thereon by a *bona fide* holder, who obtained it for value and before maturity, without knowledge of the fraud: Holding, also, that any holder of such paper, including the maker, may transfer it by delivery.

Distinguished and narrowed in Knoxville Nat'l Bank v. Clark, 51 Iowa 271, 1 N. W. 491, 33 Am. Rep. 129, holding that a forged negotiable instrument is unenforceable in whosoever hands it may come; and that where a negotiable note, not in blank, is materially altered after its execution and without the consent of the maker, such fact is a defense to an action thereon by a *bona fide* holder who obtained it before maturity and for value: Hence holding that where a negotiable note for "\$10

* * * * * ten dollars" is so altered before indorsement to read, "\$110.

* * * * * One hundred and ten dollars," such alteration is a defense in an action thereon by a *bona fide* holder who obtained it for value and before maturity.

Cross reference. See other rules hereof.

2. Negotiable Instrument in Blank—Filling Amount in Without Authority—Transfer before Maturity—Action on by Indorsee—Presumption in Favor of—Burden of Proof.—Where a negotiable accommodation paper is signed in blank, and the person for whom it was made, without authority from the maker, fills in the amount and indorses it to another before maturity, then in an action by such indorsee thereon, it will be presumed that plaintiff took the paper or note in good faith, in the usual course of business, before its maturity and for a valuable consideration; and the defendant (maker) must prove that the plaintiff took the paper or note, knowing that it was without consideration and had been filled up without authority; but express or actual notice thereof is not necessary; it is sufficient if the circumstances brought home to the plaintiff are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put him upon inquiry: For, in such case, if the circumstances attending the transfer of the paper were such as to put the plaintiff on his guard, or if he must have known therefrom that the person offering it had no right to transfer it, then he was bound to make inquiry, and took it at his peril: However, the plaintiff is not charged with notice of such facts because of any want of diligence on his part in making inquiry, or even if he took the paper or note under suspicious circum-

stances, if he had no actual notice, or, such constructive notice as above of the equities subsisting between the maker and his indorser, p. 474.

Reaffirmed in Hoffman v. Leibfarth, 51 Iowa 711, 712, (abstract), 2 N. W. 527, holding that in an action by an indorsee of a promissory note indorsed before maturity, that the facts that the plaintiff had been in the employ, as cashier, of payees who were dealers in intoxicating liquors in this state, and that the makers of the note had purchased such liquors of the payees several times during the period of two years next preceding the execution thereof, which purchases were charged on the books of the payees, were sufficient to prove knowledge of the plaintiff (indorsee) of the illegal consideration thereof.

Reaffirmed in Graff v. Adams, 100 Iowa 484, 69 N. W. 540, holding that in an action on a negotiable promissory note by the indorsee thereof, the burden of proof is on the defendant to show that the plaintiff is not an innocent purchaser, for value, before due.

Reaffirmed and extended in Lathrop v. Donaldson, 22 Iowa 237; *Tolman v. Janson*, 106 Iowa 456, 76 N. W. 732, holding further that in an action on a negotiable promissory note by an indorsee thereof, it will be presumed that he obtained it in good faith, for value, before maturity, and that in the absence of proof to the contrary such a note is not affected by any equities existing between the maker (defendant) and the payee (indorser).

Reaffirmed and extended in Moore v. Moore, 39 Iowa 464, holding further that if a negotiable instrument is taken out of the "due course of business," under circumstances calculated to impart notice of its infirmities, the indorsee takes it at his peril, although it be so taken before it is due and without notice of fraud (a defense thereto by the maker).

Reaffirmed and narrowed in Merrill v. Hole, 85 Iowa 70, 52 N. W. 5; *Lehman v. Press*, 106 Iowa 392, 393, 76 N. W. 819, holding that the circumstances coming to the knowledge of the purchaser of a note must be such as to require that he shall in good faith inquire as to its validity, and it is only where the failure to inquire evinces actual bad faith that it is sufficient to charge him with notice.

Distinguished and narrowed in Lake v. Reed, 29 Iowa 259, 260, 4 Am. Rep. 209, holding that in an action by the holder of a negotiable instrument, transferred before maturity, for value, and in due course of business, in order to defeat recovery the defendant must show by proof, direct or by circumstances, that the holder at the time he took the note, *had notice* of defects or equities; that proof that the holder, at the time he took it, was in such a situation as that he *might have had notice* if he had been diligent in making inquiries, which his situation invited him to make, is insufficient.

Distinguished and narrowed in Lane v. Evans, 49 Iowa 157, holding that facts which would have put a reasonable man upon inquiry, or

circumstances sufficient to arouse suspicion, will not charge an indorsee with notice of fraud in the inception of the note.

(Note.—See further *Richards v. Monroe*, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301; *Hawkins v. Wilson*, 71 Iowa 761 (abstract), 33 N. W. 232; *McDonald Mfg. Co. v. Thomas*, 53 Iowa 558, 5 N. W. 737; *Cook v. Weirman*, 51 Iowa 561, 2 N. W. 386; *Pond v. Waterloo Agricultural Works*, 50 Iowa 596; *Gage v. Sharp*, 24 Iowa 15; *Kelly v. Ford*, 4 Iowa 140, important cases not citing, but sustaining, qualifying and intimately connected with the text.—Ed.)

Cross reference. See other rules hereof in connection herewith.

3. Negotiable Instruments—Indorsement as Collateral Security for Pre-existing Debt—Defenses—Presumption—Burden of Proof.

—Where the holder of a negotiable instrument took it as collateral security for a pre-existing debt, he is *prima facie* a *bona fide* holder for value, and in an action thereon, the burden of proof is on the defendant (maker) to show that plaintiff is not a holder for value: Where, however, in such action, the proof shows that it was taken as collateral security only, and that plaintiff (holder) parted with nothing, agreed to give no time, relinquished no right, and suffered no damage or injury as the consideration, or in consequence of receiving it, the plaintiff is not a *bona fide* holder for value, and it is subject to any equity or defense the maker may have against the indorser, or payee, pp. 475, 478.

Reaffirmed in *Ryan & Louthan v. Chew*, 13 Iowa 590; *Davis, Sawyer & Co. v. Strohm*, 17 Iowa 428; *Bone v. Tharp*, 63 Iowa 225, 226, 18 N. W. 907; *Keokuk County State Bank v. Hall*, 106 Iowa 541, 76 N. W. 832; *Cable v. Buchanan*, 109 Iowa 665, 666, 81 N. W. 150.

Reaffirmed in *Washington Bank v. Krum*, 15 Iowa 57; *Lathrop v. Donaldson*, 22 Iowa 237, holding that where the time of the payment of a pre-existing debt is extended in consideration of negotiable paper not due being transferred as collateral security, the transferee is a *bona fide* holder for value, and is protected against equities and defenses of the maker—And the same rule applies to accommodation paper.

Reaffirmed and varied in *Clark v. Barnes & Sons*, 72 Iowa 567, 34 N. W. 421, holding that where mortgagees enter into the possession of the mortgaged property, they are entitled to priority over the holder of a pre-existing, unrecorded bill of sale therefor, they having no notice thereof at the time of the execution of the mortgage.

Reaffirmed and qualified in *Washington Bank v. Krum*, 15 Iowa 57; *Ruddick v. Lloyd*, 15 Iowa 443, 83 Am. Dec. 423; *Winters v. Home Ins. Co.*, 30 Iowa 174, 175; *Bettanier v. Smith*, 129 Iowa 599, 105 N. W. 1000, 5 L. R. A. (New Series) 628, holding, however, that where a negotiable instrument is, before maturity, taken in consideration of a loan, or advancement, or in payment of a pre-existing debt, or under an agreement to extend the time of payment of such a debt, or for a change of securities therefor, the holder will be protected from infirm-

ities affecting the instrument before its transfer—And the same rule applies to accommodation paper.

Reaffirmed and qualified in Stotts v. Byers, 17 Iowa 304, holding that where a negotiable note is transferred before maturity as collateral security, to protect the indorsee from his liability as surety for the indorser—which he becomes by reason of the transfer—that the indorsee is a *bona fide* holder for value and is protected against prior equities and defenses.

Distinguished in Reed, Murdoch & Co. v. Brown Bros., 89 Iowa 460, 461, 463, 56 N. W. 662, 48 Am. St. Rep. 406, holding that the rule that a *bona fide* purchaser, without notice of prior equities or defenses, applies only to negotiable instruments; holding further that where a creditor of an insolvent merchant, purchases his stock of goods, the consideration being the extinguishment of a pre-existing debt and a promise to pay the difference between it and the value of the goods, that it does not constitute a valuable consideration for the sale, as against a person from whom the goods were fraudulently obtained by the vendor.

(Note.—See further, Noteboom v. Watkins, 103 Iowa 580, 72 N. W. 766; Un. Nat'l Bank of Chicago v. Barber, 56 Iowa 559, 9 N. W. 890, and there are others to the same effect.—Ed.)

4. Trial—Instructions—To Be Confined to Issue and Evidence—Instruction Covered by One Already Given.—Instructions must be confined to the issue and the evidence adduced; and it is not error for the court to refuse to give an instruction based upon an hypothesis to support which there is no evidence.

Neither is it error for the court to refuse to give an instruction which is covered by one already given, pp. 473, 474.

Reaffirmed in First Nat'l Bank of Cedar Rapids v. Hurford & Bro., 29 Iowa 589; Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404.

Reaffirmed and extended in Todd v. Branner, 30 Iowa 441, holding further that errors in the giving or refusing instructions will not be considered on appeal, when the record does not show that they were excepted to below, and they are not pointed out in the assignment of errors.

(Note.—See further sustaining and explaining, but not citing the text, State v. Rorabacher, 19 Iowa 154; Nason v. Woodward, 16 Iowa 216; Denton v. Lewis, 15 Iowa 301; Cousins v. Westcott, 15 Iowa 253; Russ v. Steamboat War Eagle, 14 Iowa 363; Rindskoff Bros. v. Barrett, 14 Iowa 101; Peck v. Hendershott, 14 Iowa 40; Bevan v. Hayden, 13 Iowa 127; Hawes v. Twogood, 12 Iowa 582; State v. Hockenberry and Brandt, 11 Iowa 269; Moffitt v. Cressler, 8 Iowa 121, and there are many others to the same effect.—Ed.)

Cross reference. See further sustaining the text, annotations under Rules 3 and 4 of Moffitt v. Cressler (8 Iowa 121) Vol. I, p. 499.

"Instructions—Weight of evidence for jury—Province of court and jury—Misconduct of trial court, etc."—See annotations and cross references under *Napper v. Young* (12 Iowa 540) ante. p. 72.

STATE *v.* ARNOLD, 12 IOWA 479.

1. Change of Venue in Criminal Cases—Discretion of Trial Court—Abuse of—Reversal.—An application for a change of venue in a criminal prosecution is addressed to the sound judicial discretion of the trial court, and a refusal to grant such change will not be ground for reversal, unless it appears that such court abused its discretion, resulting in prejudice to the substantial rights of accused: The rule applies both to the ground as to the prejudice of the judge, or as to the prejudice and excitement of the people; and the accused is not entitled to such change as a matter of Right, although he avers the prejudice of the judge, in the exact language of the statute, pp. 482, 483.

Reaffirmed in *State v. Ingalls and King*, 17 Iowa 11; *State v. Baldy*, 17 Iowa 40; *State v. Ross and Mann*, 21 Iowa 469; *State v. Hutchinson*, 27 Iowa 213, 214; *State v. Collins*, 32 Iowa 43; *State v. Canada*, 48 Iowa 450.

(Note.—See further sustaining and explaining, but not citing, the text, *State v. Weems*, 96 Iowa 426, 65 N. W. 387; *State v. Crafton*, 89 Iowa 114, 115, 56 N. W. 257; *State v. Knight*, 19 Iowa 94; *State v. Ostrander*, 18 Iowa 435; *State v. Mooney*, 10 Iowa 506; *State v. Barrett*, 8 Iowa 536; *State v. Nash & Redout*, 7 Iowa 347; *State v. Gordan*, 3 Iowa 410.—ED.)

2. Criminal Law—Insanity of Accused—Inquiry As to—At What Period Inquiry to Relate—Conclusiveness of Inquiry—When Court to Hold.—Where an inquiry is ordered to inquire into the mental attitude of one accused of a crime or offense, as provided by secs. 5015-5019 of the Code of 1860, the court is to inquire into the mental condition of the accused at the time he appears for arraignment, trial, etc., or any other occasion when required, and not as to his mental condition at the time of the commission of the crime or offense. If insanity existed at the time of the commission of the crime or offense it is available as a defense, notwithstanding such inquiry.

The court may order such inquiry when he believes that there is reasonable doubt of the sanity of accused; and the court is not bound to take the evidence offered by counsel for accused, but may make full investigation into the facts and circumstances for himself, pp. 483, 484.

Reaffirmed in *State v. Grendahl*, 131 Iowa 604, 109 N. W. 121. holding that a finding that accused is insane pending an indictment, is not conclusive of his mental condition at the time or before the commission of the crime or offense; that on the trial of the indictment, such finding is admissible as evidence to be considered by the jury as any other evidence of a subsequent insane condition, as to whether or not

he was insane at a previous time; and that evidence of the prison physician, to which accused was committed under the finding, as to his mental condition while under his charge, is, also, admissible on the trial of such indictment.

Cited in Stone v. Conrad, District Judge, et al, 105 Iowa 26, 74 N. W. 911, holding that (under Revision of 1897) after an indictment is returned and filed, the district court has exclusive jurisdiction as to an inquiry in relation to the mental condition of the accused, and, may cause an inquiry to be had as to the sanity of accused, and, upon a finding of insanity, cause him to be confined in the penitentiary in the department for the insane: That upon the finding of the indictment, jurisdiction over the question of the sanity of accused, is taken from the commissioners of insanity, although an application for its action has been previously filed as by law provided.

3. Criminal Law—Trial—Jurors—Bias—Examination of Juror for—Extent Allowed.—In the examination of a juror in a criminal prosecution for the purpose of challenge, and selection to try the indictment, the investigation must be directed to the question of his opinion as to the guilt or innocence of accused and for the ascertainment of the existence or non-existence of actual bias on the part of the juror: And if it appears that the juror is in that state of mind which will prevent him from acting with entire impartiality, he is incompetent. This condition of the juror's mind must be found by directing his attention to the offense and defense as a Whole; and counsel cannot examine on a supposed case, and then base thereon a right to challenge for actual bias, pp. 485, 486.

Reaffirmed in State v. Leicht, 17 Iowa 29, holding that counsel for the defense cannot ask the jurors summoned to try an indictment, whether they had not just sat upon a jury for the trial of a person indicted for the same kind of offense, and if the evidence in the one on which they were summoned were the same as the previous one, did they have an opinion as to the guilt or innocence of the accused.

(Note.—See further, State v. Sheeley, 15 Iowa 404.—Ed.)

Cross references. See further on this question, annotations under Rule 2 of State v. Sater (8 Iowa 420); Rule 1 of State v. Thompson (9 Iowa 188) Vol. 1, pp. 523 and 560.

EDMONDS v. COCHRAN, 12 IOWA 488.

1. Pleadings—General Demurrer to Pleading of Several Counts—One Count Good—Effect.—Where a general demurrer is interposed to a pleading of more than one count, and one of the counts is good on demurrer, the demurrer must be overruled, pp. 489, 490.

Reaffirmed in Bonney v. Bonney, 29 Iowa 450.

Cross reference. See further sustaining the text, annotations and note under Jarvis v. Worwick (10 Iowa 29) Vol. 1, p. 637.

IN RE WILL OF COFFMAN, 12 IOWA 491.

1. Will Contest—Insanity of Testator as Ground—Burden of Proof.—Where a will is contested on the ground of insanity or unsoundness of mind of the testator, the burden of proof thereof is on the contestants, p. 494.

Reaffirmed in Stephenson, et al, v. Stephenson, et al, 62 Iowa 166, 17 N. W. 458; Goldthorp v. Goldthorp, 115 Iowa 435, 88 N. W. 946.

(Note.—Will contest—Undue influence—Onus probandi—See Webber v. Sullivan, 58 Iowa 260, 12 N. W. 319.—Ed.)

GOWING v. GOWGILL, ET AL, 12 IOWA 495.

1. Officers—Justice of the Peace—Liability of Sureties on Bond of.—For errors in judgment while acting in a judicial capacity a justice of the peace and the sureties on his bond are not liable; but where he acts through favor, fraud, or partiality, or knowingly commits a wrong by virtue of his office, they are liable therefor in an action by the person thereby injured, p. 498.

Reaffirmed and extended in Henke v. McCord, 55 Iowa 384, 386, 7 N. W. 625, holding further that a justice of the peace is not liable in damages for issuing a warrant for breach of a city ordinance which is void for want of authority of the city to enact it; and that a ministerial officer who executes such warrant, it being regular and sufficient on its face, is not liable in damages therefor.

Cited with approval and discussed in Heath v. Halfhill, et al, 106 Iowa 133, 76 N. W. 523, not in point, but on a parity.

Distinguished and narrowed in Jones v. Brown, 54 Iowa 78, 79, 6 N. W. 143, 37 Am. Rep. 185, holding that where a judicial officer has jurisdiction, he cannot be held liable in a civil action for damages for a decision therein, although it be alleged by the plaintiff in the action for damages that he acted fraudulently and corruptly—Holding, therefore, that an arbitrator is not liable in damages for an award made by him, although it is alleged that it was made fraudulently and corruptly.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, Thompson v. Jackson, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92; Green v. Talbot, 36 Iowa 499; Londegan v. Hammer, 30 Iowa 508; Wasson v. Mitchell, 18 Iowa 153; Howe v. Mason, 14 Iowa 510.—Ed.)

STATE v. MARVIN, 12 IOWA 499.

1. Criminal Law—Misdemeanor—Joint Indictment against Several Defendants for—Separate Trial—When Allowed—Judicial Discretion.—Where two or more persons are jointly indicted for a misdemeanor, they may (under sec. 4789 of the Code of 1860) be tried separately, whenever the trial court in the exercise of a sound judicial

discretion, deems proper; and such separate trials may be ordered either on the motion of the defendant, or any of them, or of the State. The ruling of the trial court in ordering separate trials in such case, is cause for reversal only in case of abuse of discretion, p. 501.

Reaffirmed in State v. Gigher, 23 Iowa 318, 319.

2. Verdict on Indictment—Judgment Rendered on—Time To Be Rendered—Presumption of Regularity on Appeal.—Upon an appeal to the Supreme Court every presumption is in favor of the regularity of the proceedings below; and when the record thereon in a criminal prosecution, fails to show that the district court continued in session "three clear days" between the verdict and the rendition of the judgment, it will be presumed that the trial court deferred its judgment to as remote a period as it reasonably could, and a judgment rendered before the expiration of such days will not be ground for reversal. The term "three clear days" means three days exclusive of the day of the return of the verdict, p. 502.

Reaffirmed in State v. Wood, 17 Iowa 22, 23.

Reaffirmed and narrowed in State v. Watrous, 13 Iowa 495, holding that where the record on appeal in a criminal prosecution shows that the court continued in session more than three clear days after the return of the verdict, and that judgment was rendered thereon in less than three clear days thereafter, the cause will be remanded, not for a new trial, but for a judgment on the verdict, with leave to defendant to show cause against its rendition, except cause already so shown by him.

Reaffirmed and narrowed in State v. Usher, 136 Iowa 611, 111 N. W. 812, holding that where the defendant in a criminal prosecution files his motion for a new trial and it is overruled before he is sentenced, that the fact that he is sentenced contrary to the provisions of Sec. 5431 of the Code of 1897 (requiring the court to fix the day of pronouncing judgment in advance and at least three days after verdict, if the court continues in session that long) will not be ground for reversal, where the record on appeal fails to show that he was thereby prejudiced.

(Note.—See also on this subject, State v. Stevens, 47 Iowa 276.—Ed.)

Cross references.

"Courts of general jurisdiction—Proceedings in—Presumption of regularity"—See Rule 3 of *Suiter v. Turner* (10 Iowa 517) Vol. I, p. 739.

3. Criminal Law—Lewdly and Lasciviously Cohabiting—Indictment for—What Constitutes—Sufficiency of Evidence to Convict.—The offense of an unmarried man and woman lewdly and viciously cohabiting together, denounced by sec. 4351, of the Revision of 1860, consists in the open, lewd and lascivious conduct of the parties living together as husband and wife. Secret acts of sexual intercourse will

not constitute the offense. So, where a man and woman are indicted for such offense, and the evidence for the state shows only two secret acts of sexual intercourse, it is insufficient to constitute the offense, the evidence further showing that the defendants were living in the same house as master and servant, pp. 504, 506.

Reaffirmed and qualified in State v. Kirkpatrick, 63 Iowa 556-558, 19 N. W. 661, holding that occasional acts of secret sexual intercourse is insufficient to constitute the offense of "lewdly and viciously cohabiting as husband and wife;" but that on an indictment therefor, the fact of whether or not the defendants were living together as master and servant, or as charged in the indictment, is a question to be determined by the jury from all the facts and circumstances proven in the case.

Cited with approval in State v. McDavitt, 140 Iowa 344, 345, 118 N. W. 371, holding that resorting to a hotel for one night for the purpose of lewdness, does not constitute the offense of "leading a life of lewdness at a hotel," as denounced by sec. 4943 of the Code of 1897.

Unreported Citation. 128 N. W. 379.

(Note.—See also, in this connection, State v. Shaw, 125 Iowa 422, 101 N. W. 109; State v. Irvin, 117 Iowa 469, 91 N. W. 760; State v. Russell, 95 Iowa 406, 64 N. W. 281; State v. Ruhl, 8 Iowa 447, important cases on analogy, and other intimate subjects.—Ed.)

Cross reference. See also; Boddiford v. State, 11 Am. St. Rep. 20.

WILLIAMS v. SILL & TOWN, 12 IOWA 511.

1. Pleadings—Objections to Sufficiency of—When to Be Taken.

—An objection to the sufficiency of a petition, or other pleading, where the district court has jurisdiction, cannot be taken for the first time in the Supreme Court on appeal, p. 512.

Reaffirmed in Webster v. Cedar Rapids & St. P. R. R. Co., 27 Iowa 318.

Cross reference. See further, annotations and cross references under Bridge, Veatch & Co. v. Livingston, (11 Iowa 57) Vol. I, p. 770.

DAWSON v. DAWSON, 12 IOWA 512.

1. Parent and Child—Liability of Parent for Support, etc., of.—

The duty of a father to maintain his children until they attain the age of maturity is recognized, and his liability therefor enforced, by the Common Law, p. 514.

Reaffirmed and extended in Guthrie County v. Conrad, 133 Iowa 172, 174, 177, 110 N. W. 456, holding further that a father is liable (under sec. 2297 of the Code of 1897) for the care of his insane minor son who is incarcerated in the State Hospital after being legally adjudged insane.

Reaffirmed and narrowed in Porter v. Powell, 79 Iowa 153, 157, 159, (cited in dissenting, 160) 44 N. W. 296, 18 Am. St. Rep. 353, 7 L. R. A. 176, holding that where a father emancipates his minor child,

he is not thereafter, if the emancipation be general or during the rest of minority, liable for maintenance, clothing, nursing, medical or other necessities of the child, or during the period of emancipation, if it be for a limited period; that the question of whether or not a father has emancipated his minor child is to be determined from all the facts and circumstances of the case: Holding therefore, that where, at the age of fourteen, a daughter went to reside away from her father's house at a place thirty miles distant, and for three years contracted for, earned and controlled her own wages, boarding and clothing herself, her father consenting thereto, that these facts did not relieve the father from liability for actual necessities furnished to her, and that he was liable for medical attention while she was dangerously attacked with Typhoid Fever.

Reaffirmed and narrowed in *Kubie v. Zemke*, 105 Iowa 271, 272, 74 N. W. 749, holding that where a minor child claims the right to control his time and earnings, and the father consents thereto, and they act upon the understanding, there is an emancipation, and the father is not liable for support or necessities thereafter furnished to the child: But when a father claims the right to the services of his child during his minority, then so long as he claims the right, whether he exercises it or not, there is no emancipation, and he is liable for support and necessities furnished to the child.

Cited and qualified in *Cushman v. Hassler*, 82 Iowa 298, 47 N. W. 1037, holding that where after being divorced, the husband and wife agree that the husband shall have the care, custody and control of the minor child, and thereafter the child, without cause, leaves his father's house and goes to live with his mother, that in the absence of an express or implied contract, the mother cannot recover of the father for board, schooling and clothing furnished to such child: Holding further that in such case, the refusal by the father to pay any such charges upon the mother notifying him of the child being with her, disproves an implied contract to pay therefor.

Cited in *Goulding v. Phillips & Lansing*, 124 Iowa 498, 100 N. W. 516, not in point, but analogous to the text.

(Note.—See further, *Cooper v. McNamara*, 92 Iowa 243, 60 N. W. 522; *Bener v. Edgington*, 76 Iowa 105, 40 N. W. 117; *State v. Hastings*, 74 Iowa 574, 38 N. W. 421; *Johnson v. Barnes*, 69 Iowa 641, 29 N. W. 759; *Blachley v. Laba*, 63 Iowa 22, 18 N. W. 658, 50 Am. Rep. 724; *Monroe County v. Teller*, 51 Iowa 670, 2 N. W. 583; *Everett v. Sherfey*, 1 Iowa 356; *Hurt v. Hunt*, 4 G. Greene 216, important cases sustaining, explaining, qualifying and analogous to, but not citing, the text.—Ed.)

2. Parent and Child—Liability of Child for Support of Parent—Promise to Pay for Past Support—Effect.—The liability of a child to support a parent who is infirm, aged, or destitute, is created entirely by statute; it is a prospective liability, and an express promise by a child

to pay a third person for past expenditures for such a parent, is not binding, the moral obligation being insufficient to support it. So, where in an action against a child for support of his pauper parent, the petition fails to aver an order of the proper authorities therefor, (as provided by statute) or a contract therefor by the defendant (child), it is insufficient, pp. 514, 515.

Cited in Allen v. Bryson, 67 Iowa 596, 25 N. W. 823, 56 Am. Rep. 358, holding that a moral obligation is an insufficient consideration to support a subsequent promise to pay a sum of money, or any other contract.

Unreported citation, 125 N. W. 214.

(Note.—See further in connection herewith, Hamilton County v. Hollis, 141 Iowa 477, 119 N. W. 980; Clay County v. Palo Alto County, 82 Iowa 626, 48 N. W. 1053; Hardin County v. Wright County, 67 Iowa 127, 24 N. W. 754; McCarty v. Hampton Bldg. Ass'n, 61 Iowa 287, 16 N. W. 114; Boone County v. Ruhl, 9 Iowa 276.—ED.)

FINLEY v. DIETRICK, 12 IOWA 516.

1. Homestead—Agricultural Lands—Land within Town Plat—What Deemed—Extension of City Limits—Effect.—Where agricultural land occupied as a homestead is included within a city limit by an act of the General Assembly, it does not thereby lose its homestead quality, or become land within a town plat, and the owner is entitled to all of such land—if not more than forty acres—as homestead. In order for land claimed as homestead to be within a town plat as provided by sec. 1252 of the Code of 1851, and the debtor to be entitled to a lot not to exceed one-half acre as homestead, the land must be laid out by him, with the concurrence of his wife, into lots, streets, etc., and be duly platted and recorded as provided by statute. When a homestead right once legally attaches, it cannot be taken away, without consent of the owner. The word "town" as used in such statute, includes cities, towns and villages, pp. 518, 519.

Reaffirmed and extended in McDaniel v. Mace, 47 Iowa 510, 511; Sayers v. Childers, 112 Iowa 678, 84 N. W. 938; Parrott v. Thiel, 117 Iowa 393, 394, 90 N. W. 746, 94 Am. St. Rep. 316, 57 L. R. A. 764, holding further that agricultural lands situated within the limits of a town, but which has never been platted, is not within the provisions of sec. 1996 of the Code of 1873, and sec. 2978 of the Code of 1897, and that in such case the debtor is entitled to homestead therein of forty acres: And that of this right he cannot be deprived by an Act of the General Assembly, or by act of the Auditor in platting it as provided by sec. 568 of the Code of 1897, or by act of a city in extending its boundary.

Reaffirmed and extended in Frost v. Rainbow, 85 Iowa 292, 52 N. W. 199, holding further that a ten acre tract of land occupied as a homestead, designated on a city plat as part of an "out-lot," but which has

never been subdivided into lots, streets and alleys, does not come within sec. 1996 of the Code of 1873, and that the owner thereof is entitled to the entire tract as homestead (if not exceeding forty acres).

Cited in Dilger v. Palmer, 60 Iowa 127, (dissenting opinion) 10 N. W. 767, and 14 N. W. 134, the majority opinion and issue involved being not in point.

(Note.—See further, Beyer v. Thoeming, 81 Iowa 517, 46 N. W. 1074.—Ed.)

FINNAGAN v. MANCHESTER, 12 IOWA 521

1. **Mortgages—Action For Foreclosure and For Judgment on Note Secured—Venue.**—An action for the foreclosure of a mortgage on land, and for a general judgment and execution against the maker of the note may (under the Code of 1851) be brought in the county wherein the land is situated, p. 522.

Reaffirmed and varied in Chadbourne & Forster v. Gilman, 29 Iowa 183, holding that where an action is brought to foreclose six mortgages on six separate tracts of land each lying in a different county, and the action is brought in a county wherein only one of the tracts is situate, a motion to strike from the petition the allegations concerning the five tracts lying outside the county wherein the action is brought, must be sustained.

Reaffirmed and qualified in McDonald v. Second Nat'l Bank of Nashua, 106 Iowa 521, 522, 76 N. W. 1012, holding that an action to foreclose a mortgage or other lien upon real estate must be brought in the county wherein it, or some part of it, is situated; but that such an action may be brought in such county and another action at the same time be brought on the note secured by the mortgage in the county of the defendant's (mortgagor's) residence; or judgment may be obtained in the latter action, and thereafter an action to foreclose the mortgage be instituted in the county wherein the real estate, or some part of it, is situated: The court further holding, however, that where an action *in rem* as well as *in personam* is brought in the wrong county (such as actions to foreclose a mortgage), the defendant waives the error, unless before answer, he demands a change of venue to the proper county; but the rule is otherwise where the action is *in rem* only.

Cited and extended in Harshberger v. Harshberger, 26 Iowa 505, holding that the district court of a county having jurisdiction of an action for divorce and alimony, has power to make such orders as it deems right and proper in relation to the children, and also the property of the parties, and may enforce any lien on real estate connected with the subject-matter of the action, although it may be situated in another county.

Cross reference. See further on this question, annotations and notes under Cole v. Connor (10 Iowa 299) Vol. I, p. 686.

2. Actions—Parties—Several Defendants—Judgment Against one—Failure of Judgment to Name Party—Effect.—Where a judgment against one defendant in an action against several defendants, fails to name the party against whom it is rendered, but it is manifest from the whole record and its entire language which defendant is referred to, it is sufficient, p. 522.

Cited in Williams v. Brown, 28 Iowa 248, a case involving an informal judgment of a justice of the peace, the court holding that in such cases a liberal construction will be given, in order to sustain them.

DES MOINES BRANCH OF STATE BANK *v.* VAN; AND ALLEN *v.* SMOCK,
12 IOWA 523.

1. Actions—Original Notice—What to Contain.—The original notice must (under sec. 2812 of the Code of 1860) name and designate the particular term of court at which the defendant is to appear and answer: It must be clear and unmistakable as to the term and time that the defendant is to appear and answer; and a notice for him to do so at the *next* term is too vague, pp. 524, 525.

Reaffirmed and extended in Boals v. Shules, 29 Iowa 509, holding further that a notice warning defendant to appear "on or before noon of the second day of the April term of the district court, *to begin on the 12th day of April, 1870*," (the day named being before the commencement of the term), is insufficient.

Reaffirmed and qualified in Van Vark v. Van Dam, 14 Iowa 233, holding that where an original notice is defective in that it warns the defendant to appear and answer at the "next term" of court, but the record shows that when the action was submitted, that the defendant appeared by attorney, but failed to file an answer, the appearance waived the defect.

Reaffirmed and qualified in Decatur County v. Clements, 18 Iowa 536; *De Tar v. Boone County*, 34 Iowa 490, holding that where a judgment by default is entered on an original notice which is defective in warning the defendant to appear and answer at "the next term" of court, that before such judgment will be reversed therefor, a motion to set it aside on account thereof must first be made in the trial court.

Reaffirmed and narrowed in Burr v. Wilcox, 19 Iowa 32, 33, holding that where an original notice warns the defendant to appear and answer before noon of a certain day of the month and year, it is sufficient: And in such case it is error to enter judgment by default before the date named, although it be later than the *second day* of the next succeeding term—And see *Knapp, Stout & Co. v. Haight*, 23 Iowa 76, (reaffirming and narrowing the text), holding that where an original notice names the day, month and year, on which the defendant is to appear and answer (it being a day of the next succeeding term of court), it is sufficient.

Cited in *Hudson v. Blaufus*, 22 Iowa 325, holding that under the Code of 1860, if the petition is not filed by the time named in the notice and ten days before the commencement of the term of the court, wherein the action is pending, next succeeding, the action will be discontinued.—(Note.—And See *Decatur County v. Clements*, 18 Iowa 536; *Des Moines B. of State Bank v. Van*, 12 Iowa 523.—Ed.)

Cited in *Peoria Marine & Fire Ins. Co. v. Dickerson*, 28 Iowa 277, (dissenting opinion) the majority court holding that where an original notice warns the defendant to appear and answer at a named term and day of court, and thereafter the General Assembly changes the time of holding such term of court, that the defendant must, without other notice, appear and answer at the term of court held under the change of law.

Cross references.

"Defective and void original notice—Judgment on—Direct and collateral attack of, etc.—" See annotations and note under *Coon v. Jones* (10 Iowa 131) Vol. I, p. 657.

"Judgment by default erroneously entered—Necessity for motion to set aside before appeal"—See annotations under *Pigman v. Denney* (12 Iowa 396) ante. p. 66.

2. Actions—Defective Original Notice—Appearance—Waiver.—Although an original notice is defective, still if the defendant enters his appearance to the action for any purpose, he thereby waives defectiveness, pp. 525, 526.

Reaffirmed and extended in *Wilgus v. Gettings*, 19 Iowa 84, holding further that where a court has jurisdiction of the subject-matter of an action, a mere irregularity in a process, or its service, is waived by voluntary appearance by the defendant; and that where defendant appears and moves for a continuance of an action in the district court, he thereby waives all irregularities in the manner of the taking an appeal in such action from a justice's to the district court, and in the giving of notice thereof.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, *Dist. Township of Lodomillo v. Dist. Township of Cass*, 54 Iowa 115, 6 N. W. 164; *Wood, Bacon & Co. v. Young*, 38 Iowa 102; *Chittenden & Co. v. Hobbs*, 9 Iowa 417; *Clark v. Blackwell*, 4 G. Greene 441; *Ulmer v. Hiatt*, 4 G. Greene 439; *Milbourne v. Fouts*, 4 G. Greene 346; *Deshler v. Foster*, *Morris*, 404.—Ed.)

FAXTON v. McCOSH, 12 IOWA 527.

1. Taxation and Revenue—Railroad Companies—Taxation of Shares of—Non-Resident Shareholder.—Section 462 of the Code of 1862, and Chap. 152, sec. 7 of the Session Acts of 1858, providing that the property of railroad companies organized under the laws of this State shall be taxed through the shares of the stockholders, and that

when such stockholders are non-residents, their interests shall be taxed in the county wherein is situated the principal business office of such corporations, within the state, etc., is constitutional, pp. 529, 530.

Reaffirmed in City of Davenport v. M. & M. R. R. Co., 12 Iowa 544; Iowa Homestead Co. v. Webster County, 21 Iowa 224, holding that under the statutes mentioned in the text, the property of a railroad company is to be taxed in no other way than through the shares of its stockholders.

Distinguished in City of Davenport v. M. & M. R. R. Co., 16 Iowa 360, holding that (after repeal of the laws of the text by the Act of April 1862 relating to the manner of assessment of the property of railroad companies by the treasurer of the State upon the gross receipts of such a company), the rolling stock of a railroad company is not liable to city taxation.

Distinguished in Iowa Homestead Co. v. Webster County, 21 Iowa 224, holding that the statutes of the text were repealed by the Revision of 1860 and by Chap. 173, laws of 1862, and that by the latter the method of assessment of the property of railroad companies was changed, and the treasurer of the State authorized to levy a tax of one per cent. on the gross receipts of such companies—The rest of the case not being in point.

Cited in City of Dubuque v. C. D. & M. R. R. Co., 47 Iowa 201, (cited in dissenting opinion, 213) holding that it is within the power of the Legislature to provide, in any proper manner, for the valuation of property, and to fix its *situs* for the purposes of taxation: Holding further that Chap. 26, laws of 1872, relative to the assessment for taxation of property of railroad companies by the census board, etc., is constitutional—But see City of Dubuque v. Ill. Cent. R. R. Co., below.

Cited in C. R. I. & P. R. R. Co. v. City of Davenport, 51 Iowa 454, 1 N. W. 723, holding that property cannot be taxed until authority therefor is conferred by the Legislature, and that the manner prescribed by law must be pursued: Holding further that the right of a railroad to use a bridge owned by the United States Government, is not subject to either State, county or municipal taxation; and that such bridge is also exempt therefrom.

Cited in Judy, county treasurer, v. Beckwith, et al, Ex'rs, 137 Iowa 32, 114 N. W. 568, holding that the State may constitutionally tax shares owned by its residents in foreign corporations, and that the Code of 1897 contemplates the listing of such shares; and that the shares of a testator in a foreign corporation are subject to taxation in the county of his residence at the time of his death, although they may have been listed and taxes paid thereon in a foreign state.

Cited in McGregor's Ex'rs v. Vapel, 24 Iowa 440, not in point.

Cited in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 98, (concurring opinion of Miller, Ch. J.), the case not in point—But compare with City of Dubuque v. C. D. & M. R. R. Co., above.

(Note.—This last case fully discusses the right of the State as to taxation, and what constitutes "double taxation."—Ed.)

Unreported citation, 123 N. W. 745.

Cross references. See further, annotations and cross references under *Tallman v. Treasurer of Butler County*, next succeeding; *City of Davenport v. M. & M. R. R. Co.* (12 Iowa 539), *Infra.* p. 94.

TALLMAN v. TREASURER OF BUTLER COUNTY, 12 IOWA 531.

1. Lands—Patent—When Land Acquired By, is Assessable For Taxation.—Land conveyed by patent from the State after the time fixed for the completion of the annual assessment for taxes, is not subject to taxation until the following year, p. 532.

Reaffirmed and extended in *Sully v. Poorbaugh*, 45 Iowa 455, holding further that where swamp lands are conveyed by a county after the time for assessment for taxation has closed, they are not liable to taxation until the next succeeding year.

Cross reference. See further, annotations and note under *Des Moines, N. & R. Co. v. Polk County*, (10 Iowa 1) Vol. 1, p. 634.

2. Taxation and Revenue—Taxing Power of State—Railroad Companies—How Property Taxed.—No property can be taxed until the Legislature authorizes and requires it; and it must be done in the manner provided by statute and in no other way.

Under sec. 462, of the Code of 1851, and Sec. 7, Chap. 152, laws of 1858, property of a railroad company is to be taxed through the shares of the stockholders: Hence land held by a railroad under a patent from the State (being land granted by the United States Government to the State to aid in the construction of railroads), is not subject to taxation, pp. 534, 535.

Reaffirmed in *Faxton v. McCosh*, 12 Iowa 529.

Reaffirmed in *Iowa Homestead Co. v. Webster County*, 21 Iowa 224, holding that under the statute mentioned in the text, the property of a railroad company is to be taxed in no other way than through the shares of the stockholders.

Reaffirmed in *City of Dubuque v. C. D. & M. R. R. Co.*, 47 Iowa 200, (cited in dissenting opinion, 212) holding that it is within the power of the Legislature to provide, in any proper manner, for the valuation of property, and to fix its *situs* for the purposes of taxation: Holding further that Chap. 26, laws of 1872, relative to the assessment for taxation of property of railroad companies by the census board, etc., is constitutional.—But see and compare *City of Dub. v. Ill. Cent. R. R. Co.*, 39 Iowa 98, below.

Reaffirmed and extended in *United States Express Co. v. Ellyson, Assessor*, 28 Iowa 378, holding further that the General Assembly has power to prescribe the manner in which particular classes of persons, real and legal, may be taxed; and that an amendment to the general

revenue law prescribing the manner of assessment of express and telegraph companies and corporations, is not a special law, and is constitutional.

Reaffirmed and extended in C. R. I. & P. R. R. Co. v. City of Davenport, 51 Iowa 454, 1 N. W. 723, holding further that property cannot be taxed until authority therefor is conferred by the Legislature, and that the manner prescribed by law must be pursued: Holding further that the right of a railroad to use a bridge owned by the United States Government, is not subject to either State, county, or municipal taxation; and that such bridge is also exempt therefrom.

Reaffirmed and extended in Cook v. City of Burlington, 59 Iowa 253, 13 N. W. 114, 44 Am. Rep. 679, holding further that an act requiring that the property of a corporation be taxed against the corporation, and that the shares of stock representing the property be taxed in the hands of the owners thereof, does not constitute "double taxation," and is constitutional.

Reaffirmed and extended in Judy, county treasurer, v. Beckwith, et al, Ex'rs, 137 Iowa 27, 32, 114 N. W. 568, holding further that the shares of a testator in a foreign corporation are to be assessed at the place of his residence in this state at the time of his death, although they may have been assessed for taxation in the state of such corporation's residence, such not being "double taxation"—The court saying:

"Each State is sovereign within its own territorial jurisdiction, and its power to tax any and all property therein, except such as is in actual transit through it, cannot be taken away, limited, or lessened by the act of the taxing authorities of any other State. * * * A double taxation is where the second or additional burden is imposed by the same sovereignty which imposed the first."

Reaffirmed as to first paragraph in Un. Cent. L. Ins. Co. v. Chapin, 113 Iowa 416, 85 N. W. 793; *In re* Assessment of Boyd, 138 Iowa 587, 116 N. W. 332.

Reaffirmed and extended as to first paragraph in Farraher v. City of Keokuk, 111 Iowa 311, 312, 314, 82 N. W. 754; C. M. & St. P. Ry. Co. v. Phillips, 111 Iowa 383, 384, 82 N. W. 789, holding further that a power of a city to make assessments for the construction and repair of sidewalks, or other public improvements, must be exercised in the manner provided by statute, or it is void.

Cited in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 98, (dissenting opinion), the majority court holding that Chap. 26, sec. 9, laws of 1872, so far as it attempts to release railroad companies from city taxes already levied, is unconstitutional—But see and compare City of Dubuque v. C. D. & M. R. R. Co., above, and Hawkeye Ins. Co. v. French, below.

Cited in First Nat'l Bank of Albia v. City Council of Albia, 86 Iowa 31, 52 N. W. 335, a case involving the taxation of national bank stock and real estate.

Distinguished in City of Davenport v. M. & M. R. R. Co., 16 Iowa 360, (cited in concurring opinion, 362) holding that (after repeal of the laws of the text by the Act of April 1862, relating to the manner of assessment of the property of railroad companies by the treasurer of the State upon the gross receipts of such a company), the rolling stock of a railroad company is not liable for city taxation.

Distinguished in Iowa Homestead Co. v. Webster County, 21 Iowa 224, holding that the statutes of the text, were repealed by the Revision of 1860, and by chap. 173, laws of 1862, and that by the latter the method of assessment of the property of a railroad company was changed, and the treasurer of the State authorized to levy a tax of 1 per cent. on the gross receipts of the company: That under these latter laws, where a railroad company receives a certificate to land upon completing a certain number of miles of railroad entitling it thereto under an Act of Congress, that such land is taxable as of the year the certificate therefor issues from the government, although it may not be conveyed until later.

Distinguished and narrowed in Hawkeye Ins. Co. v. French, 109 Iowa 591, 79 N. W. 73, holding that sec. 1333 of the Code of 1897, in so far as it relieves insurance companies from payment of taxes on personal property, and from taxation for road, school, city, and county purposes, is unconstitutional.

Cross references. See further, annotations under Faxton v. McCosh, next preceding; Stockdale v. Treasurer of Webster County, next succeeding; and City of Davenport v. M. & M. R. R. Co. (12 Iowa 539) *Infra*. p. 94.

STOCKDALE v. TREASURER OF WEBSTER COUNTY, 12 IOWA 536.

1. Taxation and Revenue—Lands—What Interest Taxable.—

Any right, interest or title in lands, is taxable against the owner. So, lands held in trust by the United States for a railroad company (under an Act of Congress in aid of the construction of railroads) is taxable against the latter, pp. 538, 539.

Reaffirmed in Iowa Homestead Co. v. Webster County, 21 Iowa 233; Stryker v. Polk County, and Tiffin, treasurer, 22 Iowa 136, 137; C. M. & St. P. Ry. Co. v. Hemenway, 117 Iowa 601, 91 N. W. 907.

Reaffirmed and extended in C. R. & M. R. R. Co., and I. R. L. Co. v. Carroll County, 41 Iowa 162, holding further that where, under an Act of Congress, a railroad company is entitled to certain lands upon completing a certain number of miles of railroad, that upon its completing the distance prescribed, the land becomes subject to taxation, although a patent therefor be not issued until after it is assessed.

Reaffirmed and extended in Long v. Olson and Bowman, 115 Iowa 392, 88 N. W. 934, holding further that lands held by the assignee of a military land warrant are not exempt from State taxation; that sec. 6, subdivision 5, of the Act of Congress (admitting Iowa into the Union)

on this subject, only exempts such lands which are held by soldiers and their heirs under such warrants.

Cited in Tallman v. Treasurer of Butler County, 12 Iowa 535, not in point.

Distinguished and narrowed in Moriarty v. Boone County, 39 Iowa 639, holding that land pre-empted as homestead is not subject to taxation during the five years it is occupied for the purpose of obtaining a certificate or patent thereto.

(Note.—See further, Fisher v. Wismer, 34 Iowa 447; Sands v. Adams County, 11 Iowa 577.—Ed.)

Cross references. See further specially, annotations under Des M. N. & R. Co. v. Polk County (10 Iowa 1) Vol. 1, p. 634.

See further in this connection, annotations under Faxton v. McCosh; Tallman v. Treasurer of Butler County, the two next preceding this present case; and Rule 2 of City of Davenport v. M. & M. R. R. Co., next succeeding.

CITY OF DAVENPORT v. M. & M. R. R. Co., 12 IOWA 539.

1. Taxation and Revenue—Taxing Power of State.—No property can lawfully be taxed until the Legislature authorizes and requires it to be done; and when the statute requires it to be done in a particular manner, that alone can be pursued, pp. 545, 546.

Reaffirmed in Clark, Dodge & Co. v. City of Davenport, 14 Iowa 497, 498; Iowa R. R. Land Co. v. Sac County, 39 Iowa 149 (opinion on Re-hearing).

Reaffirmed and extended in City of Ottumwa v. Zekind, 95 Iowa 626, 64 N. W. 647, 58 Am. St. Rep. 447, 29 L. R. A. 734, holding further that a power to a city to "regulate and license auctioneers and transient merchants," does not authorize it to require a license so large as to amount to a tax; and that an ordinance, passed by a city under such a power, requiring such a merchant to pay a license fee of \$250 per month, or \$25 per day for a short period of time, is unreasonable and void.

Reaffirmed and qualified in State v. Smith, 31 Iowa 495, holding that a municipal corporation can exercise no power of taxation unless it is expressly conferred by the Legislature, or is absolutely necessary to carry out some other power expressly conferred.

Special cross reference. See further annotations under Rule 2 of Tallman v. Treasurer of Butler County (12 Iowa 531) ante, p. 91, where other cases citing the text, and many others will be found.

2. Taxation and Revenue—Mortgages—When to Be Taxed—Non-resident Holders of.—A mortgage is personal property, a chose in action, and attaches to the person of its owner: And a mortgage owned and held by a non-resident of this State, is not subject to taxation herein, p. 547.

Reaffirmed in Gilbertson, State treasurer, v. Oliver, Ex'r, 129 Iowa 570, 571, 105 N. W. 1003, 4 L. R. A. (New Series) 953, holding that a debt has its *situs* at the residence of the creditor: And holding *a fortiori*, that debts evidenced by notes, certificates of deposits of banks, mortgages, etc., owned by a testator who, at the time of her death, was a non-resident, were not subject to an inheritance tax, although the debtors resided in this state.

Special cross reference. See further, annotations under Faxton v. McCosh (12 Iowa 527), ante. p. 89, for other cases citing the text, and many more on its subject.

Cross references. See further, annotations under Stockdale v. Treasurer of Webster County, next preceding this present case. See also, Boyd v. Selma, 16 L. R. A. 729.

THORNTON v. MULQUINNE, 12 IOWA 549, 79 AM. DEC. 548.

1. Decedent's Estate—Sale of Real Estate of—Proceedings for—Requisites—When Sale Will be Set Aside—Collateral Attack.—Where in a probate proceeding under Chap. 10, Statutes of 1843, for the sale of real estate of a decedent, the record fails to show a petition for such purpose by the administrator, that notice was given of the sale as required by law, that the administrator took the oath as required by law, and there is no record, other than the deed, that a sale was made, then in an action by the heirs of decedent against the purchasers, such sale and deed will be set aside, p. 554.

Reaffirmed in Good v. Norley, 28 Iowa 195-198, holding that probate proceedings to sell real estate of a decedent, where the heirs and persons having an interest therein are not served with notice, are void *ab initio*.

Reaffirmed and narrowed in Mullin v. White and Hudson, 134 Iowa 684, 112 N. W. 165, holding that a judgment in a probate proceeding for the sale of real estate of a decedent, is void as to the interest of an heir or other person having an interest or lien thereon, who is not served with notice thereof.

Cited in Pursley v. Hayes, 22 Iowa 20, 92 Am. Dec. 350, as an instance of collateral attack of a judgment.

Cross reference. See further specially, annotations and note under Coon v. Jones (10 Iowa 131) Vol. I, p. 657.

2. Decedent's Estate—Release of Interest in By Heir—Sufficiency of Description of Estate in.—Where the sole heir at law of a decedent releases and relinquishes to the widow "all, and every claim and demand" against the estate of the decedent, and "all right as heir to the estate," it is sufficient to pass all the estate real, personal, and mixed to the widow, pp. 555, 556.

Cited with approval in McCormick v. McCormick Harvesting Machine Co., 120 Iowa 597, 95 N. W. 183, involving the sufficiency of a description of land in a levy of an execution.

MCKINLEY v. BETCHTEL, 12 IOWA 561.

1. **Judgment by Default Erroneously Entered—Motion to Set Aside Necessary Before Appeal.**—Where a judgment by default is erroneously entered, the defendant must move to set it aside in the trial court before appeal, or it will not be reviewed by the Supreme Court, p. 562.

Special cross reference. See annotations and note under *Pigman v. Denney* (12 Iowa 396), ante, p. 66, for cases citing the text, and others on the question.

HOLLADAY, ADM'R, v. JOHNSON, 12 IOWA 563.

1. **Appeals—Time in Which to Be Taken.**—Appeals must be taken within one year from the final order or judgment appealed from. So, where an appeal is taken within one year after the entering a decree confirming the report of a master commissioner, and ordering the relief therein granted, it is in time, p. 565.

Unreported citation, 126 N. W. 932.

FINN & Co. v. ROSE, 12 IOWA 565.

1. **Officers—District Court Clerk—Deputy of—Power of—Necessity for Seal.**—The deputy clerk of the district court may administer oaths, without the absence or inability of the clerk being stated. Such a deputy may approve an attachment bond and issue the writ; and the deputy's signature to a jurat accompanying a petition for an attachment, need not be under seal, pp. 566, 567.

Reaffirmed in *Wheelock v. Hull*, 124 Iowa 758, 759, 100 N. W. 866, holding that the seal of office is unnecessary to render valid the official acts of a deputy clerk.

Reaffirmed and explained in *Moore v. McKinley, et al, Ex'rs*, 60 Iowa 371, 372, 14 N. W. 771, holding that a deputy clerk of the district court may approve a bond for the stay of an execution, although the clerk be not absent or under disability—The court saying (in construing Sec. 767 of the Code of 1873, in reference to powers of deputies in absence, or disability of the principal): "The provision above was designed, we think, rather to devolve upon and make imperative by the deputy clerk the performance of the duties of the clerk, in the absence or disability of the latter, and not to withhold from him all power to perform such duties, except in the absence or disability of his principal."

Reaffirmed and extended in *Wetmore, and McFarland v. Marsh*, 81 Iowa 680, 47 N. W. 1022, holding further that where an affidavit shows that it is prepared to be filed in the district court of a particular county, that a jurat of the district court clerk thereto, signed by him with the word "clerk" after his name, is sufficient.

Cited in *State v. Laffer*, 38 Iowa 426, not in point.

(Note.—See further specially, *Kinney v. Howard*, 133 Iowa 94, 110 N. W. 286; *Twinam v. Lucas County*, 104 Iowa 234, 73 N. W. 474; *Ewing, Jewett & Chandler v. Folsom*, 67 Iowa 65, 24 N. W. 595; *Wood v. Bailey*, 12 Iowa 46; *Abrams v. Ervin*, 9 Iowa 87, important cases on the subject of rights of ministerial officers to act by deputy, and sustaining, explaining and qualifying, but not citing, the text.—Ed.)

2. Husband and Wife—Expenses of Family—Joint Liability of Both for.—Under Sec. 1455 of the Code of 1851, the husband and wife are jointly and severally bound for contracts in relation to the expenses of the family, etc. So, an action may be maintained thereunder against both husband and wife for the price of a cook stove and fixtures, table china ware, etc., when they are purchased and used in their house, p. 567.

Reaffirmed and extended in *Frost v. Parker*, 65 Iowa 181, 182, 21 N. W. 508, holding further that both husband and wife are liable for the purchase price of an organ; that the liability of the wife continues as long as the right of action against the husband continues; that the vendor is not limited to a personal judgment against the wife; and that the assignee of a judgment creditor (of vendor) against the husband therefor, may sue in chancery to subject the lands of the wife to its satisfaction.

Reaffirmed and extended in *Neasham v. McNair*, 103 Iowa 697, 699, 72 N. W. 774, 64 Am. St. Rep. 202, 38 L. R. A. 847, holding further that a wife is liable for the price of a diamond shirt-stud purchased by the husband for personal use and adornment, where the husband and wife and their family are of large fortune, high social rank, and luxurious habits.

Reaffirmed and extended in *McDaniels v. McClure*, 142 Iowa 372, 120 N. W. 1032, holding further that a wife is liable for the purchase price of a base-burner used in the family residence, coal oil, a wash wringer, a heating stove, and a buggy kept for use by the family.

Reaffirmed, extended, and qualified in *Smedley v. Felt*, 41 Iowa 590, 591, holding further that a husband and wife are jointly and separately bound for the purchase price of a piano, purchased on account of and to be used in the family, although it is purchased by the husband, and the vendor takes his individual note therefor: But if, in such case, the vendor agrees to look *alone* to the husband for payment, the wife is not liable.

Reaffirmed and narrowed in *McCormick v. Muth*, 49 Iowa 537, 538, holding that a wife is not liable for a reaping machine purchased by the husband to be used on his farm—The court saying: "Whatever is necessary and proper for the education of the children and expenses of the family, is chargeable on the property of both husband and wife; but the expenses of a family are something quite different from whatever may contribute either remotely or directly to the support of the family."

(Note.—See further, *Murdy v. Skyles*, 101 Iowa 549, 70 N. W. 714, 63 Am. St. Rep. 411; *Hecht v. Gitch*, 82 Iowa 596, 48 N. W. 988; *Schurz v. McMenemy*, 82 Iowa 432, 48 N. W. 806; *Schrader v. Hoover*, 80 Iowa 243, 45 N. W. 734; *Devendorf & Mann v. Emerson*, 66 Iowa 698, 24 N. W. 515; *Blachley v. Laba*, 63 Iowa 22, 18 N. W. 658, 50 Am. Rep. 724; *Marquardt v. Flaughner*, 60 Iowa 148, 14 N. W. 214; *Fitzgerald v. McCarty*, 55 Iowa 702, 8 N. W. 646; *Farrar & Wheeler v. Emery*, 52 Iowa 725 (abstract), 3 N. W. 50; *Russell v. Long*, 52 Iowa 250, 3 N. W. 75; *Sherman v. King*, 51 Iowa 182, 1 N. W. 441; *Jones v. Glass*, 48 Iowa 345; *Porter & Moir v. Briggs*, 38 Iowa 166; *Lawrence v. Sinnamon*, 24 Iowa 80, important cases sustaining, explaining, extending and qualifying, but not citing, the text.—Ed.)

LUCAS v. CASADY, 12 IOWA 567.

1. Trial—Continuance—Absence of Party in Military Service of The United States.—Under Chap. 7, laws of the extra Session of 1861, if a party to an action pending in any court of this State, is absent from home in the military service of the United States, and his presence is for any purpose necessary at the trial thereof, he is entitled to a continuance, pp. 568, 569.

Reaffirmed and narrowed in McCormick v. Rusch, 15 Iowa 139, 140, 83 Am. Dec. 401; *Butler, Keeth & Co. v. McCall & Sypher*, 15 Iowa 432, 433; *Clark v. Woodbury*, 23 Iowa 63, holding that (under Chap. 109, laws of 1862) where it appears to the court that a party to an action is absent from home in the service of the United States, he is entitled to a continuance as a matter of Right, during the time of his enlistment in the United States Army.

SHEPPARD & MORGAN v. COLLINS, 12 IOWA 570.

1. Bonds—Attachment—Defective Delivery Bond—Valid as Common Law Bond.—A bond based on a sufficient consideration is not invalid because not authorized by statute; it will be good as a Common Law bond, where it does not contravene public policy and is not in violation of a statute. So, a defective or informal delivery bond in an attachment action under which the attached property is released, is valid as a Common Law bond, pp. 573, 574.

Reaffirmed in Garretson v. Reeder, 23 Iowa 24, 25; *Painter v. Gibson*, 88 Iowa 123, 124, 55 N. W. 85.

Reaffirmed and extended in Wadsworth & Co. v. Walliker, 45 Iowa 398, 24 Am. Rep. 788, holding further that a Common Law bond is to be governed by Common Law principles: That in the absence of any statutory provision to the contrary, an officer levying under an attachment (or execution) may release the property, being liable on his bond in damages to the attachment (or judgment) creditor, unless he shows that such property was not owned by the defendant (debtor), or was not subject to the writ.

Reaffirmed and extended in Rowley v. Jewett, 56 Iowa 493, 494, 9 N. W. 353, holding further that where the defendant in an attachment action executes a delivery bond, and thereafter the plaintiff obtains a judgment therein, which he assigns, the assignee may maintain an action on the bond: Holding further that an interlineation in, or alteration of, such bond does not affect its validity, if the legal effect thereof is not thereby changed.

Reaffirmed and extended in Moore v. McKinley, et al, Ex'rs, 60 Iowa 370, 371, 18 N. W. 673, 50 Am. Rep. 730, holding further that it is not essential to the validity of an official bond of a district court clerk (for the faithful performance of his duties) that it be approved by the board of supervisors.

Reaffirmed and extended in State, for the use of Meeker, v. McGlothlin, 61 Iowa 314, 16 N. W. 138, holding further that a delivery bond remains in force until its conditions are performed, its validity not being affected by the execution of a supersedeas bond: Holding, also, that where the statutory remedy on a bond is not *exclusive*, action may be maintained thereon as at Common Law.

Reaffirmed and extended in Allen v. Platt, 79 Iowa 117, 44 N. W. 244, holding further that where an execution is levied on personal property, and a person claiming to have purchased it from the execution debtor, enters into a contract whereby, for and in consideration of the release of the property, he agrees to hold the property and its proceeds subject to the order of the court from which the execution issued, that action is maintainable thereon, by the execution creditor.

Distinguished and narrowed in State v. Heisey, 56 Iowa 405, 406, 9 N. W. 327, holding that where an officer is not required by statute to execute a bond for the faithful performance of his duties, such a bond is without consideration and is void.

(Note.—Attachment — Delivery bond — Effect — Common Law bonds—Remedies. See Ripley v. Gear, 58 Iowa 460, 12 N. W. 480; Boone County v. Jones, 54 Iowa 699, 2 N. W. 987, and 7 N. W. 155, 37 Am. Rep. 229; City of Burlington v. B. & M. R. R. Co., 41 Iowa 134; City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 56; Risdon v. Shank, 37 Iowa 82; Moorman & Greene v. Collier, 32 Iowa 138; Robinson v. Phoenix Ins. Co., 25 Iowa 430; Cole v. City of Muscatine, 14 Iowa 296; Gimble v. Ackley, 12 Iowa 27; Austin & Co. v. Burgett, 10 Iowa 302; Cavender v. Smith, 8 Iowa 360; Jones v. Peasley, 3 G. Greene 52.—ED.)

Cross reference. See further, annotations, notes and cross references under Gimble v. Ackley (12 Iowa 32), ante. p. 4.

DAVIS & CO. v. BUCHANAN & BONE, 12 IOWA 575.

1. Partnership—Judgment Against—Individual Property of Members—How Subjected.—The individual property of members of a partnership is to be subjected to a satisfaction of a judgment

against the firm by *scire facias*; and such property is not to be levied on until such partners have had an opportunity to show cause why such levy should not be made, p. 576.

Reaffirmed and qualified in Ticonic Bank v. Harvey, 16 Iowa 145, 146, holding that where one partner has fraudulently conveyed his property, a judgment creditor of the firm may proceed in equity to set aside such conveyance for fraud, and to subject the property to his debt, without first proceeding by *scire facias*.

Reaffirmed and qualified in Markham v. Buckingham, 21 Iowa 496, 497, 89 Am. Dec. 590, holding that a partnership may be sued in the names of the members, and that when this is done and all are served with notice, the judgment creditor may take the property of any member under execution.

Cited in Lathrop v. Brown, 23 Iowa 46, holding that a judgment against a partnership, the names of the members not being disclosed, is not a lien on the property of the individual members.

Distinguished and narrowed in Anderson v. Wilson, 142 Iowa 161, 120 N. W. 678, holding that under Sec. 3468 of the Code of 1897, the creditor of a partnership may sue a partnership as such, or any member or members thereof which he chooses to make a party, and may enforce his judgment against such defendant or defendants without losing his right to bring a new action against other members not made parties; but that the execution cannot be broader than the judgment, and a judgment against a partnership does not authorize an execution against the individual property of the members of the firm.

STODDARD v. HAYS, 12 IOWA 576.

1. Mortgages—Foreclosure—Redemption.—Neither a mortgagor nor his judgment creditor has a right to redeem mortgaged land after a decree of foreclosure and sale thereunder by the mortgagee, p. 577.

Reaffirmed in Wagner v. Galyear, 13 Iowa 598 (abstract); Martin v. Jones, and Hildebrand, 15 Iowa 241.

Reaffirmed and explained in Stoddard v. Forbes, 13 Iowa 298, holding that the decree foreclosing a mortgage on land need not use any express language in order to cut off the right of redemption.

(Note.—See further specially, Johnson v. Harmon, 19 Iowa 56; Anson v. Anson, 20 Iowa 55, 89 Am. Dec. 514; Wright v. Howell, 35 Iowa 288; Davis v. Spaulding, 36 Iowa 610; Mayer v. Farmers' Bank, 44 Iowa 212, important cases qualifying and impliedly overruling, but not citing, the text.—Ed.)

HAWES v. TWOGOOD, 12 IOWA 582.

1. Appeal—Assignment of Errors—Certainty Required.—An assignment of error must not be general, but must, as specifically as

the case will allow, point out each error relied on to reverse the judgment. The following assignment of errors is too general and indefinite, and is insufficient, to-wit:

"1st. The court erred in admitting improper and incompetent testimony.

"2nd. There was error in the instructions," p. 583.

Reaffirmed in Betts v. City of Glenwood, 52 Iowa 125, 126, 2 N. W. 1013; Wood v. Whitton, 66 Iowa 300, 301, (Opinion on Re-hearing), 23 N. W. 676, and 19 N. W. 907, holding that an assignment of errors must point out with particularity, the error or errors relied on.

Reaffirmed in Chandler & Co. v. Knott & Co., 86 Iowa 116, 117, 53 N. W. 88, holding that an assignment of error that "the court erred in the admission and exclusion of evidence in the trial against the objection of defendant," is too general and indefinite.

Reaffirmed and extended in Todd v. Branner, 30 Iowa 441, holding that an assignment of error that "the court erred in giving instructions to the jury against the objections of defendant," is too general and is insufficient, and that errors in instructions will not be considered on appeal under such an assignment: Holding further that whether or not there was error in the giving or refusing instructions, will not be considered on appeal, when not excepted to below, and the assignment of errors does not point them out.

Reaffirmed and narrowed in Sherwood v. Snow, Foote & Co., 46 Iowa 482, 483, 26 Am. Rep. 155, holding that where an assignment of error specifically points out several instructions, that it is sufficient, and that reference does not have to be made to each instruction in a separate assignment—And see to the same effect, Wood v. Whitton, 66 Iowa 300, 301, (Opinion on Re-hearing) 23 N. W. 676.

(Note.—See further, Armstrong v. Killen, 70 Iowa 51, 30 N. W. 14; McCormick v. C. R. I. & P. R. R. Co., 47 Iowa 345; Oschner v. Schunk, 46 Iowa 293; Tomblin v. Ball, 46 Iowa 190; Peck v. Hendershott, 14 Iowa 40; Bevan v. Hayden, 13 Iowa 127; State v. Sater, 8 Iowa 420, important cases sustaining, explaining and analogous to, but not citing, the text.—Ed.)

Cross reference. See further in this connection, annotations under Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229) *Infra.* p. 140.

McHENRY v. SYPHER, 12 IOWA 585.

1. **Actions at Law—Transfer to Equity.**—Under the Revision of 1860, when the defendant in an action at law discloses an equitable defense in his answer, he may have the cause transferred to the equity side of the docket, p. 586.

Reaffirmed and qualified in Rosierz v. Van Dam, 16 Iowa 181, 182, holding that under the Code of 1860, an equitable defense is available in an action at law, without the action being transferred to equity.

Cross reference. See further sustaining, explaining, extending and qualifying the text, annotations under Rule 3 of *Holmes v. Clark* (10 Iowa 423) Vol. 1, p. 721.

BARROWS v. HARRISON, SHERIFF, 12 IOWA 588.

1. Sales of Personal Property—Sufficiency of Delivery to Pass Title—Rights of Attachment Creditors of Seller.—Where personal property sold is not in the actual possession or custody of the vendor, the law does not require a manual delivery, but only that it be placed in the power of the purchaser; and where such personalty is in the hands of a third person who agrees to hold it as the bailee of the purchaser, the title passes, and the creditors of the seller cannot attach it. So, where personal property is sold in good faith and for a valuable consideration, and an order is given therefor by the seller to his agent (having its custody) to deliver the possession to the purchaser, and the agent agrees to hold the property as agent of the purchaser, such sale is complete, and the subsequent levy of an attachment thereon for a debt against the seller is of no effect, pp. 592, 593.

Reaffirmed and extended in *Aultman, Miller & Co. v. Nilson*, 112 Iowa 636, 84 N. W. 692, holding that where a purchaser of personal property receives an order therefor to the person having it in possession, and thereafter arranges with the custodian for it to remain with him for a stated period, he (the purchaser) cannot thereafter rescind the contract of purchase.

Cited in *King v. Wallace Bros.*, 78 Iowa 226, 42 N. W. 777; *Frank v. Levi*, 110 Iowa 269, 81 N. W. 460, cases involving rights of purchasers and mortgagees where the vendor or mortgagee retains possession (under the statute).

(Note.—See further specially, *Brown v. Wade*, 42 Iowa 647.—ED.)

Cross reference. See further sustaining, explaining and qualifying, but not citing, the text, annotations, note and cross references under *Courtright & Co. v. Leonard* (11 Iowa 32) Vol. 1, p. 766.

WHITAKER v. JOHNSON COUNTY, 12 IOWA 595.

1. Res Adjudicata—What Constitutes—Effect.—The estoppel of a judgment extends to the whole matter in controversy in the action wherein it is rendered; and a plea of *res adjudicata* is available although the *form* of the action is different in the latter, if the cause is in fact the same.

So, where plaintiff sues a county on coupons of certain bonds and the defendant (county) pleads failure of consideration, which is determined against it, then in an action by the same plaintiff against such defendant on other coupons, issued by defendant at the same time and for the same purpose, it cannot plead failure of consideration

therefor; and a plea of *res adjudicata* in the second action by the plaintiff in response to such defense, is good, pp. 596-598.

Reaffirmed in Rew v. Indep. Sch. Dist. of Sioux City, 125 Iowa 31, 98 N. W. 803, 106 Am. St. Rep. 282.

Reaffirmed and explained in Myers v. Johnson County, 14 Iowa 48; Reynolds v. Babcock, 60 Iowa 296, 14 N. W. 325, holding that in order for a plea of *res adjudicata* to be available, the former adjudication must be *between the same parties*, and have the effect of estopping both parties as to the matters therein involved.

Reaffirmed and extended in Hackworth, Gd'n, v. Zollars, 30 Iowa 437, holding further that a judgment in the United States District Court, is a bar to an action in a court of this state between the parties to the first action and their privies, concerning or involving the matter in controversy in the former action.

Reaffirmed and extended in Woodin v. Clemons, 32 Iowa 287, 288, holding further that any one claiming through or under a party to a former action, has the same right to claim the benefit of a former adjudication (in a subsequent action involving the subject-matter) as the original party thereto.

Reaffirmed and extended in Watson v. Richardson, 110 Iowa 700, 80 N. W. 417, 80 Am. St. Rep. 331, holding further that a former adjudication involving the right of a party to inherit land of a decedent, is conclusive in a subsequent action between the same parties involving the right of the same party to inherit personal property of the same decedent, the same evidence being required in the latter as in the former action: That if the right or title on which a subsequent action between the same parties, is based, be the same, *res adjudicata* applies—And to the same effect see Goodenow v. Litchfield, 59 Iowa 233, (reaffirming text), 9 N. W. 110, and 13 N. W. 86.

Reaffirmed and extended in Madison v. Garfield Coal Co., 114 Iowa 63, 64, 86 N. W. 44, holding further that a judgment dismissing a bill in an injunction action involving the right of a company to use land for certain purposes under a lease, is a bar to a subsequent action between the same parties for damages for such use.

Reaffirmed and extended in Reynolds v. Lyon County, 121 Iowa 742, 96 N. W. 1099, holding further that the estoppel of a former judgment in an action between the same parties to a subsequent action, extends and covers the point which was actually litigated and determined by the former verdict or finding, although it may not have been pleaded or technically in issue.

Reaffirmed and extended in Hogle v. Smith, Adm'r, 136 Iowa 37, 113 N. W. 557, holding further that where a vendee under a contract for a sale of land and in possession thereof, sues his vendor for specific performance, who attacks the contract and claims rents and profits against the vendee for the use thereof, that a judgment therein dis-

missing the vendee's bill, and not disposing of the cross-bill for rents and profits, is a bar to an action by the vendor therefor.

Reaffirmed and qualified in City of Davenport v. C. R. I. & P. R. R. Co., 38 Iowa 640, holding further that taxes for several years constitute a cause of action as to each year, and that a judgment in an injunction action to restrain the collection of taxes for two-several years, is no bar to an action to recover taxes for other, or subsequent years—But see on this question Goodenow v. Litchfield, 59 Iowa 233, 9 N. W. 110, and 13 N. W. 86 (reaffirming the text), but distinguishing this last case.

Cited with approval in Ney v. D. & S. City R. R. Co., 20 Iowa 354.

Distinguished and narrowed in Harbach v. Des M. & K. C. Ry. Co., 80 Iowa 597, 598, 44 N. W. 349, 11 L. R. A. 113, holding that a judgment assessing damages against a railroad company for the taking of land for railroad purposes, does not preclude the land owner from enjoining the company from use of the land so appropriated until the payment of the damages assessed.

(Note.—See further, Zalesky v. Home Ins. Co., 114 Iowa 516, 87 N. W. 428; Kraft v. Welch, 112 Iowa 695, 84 N. W. 908; Murphy v. Cuddihy, 111 Iowa 645, 82 N. W. 999; Prouty et al, Ex'rs, v. Mattheson, 107 Iowa 259, 77 N. W. 1039; Griffith v. Fields & Bryant, 105 Iowa 362, 75 N. W. 325; Thomas v. McDonald, 102 Iowa 564, 71 N. W. 572; Aetna Iron Works v. Firmenich Mfg. Co., 90 Iowa 390, 67 N. W. 904; City of Des Moines, Ft. D. Ry. Co. v. Bullard, 89 Iowa 749 (abstract), 56 N. W. 498; State v. Waterman, 87 Iowa 255, 54 N. W. 359; Munn v. Shannon, 86 Iowa 363, 53 N. W. 263; Hodge v. Shaw, 85 Iowa 137, 52 N. W. 8, 39 Am. St. Rep. 290; Am. Em. Co. v. Fuller, 83 Iowa 599, 50 N. W. 48; Keokuk Gas Light & Coke Co. v. City of Keokuk, 80 Iowa 137, 45 N. W. 555; Lindley v. Snell, 80 Iowa 103, 45 N. W. 726; Kenyon v. Wilson, 78 Iowa 408, 43 N. W. 227; Donahue v. McCosh, 81 Iowa 296, 46 N. W. 1008; Hawk & Co. v. Evans, 76 Iowa 593, 41 N. W. 368, 14 Am. St. Rep. 247; Hunter v. B. C. R. & N. Ry. Co., 76 Iowa 490, 41 N. W. 305; Lamb v. McConkey, 76 Iowa 47, 40 N. W. 77; Case v. Hicks, 76 Iowa 36, 40 N. W. 75; Hahn v. Miller, 68 Iowa 745, 28 N. W. 51; Shirland v. Un. Nat'l Bank, 65 Iowa 96, 21 N. W. 200; Linton v. Crosby, Ex'r, 61 Iowa 293, 16 N. W. 113; Davis v. City of Clinton, 58 Iowa 389, 10 N. W. 768; Jones v. Brandt, 59 Iowa 332, 10 N. W. 854, and 13 N. W. 310; Newby v. Caldwell, 54 Iowa 102, 6 N. W. 154; Goodhue v. Daniels, 54 Iowa 19, 6 N. W. 129; Stodghill v. C. B. & Q. R. R. Co., 53 Iowa 341, 5 N. W. 495; Gunsaulis v. Cadwallader, 48 Iowa 48; Painter v. Hogue, 48 Iowa 426; C. & S. W. R. R. Co. v. Heard, 44 Iowa 358; Street v. Beckman, 43 Iowa 496; Dewey v. Peck, 33 Iowa 242; Fairfield v. McNany, 37 Iowa 75; Schmidt v. Zahensdorf, 30 Iowa 498; Sobey, Adm'r, v. Beiler, 28 Iowa 323; Osborn v. Cloud, 23

Iowa 104; *Hayden v. Anderson*, 17 Iowa 158; *Coy v. City of Lyons*, 17 Iowa 1; *Carl v. Knott*, 16 Iowa 379; *Clark v. Sammons & Van Felt*, 12 Iowa 368, important cases sustaining, explaining, extending and qualifying, but not citing, the text.—Ed.)

Cross references. See also, *Smith v. Lathrop*, 84 Am. Dec. 448; *Garrett v. Johnson*, 35 Am. Dec. 272; *Wood v. Jackson*, 22 Am. Dec. 603; *Emlden v. Lesherman*, 56 Am. St. Rep. 442; *Fahey v. Esterly*, 44 Am. St. Rep. 563; *Thorn v. Newsom*, 53 Am. Rep. 747; *Zoeller v. Riley*, 53 Am. Rep. 157; *Christman v. Harmon*, 26 Am. Rep. 387.

BLAKLEY *v.* BIRD, 12 IOWA 601.

1. Attachment—Petition or Affidavit for—Allegations.—The petition or affidavit for an attachment must, besides the grounds for attachment, state that something is due, and as nearly as possible the amount thereof; and an attachment issued on a petition or affidavit failing to so allege will be quashed on motion of the defendant, pp. 602, 603.

Reaffirmed in *Kelley v. Donnelly*, 29 Iowa 71.

Distinguished and narrowed in *Sherrill v. Fay*, 14 Iowa 295, holding that in an action for unliquidated damages the petition or affidavit for attachment need not state the amount due.

SHEA *v.* WATKINS, SHERIFF, 12 IOWA 605

(Abstract.)

1. Replevin—Property Seized Under Execution.—A party whose personal property is seized by an officer under an execution against another, may maintain replevin therefor, pp. 605, 606.

Reaffirmed and extended in *Ramsden v. Wilson*, 49 Iowa 212, holding that a person entitled to the possession of personal property wrongfully seized by an officer, may maintain replevin therefor.

Cross reference. See further annotations, note and cross references under *Gimble v. Ackley* (12 Iowa 27) ante. p. 4.

EDWARDS, NICHOLS & RICHARDS *v.* PITZER & Co., 12 IOWA 607

(Abstract.)

1. Judgment—Confession of—Sufficiency of Statement—Entry of—Signing and Approving—Time of.—The object of the statute in requiring a statement of facts out of which an indebtedness arose in order to allow a judgment by confession, is to prevent fraud as to creditors; and when in such case the consideration is stated with such conciseness as to direct the attention of third persons to its actual nature, then, in the absence of fraud, it is sufficient, and a judgment by confession entered thereon will not be irregular or invalid.

The statute providing that a judgment entered by confession shall be read and signed by the judge of the court at the next succeeding term, is directory; and a failure to so read and sign such a judgment will not invalidate it, pp. 607, 608.

Special cross reference. See further specially, annotations under *Vanfleet v. Phillips* (11 Iowa 558) Vol. 1, p. 860, for cases citing the text, and many others on this question.

2. Partnership—Confession of Judgment by Partner.—See annotations under *Christy v. Sherman* (10 Iowa 535) Vol. 1, p. 743.

Annotations to Decisions Reported in Volume 13 Iowa.

GATES v. REYNOLDS, 13 IOWA 1.

1. False and Fraudulent Representations—Measure of Damages—Recovery of Consideration for Sale—Offer to Rescind—Statu Quo.—In an action for damages for false and fraudulent representations inducing a purchase of land by plaintiff from defendant, the measure of damages is the difference between the value of the land purchased at the date of the contract, and the amount the land would have been worth at that time, had it been as represented.

In such an action the plaintiff (purchaser) cannot recover the part of the consideration he has paid the defendant (vendor) therefor, unless he has offered to rescind and place the latter in *statu quo*, p. 4.

Reaffirmed in Swayne v. Waldo, 73 Iowa 751, 33 N. W. 79, 5 Am. St. Rep. 712.

Reaffirmed as to first paragraph in Moberly v. Alexander, 19 Iowa 164.

Reaffirmed and extended in Callanan v. Brown & Co., 31 Iowa 340, 341, holding further that in an action for damages for breach of warranty in the sale of bonds, the measure of damages is the difference in the market value of the bonds in fact delivered, and the market value of the bonds according to the warranty.

Reaffirmed and extended in Douglass & Hemingway v. Moses, 89 Iowa 43, 56 N. W. 271, 48 Am. St. Rep. 353, holding further that in an action for damages for breach of warranty of a horse, that the measure of damages is the difference between the actual value at the time of the sale, and what it would have been worth if it had been as warranted.

Reaffirmed and extended in Warfield v. Clark, 118 Iowa 75, 91 N. W. 836, holding further that in an action for fraudulent representations as to the financial condition of a corporation inducing the purchase of stock therein, that the measure of damages is the difference between the market value of the stock at the time of its purchase, and what it would have been worth if the condition of the company had been as represented.

Distinguished and qualified in White v. Smith, 54 Iowa 236-238, 6 N. W. 286, holding that where a vendor sells a lot knowing that the purchaser intends to erect a residence thereon, and falsely and fraudulently represents that the lot has a street on two sides thereof, thereby inducing the purchase, that in an action for damages, the pur-

chaser may recover the difference between the value of the lot with the street as represented and the actual value of the lot at the time of its sale, and, also the difference between the value of the residence erected by the purchaser if the street was on the sides of the lot as represented and what the residence is actually worth: Provided that if the residence was erected by the purchaser knowing that the street was not on the sides of his lot, as represented, he is not entitled to such damages therefor.

(Note.—See further specially, *Hibbetts v. Threldkeld*, 137 Iowa 166, 114 N. W. 1046; *Galliers v. C. B. & Q. Ry. Co.*, 116 Iowa 321, 89 N. W. 1110; *Boddy v. Henry*, 113 Iowa 462, 85 N. W. 771, 53 L. R. A. 769; *Short v. Matteson*, 81 Iowa 639, 47 N. W. 874; *Stewart v. Jack*, 78 Iowa 154, 42 N. W. 634; *Joy v. Bitzer*, 77 Iowa 73, 41 N. W. 577, 3 L. R. A. 184; *Howes v. Axtell*, 74 Iowa 400, 37 N. W. 974; *Lacy v. Straughan*, 11 Iowa 258; *Moore v. Bare*, 11 Iowa 198; *Likes v. Baer*, 8 Iowa 368, and 10 Iowa 89; *Hahn v. Cummings*, 3 Iowa 583, important cases sustaining, explaining and qualifying, but not citing, the text.—ED.)

Cross references. See further in connection herewith, annotations under Rules 1 and 2 of *Holmes v. Clarke* (10 Iowa 423) Vol. 1, p. 719.

See also, *Kountz v. Kennedy*, 49 Am. St. Rep. 651.

2. Action for Unliquidated Damages—Attachment—When to Issue Under Code of 1851.—In an action for unliquidated damages an attachment cannot issue until the plaintiff complies with the requirements of Sec. 1851, of the Code of 1851; and an attachment issued without such compliance will be dissolved on motion of the defendant, p. 5.

Distinguished and impliedly overruled in *Magoon v. Gillett*, 54 Iowa 55, 6 N. W. 131, holding that under Sec. 3021 of the Code of 1873, it is proper for the court in an action not based on a written contract and pending a motion to quash an attachment and discharge the property attached, to enter an order that the plaintiff be allowed to hold the property attached and be allowed to attach property in all not exceeding a certain amount fixed in the order: And such order cures a failure to make an allowance of the amount in value of the property that may be attached, as required by Sec. 2955 of the Code of 1873.

REED v. REED, 13 IOWA 5.

1. Replevin—Defense in—Title in Third Person.—Where a person upon the delivery of personal property to him, executes a receipt therefor which admits the right of possession in the consignor, he cannot in an action of replevin by the latter, plead and prove ownership of such property by a third person, p. 10.

Reaffirmed and extended in Burrows v. Waddell, and Schaller, 52 Iowa 196, 3 N. W. 38, holding further that where personal property is levied on by a sheriff under an execution, which is claimed by an intervenor, under a bill of sale, that the officer cannot prove ownership in a person other than the execution debtor; and in such case the intervenor (vendee) must recover on the strength of his title and not the weakness of that of his adversary.

(Note.—See further on this question, Hilman v. Brigham, 117 Iowa 70, 90 N. W. 491; Brody v. Cohen, 106 Iowa 309, 76 N. W. 683; Waterhouse v. Black, sheriff, 87 Iowa 317, 46 N. W. 1093; Campbell v. Williams, 39 Iowa 646; Root v. Schaffner, 39 Iowa 375; Phillips v. Blair, 38 Iowa 649; McCready v. Sexton & Son, 29 Iowa 356, 4 Am. Rep. 214; Patterson v. Clark and Tinson, 20 Iowa 429; Gray v. Earl, 13 Iowa 188; Kingsbury v. Buchanan, 11 Iowa 387; Fidler v. Smith, 10 Iowa 587 (abstract); Dyson v. Ream, 9 Iowa 51, important cases not citing, but sustaining, explaining and analogous to the text.—Ed.)

Cross references. See further in connection herewith, annotations and cross references under Buck v. Rhodes, (11 Iowa 348) Vol. 1, p. 823; Rule 3 of Williams v. Swetland (10 Iowa 51) Vol. 1, p. 642.

CULBERTSON & RENO v. LUCKEY, 13 IOWA 12.

1. Fraudulent Conveyances—Conveyance by Parent to Child—When Fraudulent—Presumption—Burden of Proof.—The fact that a sale or conveyance is made by a parent to his child in contemplation of insolvency, is an evidence of fraud, but is not conclusive thereof. And the facts that the consideration named in such a conveyance is greater than that actually paid, that the grantee (child) did not take possession of the property conveyed, and a failure to file the deed for record for a considerable length of time after its execution, are not sufficient to overcome a denial in an answer sworn to (in an action by a creditor to set it aside as fraudulent). Where fraud is denied it must be established by proof, pp. 16, 17.

Reaffirmed and explained in Stewart v. Rogers, 25 Iowa 398, 81 Am. Dec. 794, holding that in the absence of an existing actual intent to defraud, the question of whether or not a voluntary conveyance by a parent to a child will be void as to the creditors of the parent, depends upon its reasonableness, and the condition of the grantor in respect to his ability to pay his debts out of the property he retains.

Cited with approval in Vandall v. Vandall, 13 Iowa 250, where the proof sustained fraud in a conveyance by a child to parent.

(Note.—See further, Mitchell & Sons v. Sawyer, 21 Iowa 582; Hook v. Mowre, 17 Iowa 195; Wright & White v. Wheeler, 14 Iowa 8; Lyman v. Cessford, 15 Iowa 229; Graves & Co. v. Alden, 13 Iowa 573; Fifield v. Gaston, 12 Iowa 218; Johnson v. McGrew, 11 Iowa 151, 77 Am. Dec. 137; Carson v. Foley, 1 Iowa 524, important cases sustaining, explaining and analogous to, but not citing, the text.—Ed.)

Cross references. See further, annotations under *Fifield v. Gaston* (12 Iowa 218), ante. p. 35; and see specially, annotations under *Whitescarver v. Bonney* (9 Iowa 480) Vol. 1, p. 611.

2. Pleadings—Sworn Answer—Weight of.—Under Secs. 1744-1747 of the Code of 1851 an answer under oath is evidence of equal weight with that of a disinterested witness; and where the plaintiff calls for an answer under oath, he must abide its effect, unless he overcomes it by testimony, p. 17.

Cited with approval in *Vandall v. Vandall*, 13 Iowa 250, a case wherein the weight of an answer under oath was overcome by proof.

Cross reference. See further, annotations and cross references under *Shepard v. Ford* (10 Iowa 502) Vol. 1, p. 736.

BYINGTON v. WOODS, 13 IOWA 17.

1. Pleadings—Allegations in—Motion to Make More Specific—When Proper.—Where allegations as to certain items in a petition or other pleading, are general or indefinite, but the pleading as a whole sufficiently states a cause of action or defense, a motion to make the allegations thereof more specific is proper; and such indefiniteness cannot be reached by demurrer, p. 19.

Reaffirmed in *Hayden v. Anderson*, 17 Iowa 163; *Byington v. Robertson*, 17 Iowa 563, holding that where statements in a pleading are not sufficiently specific, the defect cannot be reached by demurrer.

Cited with approval in *Cottle v. Cole & Cole*, 20 Iowa 483, holding that pleadings must allege, or deny, *facts*, and not state conclusions of the pleader.

2. Tax Titles—Foreclosure of, on Several Tracts of Land Owned by the Same Persons, in One Action—Averments of Petition—Procedure.—An action for the foreclosure of several tax titles on several distinct parcels of land owned by the same person, or persons, may be maintained; but in such case the petition should state the amount of taxes due the plaintiff on each parcel, and the liens thereon accrued by subsequent payment of taxes, and a judgment and foreclosure be had on each parcel or tract separately, pp. 20, 21.

Cited in *Orr v. Travacier*, 21 Iowa 70, holding that where the owner of land sues and obtains a cancellation of a tax deed, the grantee therein is entitled to a lien thereon for taxes paid by him in good faith.

(Note.—See further on multifarious pleading and parties to actions having interest in subject-matter, *Beckwith v. Dargets*, 18 Iowa 303; *Mitchell v. Peters*, 18 Iowa 119; *Baldwin v. Thompson*, 15 Iowa 504; *Greither v. Alexander*, 15 Iowa 470; *Walkup v. Zehring*, 13 Iowa 306; *Camp v. McGillicuddy*, 10 Iowa 201; *Bowers v. Keesecher*, 9 Iowa 422; *Clemons v. Elder*, 9 Iowa 272; *Blair & Co. v. Marsh*, 8 Iowa 144.—ED.)

Cross references.

"Tax sales—Redemption from"—See further, annotations under *Byington v. Allen* (11 Iowa 3); *Byington v. Rider* (9 Iowa 566) Vol. 1, pp. 739 and 629.

COOK v. WOODBURY COUNTY, 13 IOWA 21.

1. Chancery Actions—Pleadings—Petition—Allegations of—Failure to Deny—Proof Taken—Effect.—A petition in chancery, when undenied, is to be taken for confessed, but the extent of such confession may be measured by exhibits attached thereto: And where proof is introduced which destroys the cause of action as made by the pleading, relief should be denied, p. 22.

Reaffirmed and extended in *Un. Nat'l Bank v. Barber*, 56 Iowa 564, 565, 9 N. W. 893, holding further that where the evidence is sufficient to support the finding of the trial court, reversal cannot be had by reason of irregularity in the making of the issue.

(Note.—See further, *Atkins v. Faulkner*, 11 Iowa 326.—Ed.)

Cross references. See further, Rule 2 hereof in connection herewith.

"Plea of payment not to be taken as confessed although undenied"—See annotations and note under *Powesheik County v. Mickel* (10 Iowa 76) Vol. 1, p. 646.

"Defects in pleadings that are cured by verdict"—See annotations under Rule 3 of *Cotes & Patchin v. City of Davenport* (9 Iowa 227) Vol. 1, p. 569.

2. Actions in Equity—Appeal—Trial De Novo—When Not so Tried.—In order to have a hearing *de novo* on an appeal in an action in chancery, the appellant must bring all the pleadings and evidence considered below, before the Supreme Court, p. 22.

Reaffirmed in *Anderson v. Easton & Son*, 16 Iowa 58; *State v. Orwig*, 27 Iowa 531.

Reaffirmed and qualified in *Winslow, Harris & Co. v. Turner*, 20 Iowa 295, holding that where objection to a trial *de novo* on an appeal in a chancery action (on the ground that the pleadings and the evidence are not part of the record) is made on the hearing, and after appellant's argument is filed and in the absence of his counsel, the appellate court should affirm without prejudice to the right of appellant to prosecute another appeal.

Cross references. See further sustaining text, annotations and note under *Garner v. Pomroy* (11 Iowa 149) Vol. 1, p. 791.

See also, annotations and note under Rule 2 of *Blake v. Blake*, (13 Iowa 40), *Infra.* p. 115.

BYINGTON v. HAMPTON, 13 IOWA 23.

1. Tax Sales—Redemption From—Acceptance of Insufficient Amount Due by Purchaser—Estoppel.—Where the owner of land

sold for taxes pays an insufficient amount to the treasurer, for the purpose of redemption, and the tax purchaser accepts such sum, he thereby ratifies the act of the officer in issuing the certificate of redemption, p. 24.

Reaffirmed and qualified in Darro v. Union County, 87 Iowa 166, 167, 54 N. W. 150, holding the rule applicable where the purchaser of the tax title, *with full knowledge* accepts an insufficient amount paid upon redemption; and in such case he is estopped from claiming the residue due to him.

Cross reference. See further on this question, annotations and cross references under Rule 2 of Byington v. Woods (13 Iowa 17) ante. p. 110.

THRIFT v. REDMAN, 13 IOWA 25.

1. Gambling and Gamblers—Money Paid Cannot be Recovered.—Where money is lost in gaming and is paid to the winner, the loser cannot maintain an action therefor, p. 28.

Reaffirmed in Dee v. Sears-Nattinger Automobile Co., 141 Iowa 613, 118 N. W. 530, holding that after property has been delivered to the successful party in consequence of a bet or wager, it is too late for another party to the transaction to attempt rescission or to raise the question of illegality.

Reaffirmed and extended in Trenergy v. Goudie, 106 Iowa 694, 77 N. W. 467, holding further that a notice by one debtor to the stakeholder for him not to pay over money "until further notice," is not sufficient to allow the former to recover of the latter who has paid it over.

Reaffirmed and extended in Okerson v. Crittenden, 62 Iowa 298, 17 N. W. 528, holding further that where money is placed as a bet or wager in the hands of a stakeholder who is to pay it to the winner, that a demand of the money of the stakeholder by one of the parties, on the ground that he is the winner, is not such a notice to pay as will entitle the latter to recover the money of the former after he has paid it to the other bettor.

Reaffirmed and varied in Himmelman v. Pecaut, 133 Iowa 505, 506, 110 N. W. 920, holding that where a stakeholder, after being notified by L. not to do so, pays wagered money to P. on the agreement that if it should turn out that L. was the winner P. would reimburse him, that such agreement is enforceable.

Reaffirmed and narrowed in Shaw v. Gardner, 30 Iowa 112, 113, holding, however, that where a note deposited in lieu of money on a bet or wager, is delivered to the winner who collects it, that the loser may recover against the winner the amount of such note which is in excess of the bet or wager.

Cross reference. See further on this question, annotations and note under Shannon v. Baumer (10 Iowa 210) Vol. 1, p. 669.

2. Principal and Surety—Payment of Note by Surety—Rate of Interest Allowed to.—Where a surety on a promissory note pays it, he is allowed six per cent. interest per annum on the amount thereof from the time of payment, p. 28.

Reaffirmed and extended in Myers v. Smith, 15 Iowa 184, 185, holding further that where upon dissolution of a partnership one partner assumes all the debts of the firm, that another partner who pays a judgment against it, is entitled to judgment against the former therefor, with six per cent. interest per annum from date of its payment.

Reaffirmed and extended in Vennum v. Gregory, 21 Iowa 328, holding further that the legal rate of interest is six per cent. per annum, unless a higher rate be agreed upon and expressed in writing; and that in the absence of a written agreement therefor the court cannot allow a rate higher than the legal, *as damages*.

Reaffirmed and extended in Richards v. Burden, 59 Iowa 729 (abstract), 7 N. W. 22, holding further that interest at a greater rate than six per cent. per annum is allowable only when the parties agree in writing for its payment.

(Note.—See further, Lommen v. Tobiasson, 52 Iowa 665, 3 N. W. 715; Knapp v. Miller, 13 Iowa 596.—Ed.)

LONG v. BURNETT, 13 IOWA 28, 81 AM. DEC. 420.

1. Decedent's Estate—Special Administrator—Powers of—Order Directing Sale by is Void.—Under the statutes of 1843, the powers of a special administrator are limited to the preservation of the personal assets of the decedent until the regular administrator is appointed: He is simply an agent, and not an administrator.

An order entered by the probate judge directing a special administrator to sell real estate of a decedent, is void *ab initio*, as well as all proceedings thereunder, and may be collaterally attacked, pp. 33, 34.

Reaffirmed and extended in Sullivan v. Nicoulin, 113 Iowa 79, 84 N. W. 979, holding further that a special administrator has no authority to submit a controversy to arbitration, involving a claim due, or against the decedent's estate.

Reaffirmed and extended in Rauhen, Adm'r, v. Prudential Ins. Co., 129 Iowa 744, 745, 106 N. W. 205, holding further that a special administrator has no authority to compromise or settle a claim due the estate of the decedent.

Cited in Pursley v. Hays, 22 Iowa 20, 92 Am. Dec. 350, as an instance of collateral attack of judgment and proceedings.

Cross reference. See further Rule 2 hereof.

2. Probate Court—Jurisdiction for Settlement of Estate of Decedent—Procedure—Collateral Attack of Judgment.—The judge of the probate court has jurisdiction for the settlement of the estate of a decedent; but this jurisdiction becomes effective only after the granting

of letters of administration to a regular administrator: When this is done, the power to grant a license to sell real estate to pay debts arises when a petition, as the law directs, is presented by such administrator; and when such petition is presented, jurisdiction is acquired, and subsequent proceedings will be presumed as regular and conclusive as those of courts of general jurisdiction, and cannot be collaterally attacked.

Where jurisdiction of a court has so far attached as to authorize and require the court to hear and determine the sufficiency of the facts relied on to give jurisdiction, whether they relate to the law, the notice or the petition, a judgment or decree therein is not subject to collateral attack, pp. 34, 35.

Reaffirmed as to second paragraph in Shawhan v. Loffer, 24 Iowa 227; Smith, Stebbins & Co. v. Engle, 44 Iowa 268; Caughlin v. Blake, 55 Iowa 637, 8 N. W. 476; Bacon v. Chase, 83 Iowa 527, 50 N. W. 25.

Reaffirmed and extended in Good v. Norley, 28 Iowa 195-198, holding further that probate proceedings to sell real estate of a decedent where the heirs and persons having an interest therein are not served with notice, are void *ab initio*.

Reaffirmed and qualified as to first paragraph in Waples v. Marsh, 19 Iowa 386, holding that the statute does not give exclusive jurisdiction to the county court of all matters connected with the settlement of estates of decedents: That an action in equity in the district court, may be maintained by creditors of decedent to compel the administrator to sell the real estate for the satisfaction of their claims.

Cited with approval in Danforth v. Thompson, 34 Iowa 246, the court holding that where the jurisdiction of a foreign court, as to the subject-matter and parties to an action, is shown, its judgments and proceedings will be presumed as regular and conclusive as courts of general jurisdiction of this State.

Distinguished and narrowed in O'Rourke v. C. M. & St. P. R. R. Co., 55 Iowa 334, 7 N. W. 582, holding that in an action on a foreign judgment the defendant may show that what was done towards service of process on him in the foreign action, did not constitute service and that the foreign judgment is therefore void; and the garnishee in the foreign action may, in an action in this state, thereon, show that the defendant (debtor) was never actually served with process in such foreign action.

(Note.—See to the same effect as this last case, Webster v. Hunter, 50 Iowa 215.—Ed.)

Unreported citation, 48 N. W. 730.

(Note.—See further, specially, Mullin v. White, 134 Iowa 681, 112 N. W. 165; Thornton v. Mulquinne, 12 Iowa 549, 79 Am. Dec. 548.—Ed.)

Cross references. See further, annotations, notes and cross references under *Hart v. Jewett* (11 Iowa 276) Vol. 1, p. 815; Rules 1 and 2 of *Coon v. Jones* (10 Iowa 131) Vol. 1, p. 657.

BLAKE v. BLAKE, 13 IOWA 40.

1. Actions in Equity—Petition for Amount Due—Relief—Decree.—Equity will not grant greater relief than is prayed for. So, where plaintiff in an equitable action asks judgment in his petition for a certain sum due, it is reversible error for the court to enter judgment for an amount coming due after the commencement of the action, in the absence of a supplemental petition praying therefor, pp. 41, 42.

Erroneously cited in *Richmond v. Tibbles*, 26 Iowa 477.

Distinguished and narrowed in *McCrillis v. Harrison County*, 63 Iowa 593, 19 N. W. 679, holding that the fact that a decree grants greater relief than that prayed, cannot be raised in a collateral proceeding; and such a decree is conclusive until set aside, modified, or reversed.

Unreported citation, 124 N. W. 355.

(Note.—See further sustaining, but not citing, the text, *Massie v. Wilson*, 16 Iowa 390; *Cooper v. Frederick*, 4 G. Greene, 403, and there are others to the same effect.—Ed.)

2. Chancery Causes—Appeals in—Trial De Novo.—On an appeal in a chancery cause, a trial *de novo* will be had; and the Supreme Court may re-adjudicate the facts as well as the law thereof, p. 42.

Reaffirmed in *Thomas v. Stickle*, 32 Iowa 74.

Reaffirmed and explained in *McGregor v. Gardner*, 16 Iowa 543, holding that on an appeal in a chancery cause, the Supreme Court will try the whole cause on its merits, and render such decree as the district court ought to have rendered; but such trial will be had only on the pleadings and evidence filed and introduced in the lower court.

Reaffirmed and extended in *Hackworth, Gd'n, v. Zollars*, 30 Iowa 436, holding further that on appeal a chancery cause is tried *de novo* upon the facts and the law apparent of record; and that in such case no assignment of errors is necessary.

Reaffirmed and qualified in *State v. Orwig*, 27 Iowa 530, 531, holding that in order for a chancery cause to be tried *de novo* on the evidence, the pleadings and evidence must be before the Supreme Court.

Distinguished and narrowed in *Dove v. Indep. Sch. Dist. of Keokuk*, 41 Iowa 692, holding that the rule does not apply to an appeal in an action at law, although such action may have been tried by the lower court without the intervention of a jury.

(Note.—See further, *Jones v. Clark*, 37 Iowa 586; *Lay v. Wissman*, 36 Iowa 305; *Corbin v. Woodbine*, 33 Iowa 297; *Mallory v. Luscombe*, 31 Iowa 269; *Snowden v. Snowden*, 23 Iowa 457; *Winslow, Harris & Co. v. Turner*, 20 Iowa 294; *Fords v. Vance*, 17 Iowa 94;

Kellogg v. Kelsey, 16 Iowa 388; Van Orman v. Spafford, Clarke & Co., 16 Iowa 186; Ticonic Bank v. Harvey, 16 Iowa 141; Anderson v. Easton & Son, 16 Iowa 56; O'Conner v. O'Conner, 15 Iowa 303; Cooper v. Skeel, 14 Iowa 578; Robb v. Dougherty, 14 Iowa 379; Cook v. Woodbury County, 13 Iowa 21; Allison v. Halfacre, 11 Iowa 450; Garner v. Pomroy, 11 Iowa 149; Pierce v. Wilson, 2 Iowa 20; Austin & Spicer v. Carpenter, 2 G. Greene 131; Stockwell v. David, 1 G. Greene 116, important cases sustaining, explaining and qualifying, but not citing, the text.—Ed.)

Cross reference. See further, annotations under Garner v. Pomroy (11 Iowa 149) Vol. 1, p. 791.

FANNING v. STIMSON, 13 IOWA 42.

1. **Lands—Leases—Rent to be Paid by Year—Implied Covenant to Pay Rent—Liability of Lessee—Acceptance by Landlord of Rent From Assignee of Lease—Effect.**—Where a lease of land provides that the rent is to be paid at the end of each year, but does not purport on its face to create a personal obligation on the part of the lessee to pay it, it is an implied covenant to pay, and upon the assignment of such lease, the lessee is released; especially where the landlord accepts some of such rent from the assignee. *A priori* a lease "at a yearly rent of one thousand dollars, etc., payable at the expiration of each year and every year of the lease * * * the lessees, well and truly keeping and performing their part of these presents to be by them performed as aforesaid," is an implied covenant to pay the rent, and upon the assignment of the lease and acceptance of rents by the landlord from the assignee, the lessee is released from liability thereunder, pp. 48-50.

Reaffirmed and extended in Watson v. Hunkins, 13 Iowa 550, holding further that the assignee of a lessor may maintain an action for rents against the purchaser from the lessees of the leasehold interest, and may recover rents therefrom from the time of the purchase.

Reaffirmed and qualified in Barhydt v. Burgess, 46 Iowa 477, holding that where a lessee covenants for himself, executors and assigns to pay a monthly rent for the leased premises, to his lessor, the lease not to be assigned without the latter's written consent, that the assignment of such lease and acceptance of rent by the lessor from the assignee, does not release the lessee.

Reaffirmed and qualified in Harris v. Heckman, 62 Iowa 413, 17 N. W. 593, holding that where there is an express agreement by the lessee to pay the rent for the term, that the assignment of the lease and acceptance of rent by the lessor from the assignee, does not discharge the lessee from liability: That a stipulation in a lease that the lessee is to pay twelve dollars per month rent in advance for the period of five years, for the leased premises, constitutes such an express agreement.

READ *v.* HOWE, 13 IOWA 50

1. Husband and Wife—Agreement of Separation—Effect on Surviving Consort's Right to Administration on Decedent's Estate.—An agreement of separation between a husband and wife, does not dissolve the marital relation nor deprive the wife of the first right to administer on the estate of her husband who thereafter dies, p. 52.

Distinguished and narrowed in Estate of O'Brien, 63 Iowa 624, 625, 19 N. W. 797, holding that in the appointment of an executor or administrator, the court has a sound discretion; and if the wife of decedent is incompetent to discharge the trust, she should not be appointed: Holding further that where a wife of a decedent is a non-resident, she should not be appointed as the personal representative.

PELAN *v.* DE BEVARD, 13 IOWA 53.

1. Homestead in Leased Premises—Assignment of Lease—Concurrence of Wife.—Where a lessee under a stipulation therefor in the lease, erects a building on the premises and occupies it and the premises as a homestead, an assignment of the lease in which the wife does not join, gives to the assignee no right to the possession of the premises during the period of the lease, pp. 55, 56.

Reaffirmed and extended in Yates *v.* McKibben, sheriff, 66 Iowa 359, 23 N. W. 753, holding further that a life tenant is entitled to homestead in the estate so held, but that the value thereof is to be determined by the value of the fee simple title and not of the value of the life estate therein.

Reaffirmed and extended in Lessell *v.* Goodman, 97 Iowa 682, 683, 66 N. W. 917, 59 Am. St. Rep. 432, holding further that the vendee under a contract for the conveyance of land, who takes possession thereof and occupies it as a homestead, has a homestead therein which cannot be defeated except by the concurrence of the wife: That where in such case after the commencement of such occupancy, the husband (vendee) abandons his wife and refuses to pay the residue of the purchase price of the land, the wife may sue the vendor for specific performance, she in such action offering to pay the residue.

Reaffirmed and extended in Johnson County Sav. Bank *v.* Carroll, 109 Iowa 571 (cited in dissenting opinion, 577) 80 N. W. 683, 685, holding further that the vendee of lands under a contract of purchase, is entitled to homestead therein from the time he takes possession and commences to occupy the premises as a homestead for his family: And that this rule applies where the vendee so takes possession and occupies, with the consent of his vendor or his agent under a contract of purchase providing that he is not entitled to possession until the payment of the purchase price.

Reaffirmed and qualified in Anderson *v.* Cosman, 103 Iowa 269-271, 72 N. W. 524, 64 Am. St. Rep. 177, holding that where a husband enters into possession of land under a contract of purchase, occupies

it as homestead for some time and then, being unable to pay therefor, with the knowledge of the wife who makes no objection, cancels the contract of purchase with his vendor, and thereafter, along with his wife, occupies the property under a lease, that such facts constitute a waiver by the wife of homestead therein.

Cited with approval in Wertz v. Merritt, 74 Iowa 687, 39 N. W. 104, holding that where a son occupies land as homestead as tenant of his father, and after the death of the father continues to so occupy it, but in the latter time as heir, that such son's interest therein is subject to the satisfaction of a debt created by him before the death of the father.

Cited with approval in White v. Danforth, 122 Iowa 404, 98 N. W. 137, the case turning on what occupancy constituted homestead.

Cited in Fletcher v. Kelly, 88 Iowa 486, 55 N. W. 475, 21 L. R. A. 347, on a question of what constitutes fixtures, and the rights of a mortgagee of a leasehold interest.

(Note.—See further, Bradshaw v. Remick, 90 Iowa 409, 57 N. W. 897; Stinson v. Richardson, 44 Iowa 373; Hewitt v. Rankin, 41 Iowa 35; Thorn v. Thorn, 14 Iowa 49, important cases in connection herewith.—Ed.)

Cross references. See Rule 2 hereof.

"Conveyance of homestead by husband—Failure of wife to join—Effect"—See annotations under Rule 2 of Williams v. Swetland (10 Iowa 51); Alley v. Bay (9 Iowa 509) Vol. 1, pp. 642, and 615, respectively.

2. Leases—Improvements—Assignment of Lease—What it Conveys.—Where a lessee erects buildings on leased premises under a stipulation that such buildings are to be paid for by the lessor at the expiration of the lease, and after the erection thereof assigns the lease, such assignment conveys the interest of the lessee in the improvements at the expiration of the term. This rule applies although the buildings and leased premises are occupied by the lessee as a homestead, and his wife does not join or concur in the assignment, p. 56.

Cited in First Nat'l Bank of Davenport v. Bennett, 40 Iowa 539, holding that the lien of a judgment creditor of a lessee attaches to the leasehold interest of the latter and of the latter's interest in improvements on the leased premises.

Cited in Fletcher v. Kelly, 88 Iowa 486, 55 N. W. 475, 21 L. R. A. 347, holding that a conveyance of or mortgage on a leasehold interest in land carries with it the lessee's interest in improvements thereon, unless a contrary intent is shown from the conveyance.

ENGLISH v. WAPLES, 13 IOWA 57.

1. Conveyances—Actual and Constructive Notice—Rights of Subsequent Bona Fide Purchasers and Mortgagees.—A junior mort-

gagee, or a subsequent *bona fide* purchaser of real estate, who records his conveyance, has a superior right to that of a senior mortgagee, or prior purchaser, where the former has neither actual nor constructive notice of the contents and existence of the prior conveyance, or such notice as is sufficient to put a reasonable man upon inquiry: Such notice is sufficient if imparted before the completion of the subsequent contract or the payment of the consideration, though not until after the agreement upon the terms of the contract, p. 60.

Reaffirmed and extended in Allen v. McCalla, 25 Iowa 481, 96 Am. Dec. 56, holding further that the rule of the text applies to both real and personal property.

Reaffirmed and extended in Clasey v. Sigg, 51 Iowa 373, 1 N. W. 591, holding further that where a mortgagee transfers his mortgage and note secured, to a bank as collateral for money "owed and which he might owe" to it, that such bank has priority under such mortgage for all money loaned or advanced thereon, over a mortgagee of a prior mortgage which is not recorded until after such transfer, in the absence of actual notice to such bank of the existence of such prior conveyance.

Reaffirmed and extended in Wishard & Cole v. Hansen, 99 Iowa 313, 314, 68 N. W. 705, holding further that a person is chargeable with the knowledge of such facts as he would have ascertained had he acted upon the information he possessed with reasonable care and prudence.

Reaffirmed and extended in Furry Bros. v. Ferguson, 105 Iowa 236, 74 N. W. 905, holding further that the principal is bound by the knowledge of his agent of such facts as will put a reasonably prudent person upon inquiry, and enable him to ascertain the condition of the title to property purchased.

Reaffirmed and extended in Raymond v. Whitehouse, 119 Iowa 138, 139, 93 N. W. 295, holding further that where a mortgagee releases his conveyance of record, he cannot thereafter by an action in equity, cancel such release and reestablish the mortgage, thereby affecting the rights of a person who acted on the faith of such release.

Reaffirmed and qualified in Weare & Allison v. Williams, 85 Iowa 261, 52 N. W. 331, holding that in order to charge a subsequent *bona fide* purchaser, or mortgagee with notice of a prior unrecorded conveyance by reason of knowledge of facts such as would put a reasonably prudent man upon inquiry, the proof thereof must be clear and decisive.

Reaffirmed and narrowed in Powers v. Lafler, 73 Iowa 285, 34 N. W. 861, holding that where two mortgages to secure debts to separate persons and on the same property are executed on the same date, and both are placed of record, and there is nothing of record to show which one is senior, that such record does not impart constructive notice of such fact or put a third person upon inquiry as to it.

Unreported citation. 75 N. W. 503.

(Note.—See further, *Livermore v. Maxwell*, 87 Iowa 705, 55 N. W. 37; *Mather v. Jenswold*, 72 Iowa 550, 32 N. W. 512, and 34 N. W. 327; *Weidner v. Thompson*, 69 Iowa 36, 28 N. W. 422; *Aetna L. Ins. Co. v. Bishop*, 69 Iowa 645, 29 N. W. 761; *Zuver v. Lyons*, 40 Iowa 510; *Kitteridge v. Chapman*, 36 Iowa 348; *Sillyman v. King*, 36 Iowa 207; *Jones v. Bamford*, 21 Iowa 217; *Vannice v. Bergen*, 16 Iowa 555, 85 Am. Dec. 513; *Wilson v. Miller and Beeson*, 16 Iowa 111, important cases on this question, not citing the text.—ED.)

Cross references. See further Rule 2 hereof.

“Conveyances—Actual and constructive notice”—See annotations under *McGavran v. Haupt* (9 Iowa 83) Vol. 1, p. 547.

“Conveyances—Recording—Sufficiency of index entry—Constructive notice”—See annotations under *Calvin v. Bowman and Neal* (10 Iowa 529), Vol. 1, p. 741.

“Unrecorded mortgage—Who valid against”—See annotations under *Bell v. Evans* (10 Iowa 353); *Norton, et al, v. Williams* (9 Iowa 528) Vol. 1, pp. 703, and 620, respectively.

2. Mortgage—Assignee of, Charged With Notice of His Assignor.—Where a mortgage is taken with actual knowledge on the part of the mortgagee of the existence of a prior unrecorded mortgage on the property covered thereby, and it is afterwards assigned, the assignee of the last instrument is charged with notice of the former, pp. 60, 61.

Reaffirmed in *Sims v. Hammond*, 33 Iowa 372, 373.

Impliedly overruled in *Farmers' Nat'l Bank of Salem v. Fletcher*, 44 Iowa 256, holding that the text is *dictum*, and that a *bona fide* purchaser of a note and mortgage who buys without actual or constructive notice of a prior conveyance or equity to or in the land thereby covered, is not affected by the actual notice of the seller or assignor: That whoever for a valuable consideration, purchases real property of the person holding the legal title, and takes a conveyance thereto, without actual or constructive notice of liens or equities thereon or therein, takes it divested of such rights.

Impliedly overruled in *Clasey v. Sigg*, 51 Iowa 372, 1 N. W. 591, holding that where a mortgagee transfers his mortgage and note secured, to a bank as collateral for money “owed and which he might owe” to it, that such bank has priority under such mortgage for all money loaned or advanced thereon, over a mortgagee of a prior mortgage which is not recorded until after such transfer, in the absence of actual notice to such bank of the existence of such prior conveyance.

Cross reference. See further, Rule 1 hereof, and cross references there found.

DAVID v. HARTFORD INSURANCE CO., 13 IOWA 69.

1. Fire Insurance Policies—Provision as to Forfeiture by Additional Insurance—Effect.—Where a policy of fire insurance con-

tains a stipulation that it is to be of no effect if the insured obtains additional insurance on the property, and shall not with all reasonable diligence give notice thereof to the first company and have the fact indorsed on the first policy, or otherwise acknowledged in writing, and the insured subsequently obtains other insurance thereon and fails to comply with the stipulation, the first policy is void: And this is the rule where the interest insured is leasehold, and the subsequent insurance policy provides that where the interest is leasehold it shall be stated in the policy, which is not done, where the subsequent insurer recognizes its policy as valid and pays a loss thereunder, pp. 79, 85.

Reaffirmed and explained in Hubbard & Spencer v. Hartford Fire Ins. Co., 33 Iowa 329-332, 11 Am. Rep. 125, holding that a breach of a condition as to subsequent additional insurance, does not render the first policy void, but that in such case it is only voidable—But the second or additional insurance must be valid in order to have this effect: That where both initial and subsequent policies have a provision against subsequent and prior insurance, each is voidable at the will of the company issuing it.

Reaffirmed and qualified in Viele v. Germania Ins. Co., 26 Iowa 52, 53, (and in note, 71), 96 Am. Dec. 83, holding that a forfeiture of a policy of insurance on account of breach of conditions thereof may be waived by the insurer; and that such waiver need not be in writing, but may be by parol, or by acts of the insurer inconsistent with a claim of forfeiture.

Cross reference. See further specially, annotations and notes under Rules 3, 4 and 5 of Keenan v. Missouri State Mut. Ins. Co. (12 Iowa 126), ante. p. 24.

LANGWORTHY v. CITY OF DUBUQUE, 13 IOWA 86.

1. Municipal Taxation—Agricultural and other Land Exempt from—When—Enlargement of City Limits—Effect on Taxation—Injunction to Restrain Collection of Taxes.—Where lands used for agricultural or other similar purposes, or for mining, and not laid out into lots or out-lots are brought within the city limits of a city by an enlargement of its territory, it is not subject to municipal taxation; and the rule is not affected by the fact that the land owners voted at the election for the extension of the city limits, paid such taxes for some of the subsequent years, and prayed for improvements to be made by the city. Injunction will lie at the instance of such a land owner to restrain the collection of such illegal tax, p. 88.

Reaffirmed and extended in Buell v. Ball, marshal, 20 Iowa 288, holding further that lands situated within the original boundaries of a city and which are used for agricultural purposes, are not subject to city taxation; and that the question can be raised in an action of

replevin against an officer who levies upon personal property in seeking to collect it.

Reaffirmed and extended in Deiman v. City of Ft. Madison, 30 Iowa 548-550; Durant v. Kauffman, marshal, 34 Iowa 195, holding further that lands within a city limits which are used exclusively for agricultural purposes, and receive no benefits from the city, are not subject to city taxation.

Reaffirmed and qualified in O'Hare v. City of Dubuque, 22 Iowa 145, 146, holding that where agricultural, or mining land is situated in a city limits on a street thereof, and receives the advantages and benefits of the city, and is thereby enhanced in value, it is subject to city taxation.

Reaffirmed and qualified in Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 295, 66 N. W. 179, 35 L. R. A. 63, holding that in order for land within a city boundary to be exempt from taxation for municipal purposes, it must be used in good faith for agricultural purposes: Holding further that a taxation or assessment for pavements, is not "taxation for city purposes" within the meaning of the exemption.

Cited in Macklot v. City of Davenport, 17 Iowa 384, holding that the remedy of one *excessively assessed* for city taxation is by recourse to the city council for its correction (where the statute so allows) and not by injunction restraining its collection.

Cited in Zorger v. Township of Rapids, 36 Iowa 180, holding that injunction lies to restrain the illegal collection of tax.

Cited in Grant v. City of Davenport, 36 Iowa 405, holding that the provision of Chap. 78, Laws of 1872 (in reference to the power of cities to levy a special tax for the constructing and maintaining water-works) that it shall not "be levied upon the taxable property of said city which lies wholly without the limits of the benefit or protection of such works," is constitutional.

(Note.—See further, Youngerman v. Murphy, 107 Iowa 686, 77 N. W. 489; Perkins v. City of Burlington, 77 Iowa 553, 42 N. W. 441; Ill Cent. Ry. Co. v. Hamilton County, 73 Iowa 313, 35 N. W. 239; Leicht v. City of Burlington, 73 Iowa 29, 34 N. W. 494; Tubbesing v. City of Burlington, 68 Iowa 691, 24 N. W. 514; Winzer v. City of Burlington, 68 Iowa 279, 27 N. W. 241; Brooks v. Polk County, 52 Iowa 460, 3 N. W. 494; Warren v. Henly, 31 Iowa 31; Deeds v. Sanborn, marshal, 26 Iowa 419; Hershey v. City of Muscatine, 22 Iowa 184; Davis v. City of Dubuque, 20 Iowa 458; Fulton v. City of Davenport, 17 Iowa 404; Espy v. Town of Ft. Madison, 14 Iowa 226; B. & M. Riv. R. R. Co. v. Spearman, and City of Mount Pleasant, 12 Iowa 112; Butler v. City of Muscatine, 11 Iowa 433; Town of Decorah v. Gillis & Espy, 10 Iowa 234; Morford v. Unger, 8 Iowa 82, important cases sustaining, explaining, qualifying and analogous to, but not citing, the text.—Ed.)

KARNEY *v.* PAISLEY, 13 IOWA 89.

1. Witnesses—Husband and Wife—Competency of Wife to Testify for Husband—Statements of Wife.—A wife is incompetent (under the Code of 1860) to testify for her husband; and her statements to third persons cannot be received in his favor, pp. 91, 92.

Reaffirmed and narrowed in Russ *v.* Steamboat War Eagle, 14 Iowa 375, 376; Blake *v.* Graves, 18 Iowa 315, 319, holding that in an action between a husband and another, the wife is competent for or against the husband, if he waives the statutory prohibition; that the adverse party thereto cannot object to the wife's competency by reason of the marital relation: And that the same rule applies to the testimony of the husband in an action wherein the wife is a party.—The prohibition as to the competency of husband and wife, says the court, is not founded on the interest of the consort in the subject of the action, but on the interruption of harmony in the domestic relation which might thereby result.

2. Evidence—Witnesses—Power of General Assembly to Pass Laws Disqualifying for Interest.—The General Assembly has power to declare by statute that interest in the event of a suit shall or shall not disqualify a witness, p. 91.

Reaffirmed and extended in Donnell, Adm'r, *v.* Braden, 70 Iowa 554, 30 N. W. 779, holding further that the General Assembly may prescribe what shall constitute an interest such as will disqualify a witness.

3. Slander—Damages—Evidence—Pecuniary Circumstances of Parties.—In an action for slander the plaintiff may show the good pecuniary circumstances of the defendant, in aggravation of damages. So, also, in such an action the defendant may show his poor financial condition, in mitigation of damages, p. 92.

Reaffirmed doubtfully in Herzman *v.* Oberfelder, 54 Iowa 85, 86 6 N. W. 82.

Cited with approval in Kinyon *v.* Palmer, 18 Iowa 387, a case involving the sufficiency of the petition in an action for libel.

Cited and doubted in Perrine *v.* Winter, 73 Iowa 647, 35 N. W. 680, the case not in point.

Partially overruled in Guengerech *v.* Smith, 34 Iowa 349, holding that in an action for damages for assault and battery, evidence of the pecuniary condition of the defendant is inadmissible.

SMITH *v.* HEWETT, 13 IOWA 94

1. Husband and Wife—Personal Property in Joint Possession of and Common Use by—Presumption as to Title—Liability for Debts of Husband.—Personal property in the common use and joint possession of husband and wife is *prima facie* controlled and owned by the husband, and is subject to his debts to third persons who have no

notice that it is in fact owned by the wife. If such property is in fact owned by the wife, she must, in order to be protected as against the creditors of her husband who have no actual notice of her ownership, avail herself of the provisions of secs. 2499-2503 of the Code of 1860 (as to the filing for record of notice of her ownership), failing which the property is subject to such debts of the husband, p. 96.

Reaffirmed in Odell and Updegraff v. Lee & Kinnard, 14 Iowa 413; McAfee v. Busby & Son, 69 Iowa 330, 28 N. W. 624.

Reaffirmed and extended in Mazouck v. Iowa N. R. R. Co., 31 Iowa 561; Miller & Co. v. Steele, 39 Iowa 530, 531, holding further that where a wife suffers her personal property to pass into the possession and under the control of her husband without filing with the recorder of deeds the notice of her ownership as provided by statute, it is liable to be taken in execution for the claim of one who gave credit to the husband while it was in his possession and who had no notice of the wife's title thereto.

Reaffirmed and qualified in Gray v. Ferreby, 36 Iowa 150, holding that where the wife's personal property is in the possession of the husband, that if the wife file a statutory notice as to ownership, before levy under an attachment or execution for a debt created *prior* to the taking of possession by the husband, such property will be exempt therefrom: Holding further that in the absence of recorded or actual notice, such property is subject to the husband's debt irrespective of when it is created.—But see Patterson v. Spearman, Clark, and Seeley, 37 Iowa 40, 42, (reaffirming the text) holding that under sec. 2505 of the Code of 1860 as amended by Chap. 126, Laws of 1870, the wife's personalty in the possession of the husband is not subject to the satisfaction of his debt created before marriage, although she does not file the statutory notice.

Cited in Pierson v. Helsey, 19 Iowa 116; Jones v. Jones, 19 Iowa 240; Logan v. Hall, 19 Iowa 499, not in point.

Distinguished and varied in Goodrich v. Munger, 30 Iowa 349, holding that where the husband in good faith and to secure a debt, executes a mortgage to his wife on personal property, and retains possession of the property until default under its terms, which mortgage she causes to be recorded, that the record thereof is notice to third persons of her interest, without the filing of the notice required by sec. 2502 of the Code of 1860.

(Note.—See further, Nuckolls v. Pence, 52 Iowa 581, 3 N. W. 631; Hickok v. Buell, 51 Iowa 655, 2 N. W. 512; Smith v. Champney, 50 Iowa 174; McKay v. Clapp, 47 Iowa 418; Sutton v. Ballou, 46 Iowa 517; Boothby & Co. v. Brown, 40 Iowa 104; Hesser & Hale v. Wilson, 36 Iowa 152; Presnall v. Herbert, sheriff, 34 Iowa 539; Williams v. Brown, 28 Iowa 247; Myers v. McDonald, sheriff, 27 Iowa 391, important cases sustaining, explaining, qualifying and analogous to, but not citing, the text.—ED.)

SAMUELS *v.* GRIFFITH, 13 IOWA 103.

1. Trial—Order of Introduction of Evidence—Discretion of Trial Court—Abuse of—Reversal.—The trial court has a large judicial discretion in controlling the manner of the introduction of evidence, and his rulings thereon will not be ground for reversal except in case of manifest abuse, p. 105.

Reaffirmed in Donaldson *v.* M. & M. R. R. Co., 18 Iowa 289, 290, 87 Am. Dec. 391.

Cited with approval in Martin *v.* Orndorff, 22 Iowa 506, holding that it is reversible error for counsel to read as part of his argument to the jury, the notes of testimony introduced on a former trial.

Cross reference. See further, sustaining and qualifying the text, annotations and note under Rule 1 of Rutledge *v.* Evans (11 Iowa 287) Vol. 1, p. 818.

2. Trial—Evidence—Witnesses—Contradictory Statements of—How Impeached by.—A witness cannot be impeached by reason of his having made a previous contradictory statement, without first having his attention specifically called to it and having an opportunity to explain it while he is being examined; and the rule applies with equal force to previous statements made in a former deposition, pp. 106-108.

Reaffirmed in State *v.* Ostrander, 18 Iowa 456, holding the rule to apply as to previous statements of a witness made before the grand jury.

Reaffirmed in State *v.* Shannehan, 22 Iowa 437, 438, holding that where an affidavit is read in a criminal prosecution as the testimony of an absent witness, that the State cannot introduce evidence to show that such witness had made previous inconsistent statements.—And in Williamson *v.* Peel, 29 Iowa 459 (reaffirming the text), this identical point is so held in a civil action.

Reaffirmed and extended in State *v.* Collins, 32 Iowa 41, holding further that in the question or questions to the witness, the time, place and person involved in the contradictory statement must be given.

Reaffirmed and extended in Hibbard, Spencer, Bartlett & Co. *v.* Zenor, sheriff, 82 Iowa 509, 49 N. W. 64, holding further that a witness may be impeached by previous contradictory statements appearing in the transcript of a stenographer, of a previous trial of the same case, on file and made part of the record in the case, such witness' attention being specifically called thereto while he is testifying.

Reaffirmed and narrowed in State *v.* Hayden, 45 Iowa 14, holding that the minutes of an examining trial, or of the grand jury, are inadmissible to contradict or impeach a witness.

(Note.—See further, sustaining and explaining, but not citing, the text, Johnson *v.* C. R. I. & P. R. R. Co., 58 Iowa 348, 12 N. W. 329; State *v.* Hull, 26 Iowa 292; Morrison *v.* Myers & Turner, 11 Iowa 538; State *v.* Ruhl, 8 Iowa 447, and there are many others.—Ed.)

WILSON v. HOLCOMB, 13 IOWA 110.

1. Conveyances — Unrecorded Deed — Subsequent Purchaser With Actual Notice.—Where a subsequent purchaser of lands has actual notice of the title of a third person (other than his vendor) thereto, he is affected the same as if the prior deed or title had been duly recorded, and takes subject thereto, p. 112.

Reaffirmed and extended in Phillips v. Blair, 38 Iowa 656, holding further that a purchaser of real estate takes it charged with notice of the equities of the person in possession at the time of his purchase.

Reaffirmed and extended in Shoemaker v. Smith, 80 Iowa 661, 662, 45 N. W. 746, holding that where a subsequent purchaser of land has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that which he is about to purchase, and fails to make inquiry, he is charged with notice thereof: That knowledge of an attorney or other agent, is knowledge of the principal.

Cross reference. See annotations, note and cross references under Rule 1 of English v. Waples (13 Iowa 57), ante. p. 118.

2. Equity—Practice—Answer Not Demanded Under Oath—Effect of Sworn Answer.—Where an answer in chancery is not required or demanded to be under oath, then, although it be under oath, it only puts in issue the allegations of the bill so far as denied, and evidence is not required to overcome it, p. 112.

Reaffirmed in Smith v. Phelps, 32 Iowa 539, 540.

(Note.—See further, Graves & Co. v. Alden, 13 Iowa 573; Vandall v. Vandall, 13 Iowa 247.—Ed.)

Cross reference. See further, annotations and cross references under Rule 2 of Shepard v. Ford (10 Iowa 502), Vol. I, p. 736.

CASADY v. WOODBURY COUNTY, 13 IOWA 113.

1. Contracts—Part Legal and Part Illegal—Entire and Severable Contracts—Effect.—If one gives a good and valid consideration, and thereupon another promises to do two things, one of which is legal and the other illegal, the latter shall be held to do the legal, unless the two are so bound together that they cannot be separated, in which case the entire contract is void, pp. 117, 118.

Reaffirmed and explained in Osgood v. Bauder & Co., 75 Iowa 555, 39 N. W. 889, 1 L. R. A. 655, holding that if a contract is not separable, and it is illegal in part, it is void as an entirety.

Reaffirmed and explained in Grieve v. I. C. Ry. Co., 104 Iowa 663, 74 N. W. 193, holding that when the illegal and void provisions of a contract are separable from the valid ones thereof, the latter will be enforced.

Reaffirmed and narrowed in Baird v. Bochner, 77 Iowa 626, 627, 42 N. W. 456, holding that where promises to do and to refrain from

doing certain acts, in part illegal, constitute together the consideration of a contract, the entire contract is void: Hence holding that a contract by the seducer to pay money and convey land to the seduced woman, if she would leave the county and stay away a year, waive civil claims against him, and all claims criminal against him, is entirely void.

Distinguished in Koster v. Seney, 99 Iowa 586, 587, 68 N. W. 825, holding that under Sec. 4029 of the Code of 1873, a mortgage executed to secure a debt some part of which is for chances or tickets in a raffle or lottery, is entirely void.

Unreported citation, 50 N. W. 66.

(Note.—See further, Taylor & Co. v. Pickett, 52 Iowa 467, 3 N. W. 514; Dillon & Palmer v. Allen, 46 Iowa 299; Smith v. Smith Bros., 87 Iowa 93, 50 N. W. 64, and 54 N. W. 73, 43 Am. St. Rep. 359, important cases on this subject, not citing the text.—Ed.)

Cross references.

“Contracts in violation of a statute or repugnant to the Common Law are void, etc.,—” See annotations, note and cross references under Guenther v. Dewein, (11 Iowa 13) Vol. 1, p. 786.

“Entire and severable contracts—Instances of”—See annotations under Dibol and Plank v. Minott (9 Iowa 403) Vol. 1, p. 596.

2. Equity Practice—Pleadings—Prayer for Relief—What Relief Granted.—In an action in equity the court cannot under a general prayer for relief, enter a decree or grant relief which has no proper basis in the facts set up in the petition, p. 120.

Reaffirmed and extended in In re Bruning's Estate, 122 Iowa 11, 96 N. W. 781, holding further that a prayer for relief does not take the place of a statement of facts; and that where a petition in equity fails to show facts sufficient to render the defendant liable, a decree entered against him on a prayer for relief, will be reversed on appeal.

(Note.—See further, Hines v. Horner, 86 Iowa 594, 53 N. W. 317; Kows v. Mowery, 57 Iowa 20, 10 N. W. 283; Massie v. Wilson, 16 Iowa 390; Blake v. Blake, 13 Iowa 40; Singleton v. Scott, 11 Iowa 589; Bartlett v. Gaines, 11 Iowa 95; Cooper v. Frederick, 4 G. Greene, 403, important cases not citing, but sustaining, explaining and extending the text, and there are many others.—Ed.)

BEVAN v. HAYDEN, SHERIFF, 13 IOWA 122

1. Exemption Statutes—Liberal Construction of.—Exemption laws will be liberally construed in favor of one claiming their benefits, p. 125.

Reaffirmed and extended in Davis, Watson & Co. v. Humphrey, 22 Iowa 140; Kaiser v. Seaton, sheriff, 62 Iowa 465, 466, 17 N. W. 665; Root v. Gay, 64 Iowa 400, 20 N. W. 490; Reynolds & Churchill v. Haines, 83 Iowa 343, 49 N. W. 852, 32 Am. St. Rep. 311, 13 L. R. A. 719; Morgan & Hunter v. Rountree, 88 Iowa 250, 55 N. W. 65, 45

Am. St. Rep. 234; *Roberts v. Parker*, 117 Iowa 390, 90 N. W. 744, 94 Am. St. Rep. 316, 57 L. R. A. 764, holding further that an exemption statute will be given, in favor of those claiming its benefit, a liberal construction such as will carry out its object and spirit.

(Note.—See further, sustaining and explaining, but not citing, the text, *Tyler v. Coulthard*, sheriff, 95 Iowa 705, 64 N. W. 681, 58 Am. St. Rep. 452; *Consolidated Tank Line Co. v. Hunt*, 83 Iowa 6, 48 N. W. 1057, 32 Am. St. Rep. 285, 12 L. R. A. 476; *Huskins, Bryson & Co. v. Hanlon*, 72 Iowa 37, 33 N. W. 352; *Mudge, Adm'r v. Lanning*, 68 Iowa 641, 27 N. W. 793; *Charless & Blow v. Lamberson*, 1 Iowa 435, 63 Am. Dec. 457.—Ed.)

Cross reference. See other rules hereof.

2. Exemptions—Team Purchased for Habitual Use in Earning a Livelihood.—Where one procures a team of horses, or a part of a team, intending to complete it, for the purpose of using it in good faith to earn a livelihood, it is exempt, regardless of whether it has been so used much or little, p. 125.

Reaffirmed and extended in *Baker v. Hayzlett*, 53 Iowa 20, 3 N. W. 798, holding further that one who uses a wagon for the purpose of paying his debts, is engaged in earning a livelihood; and such wagon is exempt: Holding further that the fact that a man has been engaged as a laborer but a day or two, or has not completed his arrangements for the future, does not deprive him of the right to claim exemptions as a laborer: That the moment a man begins to be a laborer, he is entitled to the exemptions provided by law.

Reaffirmed and extended in *Root v. Gay*, 64 Iowa 400, 20 N. W. 490, holding further that a liveryman who uses a team of horses and wagon or other vehicle, thereby habitually earning his livelihood, is entitled to claim the exemptions.

Reaffirmed and extended in *Roberts v. Parker*, 117 Iowa 390, 90 N. W. 744, 94 Am. St. Rep. 316, 57 L. R. A. 764, holding further that a bicycle used by a laborer in earning a livelihood, is exempt under the term "other vehicle" in sec. 4008 of the Code of 1897.

(Note.—See further, *Eq. L. Assurance Soc. of U. S. v. Goode*, 101 Iowa 160, 70 N. W. 114, 63 Am. St. Rep. 380, 35 L. R. A. 691; *Perkins v. Wisner*, 9 Iowa 320, important cases on analogy.—Ed.)

3. Exempt Property—Power of Debtor to Sell.—A debtor may sell his exempt property, and a creditor has no right to complain thereof, pp. 127, 128.

Reaffirmed and extended in *Waugh v. Bridgeford*, 69 Iowa 336, 337, 28 N. W. 626, holding further that under Sec. 3078 of the Code of 1873, when a debtor absconds and leaves his family, his wife has the right to sell or dispose of the exempt property, of which his creditors cannot complain.

Reaffirmed and extended in *Reynolds & Churchill v. Haines*, 83 Iowa 343-345, 49 N. W. 852, 32 Am. St. Rep. 311, 13 L. R. A. 719,

holding further that the owner of exempt property may insure it, and the proceeds of a loss under such insurance, is exempt.

(Note.—See further, *Brainard v. Simmons*, 67 Iowa 646, 25 N. W. 844; *Evans v. St. P. Harvester Works*, 63 Iowa 204, 18 N. W. 881.—Ed.)

Cross references. See further in this connection, Rules 1 and 2 hereof.

4. Witnesses—Competency—Replevin for Property Taken Under Attachment—Death of Attachment Plaintiff—Effect.—In an action of replevin against a sheriff for the recovery of personal property taken under an attachment, the plaintiff in replevin is not rendered incompetent as a witness (under Sec. 3982 of the Code of 1860) by reason of the death of the attachment plaintiff before the trial in replevin, p. 126.

Cited with approval in *Shafer v. Dean*, 29 Iowa 145, not in point.

5. Appeal—Review—Questions Not Raised or Excepted to Below.—Errors assigned on appeal which are based upon questions not raised, or excepted to, in the trial court will not be reviewed, p. 127.

Reaffirmed in *Heaton v. Fryberger*, 38 Iowa 207.

Reaffirmed and extended in *Todd v. Branner*, 30 Iowa 441, holding further that errors in instructions will not be considered on appeal, when not excepted to below, and specifically pointed out in the assignment of errors.

(Note.—See further sustaining, and explaining, but not citing, the text, *State v. Henry*, 59 Iowa 391, 13 N. W. 344; *State v. King*, 37 Iowa 462; *Morgan v. Webster County*, 15 Iowa 595 (abstract); *State v. Malling*, 11 Iowa 239; *State v. Groome*, 10 Iowa 308; *Western Stage Co. v. Walker*, 2 Iowa 504, 65 Am. Dec. 789, and there are many others.—Ed.)

Cross reference. "Appeal—Certainty required in assignment of errors"—See annotations under *Hawes v. Twogood* (12 Iowa 582), ante, p. 100.

COCHRAN *v.* MILLER, 13 IOWA 128.

1. Evidence—Examination of Witness—Leading Question—What Constitutes.—In order for a question to a witness to be subject to the objection that it is leading, it must be such as that the witness may fairly or reasonably conclude therefrom, what he is expected to answer, p. 130.

Reaffirmed and explained in *Woolheather v. Risley*, 38 Iowa 488, holding that a question to a witness which does not suggest the answer desired, or that an affirmative or negative answer is desired, is not leading; and that a question to a witness to "state whether or not, etc.," is not leading.

2. Malpractice—Action for—Vindictive Damages—When Recoverable.—In an action against a physician for gross negligence in the treatment of a patient's injured arm, the plaintiff may recover exemplary or vindictive, in addition to actual, damages, p. 131.

Reaffirmed and extended in Hendrickson v. Kingsbury, 21 Iowa 386, 390, 391, holding that punitive damages are allowable in all cases arising from the malicious or oppressive act of the defendant, or where an element of fraud is shown—Hence holding that plaintiff may recover punitive or exemplary, as well as actual, damages in an action for assault and battery.

BRANCH OF STATE BANK AT IOWA CITY v. MORRIS, 13 IOWA 136.

1. Attachment—Wrongful Suing out—Damages on Bond—When may be Pleaded in Principal Action.—Where an attachment bond is joint and several, the obligee—defendant in the attachment action—or one of them, if there are more than one, may plead damages for its wrongful suing out, as a counterclaim against one of the obligors therein (the plaintiff in the attachment action), pp. 138, 139.

Reaffirmed and extended in Town v. Bringolf, 47 Iowa 135, holding further (under Code of 1873) that a counterclaim is an answer, and a suit for damages on the attachment bond, interposed by the defendant in the main action, is a counterclaim.

Cited in Musselman v. Galligher, 32 Iowa 389, 390, holding that in an action against husband and wife, the husband cannot set up by way of cross demand, his claims for damages for malicious prosecution of his minor children and himself.

Impliedly overruled in Youngerman v. Long, 95 Iowa 187, 189, 63 N. W. 676, holding that defendant cannot plead damages for the wrongful and malicious suing out of the attachment, by counterclaim in the main action.

(Note.—See further, Tallant v. Burlington Gas Light Co., 36 Iowa 262.—Ed.)

Cross reference. See further, annotations and note under Reed v. Chubb Bros., Barrows & Co., (9 Iowa 178) Vol. 1, p. 559.

2. Attachment Action—Substitution of New Bond in—Effect.—Where in an attachment action a new bond is substituted for the one originally filed at the commencement thereof, it takes the place of the first bond, and will be treated as if filed at the time the first was filed, p. 139.

Reaffirmed and extended in Griffith v. Milwaukee Harvester Co., 92 Iowa 638, 61 N. W. 245, 54 Am. St. Rep. 573, holding further that a sufficient bond may be given in lieu of a defective one; and that until objection is made and reasonable opportunity given to perfect proceedings in which there are curable defects, they will be treated as valid.

Cited with approval in Scott v. Frank, 121 Iowa 223, 96 N. W. 765, holding that where an amended pleading only sets up additional facts in support of a cause of action, it is proper, and in such case it relates to the time of the filing of the original pleading which it amends.

(Note.—See further, sustaining and explaining, but not citing, the text, Hamble v. Owen, 20 Iowa 70; State v. Foster, 10 Iowa 435; Hamill, Ralston & Co. v. Phenicie, 9 Iowa 525; Van Winkle v. Stevens & Co., 9 Iowa 264; Churchill v. Fulliam, 8 Iowa 45.—Ed.)

STATE EX REL. VAN HOUTEN v. COUNTY JUDGE OF HARDIN COUNTY,
13 IOWA 139.

1. County Seats—Election for Location—Mandamus to Compel Re-canvass of Votes—Collateral Attack of Mandamus Judgment.—The district court has power to compel the board of canvassers by mandamus, to re-canvass the votes cast at an election to fix the location of a county seat; and a judgment in such mandamus proceeding is binding until vacated, modified, or reversed, and cannot be attacked collaterally, p. 145.

Reaffirmed in Moore v. Parker, 25 Iowa 362, 363, holding that in an action to set aside a judgment in a mandamus proceeding on the ground that it was procured by fraud, which fraud is denied by the defendants, the burden of proof as to such fraud, is on the plaintiff.

Reaffirmed and extended in Brown v. Crego, treasurer, 32 Iowa 501, holding further that mandamus lies to compel a county officer to discharge a duty imposed on him by law.

Reaffirmed and extended in Rummel v. Dealy, et al, board of supervisors, 112 Iowa 508, 84 N. W. 527, holding further that where the judges of election fail to properly and fully certify the returns of an election for certain townships, and before the votes for such election are counted, appear before the board of supervisors and ask leave to make such certificate which is refused, that mandamus lies to compel such board to permit such certification and to re-canvass the returns of the election and count the votes of such townships.

(Note.—See further specially, Price and Wait v. Harned, 1 Iowa 473.—Ed.)

Cross references. See further specially, annotations and note under Rice v. Smith, county judge, and Dishon, (9 Iowa 570); and State ex rel. Rice v. Smith, county judge, (9 Iowa 334) Vol. 1, pp. 630 and 586.

GOWER v. HOLLOWAY, 13 IOWA 154.

1. Contracts—Novation—Discharge or Payment of Indebtedness by New Note, etc.—Release of Surety on Original Debt.—The general rule is, that the giving of a bill of exchange, or a promissory note for goods sold, or for an existing contract, is not to be regarded as payment of the indebtedness, unless there is an express agreement to that effect.

But where a new note or contract is made by the debtor and creditor in satisfaction of a prior one without the consent of the surety on the former, such surety is released, p. 156.

Reaffirmed in Edwards & Beardsley v. Trulock, 37 Iowa 249; Farwell v. Grier, 38 Iowa 87; Bank of Monroe v. Gifford, 79 Iowa 308, 44 N. W. 561.

Reaffirmed in Farwell & Co. v. Salpaugh, 32 Iowa 585, holding that where a creditor accepts an order on a third person in payment of his debt, it extinguishes it, upon the order being accepted by the third person.

Reaffirmed and explained in Hughes v. McDaniel, 33 Iowa 409; Hunt & Co. v. Higman, 70 Iowa 410, 30 N. W. 771, holding that the transfer of a note or bill of a third party on account of an existing debt, in the absence of an agreement that it shall be taken in absolute payment, operates only as a conditional payment, and does not defeat recovery upon the original indebtedness in case of non-payment of the transferred paper.

Reaffirmed and explained in Shadbolt & Boyd v. Shaw, 40 Iowa 586, holding that a promissory note given upon an existing indebtedness will not operate as a payment thereof, unless there is a special agreement to that effect, or it is received in satisfaction.

Reaffirmed and extended in Dean, Adm'r, v. Ridgeway, 82 Iowa 759 (abstract), 48 N. W. 924, holding further that a note given for interest does not operate in payment thereof, in the absence of an agreement to that effect.

Reaffirmed and extended in Dille v. White, 132 Iowa 342, 109 N. W. 915, 10 L. R. A. (New Series) 510, holding further that payment by check is dependent upon it being duly honored and cashed, in the absence of an express agreement that it is accepted in satisfaction of the debt: That where a party borrows money executing a mortgage to secure the loan, and accepts checks therefor, that upon their being dishonored, equity will cancel the contract and place the parties in *statu quo*.

(Note.—See further, Iowa County v. Foster, 49 Iowa 676; Port v. Robbins, 35 Iowa 208; Carlin & Harney v. Heller, 34 Iowa 256; McLaren v. Hall, 26 Iowa 297; Kephart v. Butcher, 17 Iowa 240, important cases sustaining and explaining, but not citing, the text.—ED.)

Cross reference. See further, annotations under Graydon et al v. Patterson et al (13 Iowa 256) *Infra*, p. 146.

WILKINSON v. GETTY, 13 IOWA 157, 81 AM. DEC. 428.

1. Husband and Wife—Deed by—Power of Attorney to Execute for Both—Agent Signing for Husband only—Effect—Dower.—Where a husband and wife execute a power of attorney empowering another to sell and convey real estate of the husband, and the agent only signs the name of the husband to the deed and acknowledges it

for him, such deed does not divest the wife of dower in the property conveyed: The non-execution of a power of attorney, in such a case, cannot be aided by proof of an intention to execute, and is not a subject of equitable relief, pp. 158, 159.

Reaffirmed and extended in Heaton v. Fryberger, 38 Iowa 201, holding further that strict compliance with the statute is necessary in order to pass the interest of the wife; and that a mistake in the manner of the execution or acknowledgment of a deed by a wife cannot be corrected in equity: Such a failure amounts to *no execution*.

Cited in Simms v. Hervey, 19 Iowa 286, holding that the joining of the wife with her husband in a conveyance of real estate passes any and all her rights: That a deed, or mortgage, of land intended to circulate or float in business channels and when it finds an owner to have the grantors' name inserted in the absence of the grantor (in this case a wife) is not effective as a conveyance without authority in writing for the insertion of such name, though the transaction may, in certain cases, give equitable right; but no equity will exist in favor of the owner of such an instrument, when the grantor (in this case a wife) therein receives and retains no benefits therefrom, and does not ratify the negotiation of the instrument and the filling in of the blank.

Cross references. See further as to necessity of joinder of wife, in deed of husband, deeds of married women, etc., annotations under Rules 2 and 3 of Grapengether v. Fejervary (9 Iowa 163); Alley v. Bay (9 Iowa 509), Vol. I, pp. 557, and 615.

WHEELHOUSE v. BRYANT, 13 IOWA 160

1. Decedent's Estate—Administrators—Concurrent Jurisdiction of County and District Courts.—The probate court has jurisdiction to compel compliance with its orders by administrators in reference to the failure to pay money as directed; but the probate court's jurisdiction is not exclusive over the delinquencies of an administrator; and an action against an administrator and sureties on his bond, may be maintained in the district court, pp. 162, 163.

Reaffirmed and extended in Waples v. Marsh, 19 Iowa 384, 386, holding further that the statute does not give exclusive jurisdiction to the county court of all matters connected with the settlement of estates of decedents; and that an action in equity in the district court may be maintained by creditors of a decedent to compel the administrator to sell the real estate for the satisfaction of their claims.

Reaffirmed and extended in Clark v. Cress, 20 Iowa 55, holding further that after an action on an administrator's bond for money due an heir is commenced in the district court, the administrator cannot make a settlement in the county court and thereby oust the district court of its jurisdiction.

Cross reference. See further in this connection, annotations under Rule 2 of Long v. Burnett (13 Iowa 28), ante. p. 113.

PERRY v. KEARNS, 13 IOWA 174.

1. Usury—Who Can Interpose Plea.—No one can interpose a plea of usury except a party to the usurious contract, p. 175.

Reaffirmed in Greither v. Alexander, 15 Iowa 475; Allison & Crane v. King, 25 Iowa 58; Carmichael v. Bodfish, 32 Iowa 419, 420; Green v. Turner, 38 Iowa 115, 116; Bacon v. Iowa Sav. & L. Ass'n, 121 Iowa 450, 96 N. W. 977.

Cross reference. See further sustaining text, annotations under Hollingsworth v. Swickard (10 Iowa 385) Vol. 1, p. 709.

DARLINGTON v. EFFEY, 13 IOWA 177.

1. Mortgages—Action for Foreclosure of Mortgage where Mortgagor is Dead—Parties—Administrator of Decedent.—In an action to foreclose a mortgage, the administrator of a deceased mortgagor is a proper, if not a necessary party; and in such an action such personal representative may be made a party on his own motion, and enter a defense thereto, p. 179.

Reaffirmed in Huston v. Stringham, Adm'r, 21 Iowa 42.

Reaffirmed and extended in McClure, trustee, v. Dee, and Power, trustee, 115 Iowa 553, 88 N. W. 1095, 91 Am. St. Rep. 181, holding further that in an action for damages for breach of covenants in a deed, that a trustee under the will of the grantor (decedent) who has any interest or title in the estate thereunder, is a proper party.

(Note.—See further, Tucker v. Silver, 9 Iowa 261.—Ed.)

Cross references. See further on analogy, annotations under Rankin v. Major (9 Iowa 297); Sangster v. Love (11 Iowa 580) Vol. 1, pp. 578, and 863.

WILSON & GUSTIN v. JEFFERSON COUNTY, 13 IOWA 181.

1. Bridges—Liability of County for Damages Resulting from Negligently Failing to Build, Maintain, and Repair.—It is the duty of the county under the statute to build, maintain and repair bridges, when the expenditure necessary therefor is large; and where in such a case a county negligently fails to so repair, etc., it is liable in damages for injuries resulting therefrom, pp. 184, 185.

Reaffirmed in Huston v. Iowa County, 43 Iowa 458, 459; Krause v. Davis County, 44 Iowa 142; Cooper, Adm'r v. Mills County, 69 Iowa 352, 353, 28 N. W. 634; Roby v. Appanoose County, 63 Iowa 115, 18 N. W. 712.

Reaffirmed and extended in Moreland v. Mitchell County, 40 Iowa 396-398, holding further that a county is liable in damages for injuries resulting from its failure to erect railings or barriers on the sides of approaches to a bridge: Holding further that where a horse takes fright, and by reason of the absence of such railings or barriers throws and injures its rider, the county is liable in damages therefor.

Reaffirmed and qualified in Davis v. Allamakee County, 40 Iowa 217; Roby v. Appanoose County, 63 Iowa 115, 18 N. W. 712, holding that where a bridge when built is safe, and it afterwards becomes defective, the county is not liable in damages for injuries resulting therefrom until notice thereof to its agents, and a failure to repair within a reasonable time thereafter: Unless such defect be notorious and of long continuance, in which case the county is liable without such notice.

Reaffirmed and narrowed in McCullom v. Black Hawk County, 21 Iowa 414, 415, holding that a city of the second class is liable in damages for injuries resulting by reason of a defective bridge over a non-navigable stream within its limits; that as the Code (of 1860) in such case gives the city control over and charges it with the duty of repairing such bridges, the county is not liable.

Reaffirmed and narrowed in Chandler v. Fremont County, 42 Iowa 59, holding that a county is not liable in damages for injuries resulting from defects in a small bridge requiring no extraordinary expenditure of money to erect, and which it is the duty of a road district to erect and keep in repair; and that a bridge which costs only seventy-five dollars is such an one.

Cited with approval in McCord v. High, 24 Iowa 350, (concurring opinion) the court holding that a road supervisor is liable in damages for diverting a channel of a stream in constructing a small bridge or culvert not built by the county officers or authorities or under their direction.

Cited in Soper v. Henry County, 26 Iowa 269, holding that a county is not liable in damages for injuries to a person occasioned by the defective condition of a culvert over a small ditch or ravine on a highway.

Cited in Green v. Harrison County, 61 Iowa 311, 16 N. W. 136, holding that a county is not liable in damages for negligence in permitting sediment to accumulate in a public ditch, which thereby causes it to overflow.

Cited in Nutt v. Mills County, 61 Iowa 754, (abstract) 16 N. W. 536, holding that a county is not liable in damages by reason of the negligent construction of a public ditch, thereby causing it to overflow.

Cited in Wilson v. Wapello County, 129 Iowa 84, 105 N. W. 366, holding that a county is not liable in damages for the death of a person resulting from a team of horses becoming frightened when nearing a bridge, when not on the approach thereto at the time.

Cited in Collins v. City of Council Bluffs, 32 Iowa 327, 7 Am. Rep. 200, on the liability of a city for injuries resulting from accumulation of ice and snow on its streets.

Cited and doubted in Kincaid v. Hardin County, 53 Iowa 433, 5 N. W. 591, 36 Am. Rep. 236, holding that a county is not liable in damages for injuries resulting from a defective, or improperly constructed court-house.

Cited and doubted in Packard v. Voltz, Ray and Butler County, 94 Iowa 279, 62 N. W. 758, 58 Am. St. Rep. 396, holding that a county is not liable in damages resulting from a defectively constructed drain across a highway.

Distinguished in Leonard v. Wakeman, 120 Iowa 143, 94 N. W. 281, holding that mandamus does not lie to compel the board of supervisors to repair a bridge, or to build a new one in lieu thereof, although the road on which it is situated is impassable until it is so repaired, or built.

(Note.—See further specially on this question, Lahner v. Inc. Town of Williams, 112 Iowa 428, 84 N. W. 507; Miller v. Boone County, 95 Iowa 5, 63 N. W. 351; Lindley v. Polk County, 84 Iowa 308, 50 N. W. 975; Long v. Boone County, 32 Iowa 181, and 36 Iowa 60; Kendall v. Lucas County, 26 Iowa 395; Barrett v. Brooks, 21 Iowa 144; Bell v. Foutch, 21 Iowa 119; Brown v. Jefferson County, 16 Iowa 339.—ED.)

BROWN v. BEESSETT, 13 IOWA 185.

1. Appeal From Justice's to District Court—Time and Manner of Taking.—An appeal from a judgment of a justice's court must be perfected within twenty days after its rendition. An appeal is not perfected until a bond is filed, and the sureties approved. So, when the date of an appeal bond, and an amended transcript of the justice rendering the judgment shows that the bond was filed more than twenty days after the rendition of the judgment appealed, it is not taken in time, and the appeal will be dismissed, p. 187.

Reaffirmed in Hahn v. Lumpa, 131 Iowa 723, 109 N. W. 310, in a case involving an appeal from an order of fence viewers.

(Note.—See further, McKeever v. Horine, 12 Iowa 227; Martin & Sellers v. Crocker, 62 Iowa 328, 17 N. W. 533.—ED.)

GRAY v. EARL, 13 IOWA 188.

1. Replevin—Evidence—Title of Plaintiff Obtained by Fraud—When Inadmissible to Prove.—In an action of replevin the defendant must (under Code of 1851) specially plead that the plaintiff obtained his title or right to the possession of the personal property involved, by fraud, before he will be allowed to prove and rely on such fact as a defense, p. 190.

Reaffirmed in Root v. Schaffner, 39 Iowa 377.

Cited in McCready v. Sexton & Son, 29 Iowa 403, 4 Am. Rep. 214, not in point.

Cited in Phillips v. Blair, 38 Iowa 651, not in point.

NEWELL v. SANFORD, 13 IOWA 191.

1. Landlord and Tenant—Tenant at Will—What Constitutes—Tenant Holding over After Expiration of Term—Effect.—Where a tenant takes possession of land under a lease having no agreement as

to time and price, the landlord may recover a 'fair consideration for the use and occupation: If after the tenant so takes possession, the landlord serves him with notice requiring him to quit possession within three months, but thereafter permits him to hold over, such tenant is a tenant at will, and the service of the notice does not affect the relation.

Where a tenant holds over after the expiration of his term, and the lessor (landlord) receives rent or otherwise recognizes him as a tenant, but there is no new agreement, the law implies that the tenant holds from year to year at the first rent, pp. 193, 194.

Reaffirmed and extended in Whalen v. Leisy Brewing Co., 106 Iowa 549, 550, 76 N. W. 842, holding further that where after the expiration of the term of a lease, the parties thereto verbally agree that the lessee may occupy the leased premises, such agreement operates as a renewal of the written lease and of all its terms and conditions so far as is applicable.

Reaffirmed and extended in Kennedy Bros. v. Iowa State Ins. Co., 119 Iowa 35, 36, 91 N. W. 833, holding further that where after the expiration of a lease, the assignee of the lessee holds possession of the leased premises without any new agreement therefor, he is bound by the terms of the original lease.

VENNUM v. BABCOCK, 13 IOWA 194.

1. Deed Absolute on its Face But in Fact a Mortgage—Contract to Reconvey as Part—Failure to Comply With Conditions by Grantee—Cancellation of Reconveyance Contract—Effect.—Where as security for a loan a party executes a deed to certain land, which is absolute on its face, the grantee at the same time executing and delivering a contract to reconvey in case the grantor pays the money loaned and interest at the time mentioned therein, time being made of the essence of the contract by the parties, and the grantor in such absolute deed upon the expiration of the stated period fails to so pay, but delivers up the contract to reconvey to be canceled, such deed thereupon vests the absolute title to such land in the grantee (mortgagee), pp. 196, 197.

Reaffirmed and extended in Baxter v. Pritchard, 122 Iowa 591, 98 N. W. 373, 101 Am. St. Rep. 282, holding further that a grantor in a deed absolute on its face, but given to secure a debt, may by parol surrender his right of redemption and the possession of the land conveyed, in which case the absolute title thereto vests in the grantee.

Reaffirmed and extended in Thompson v. People's B. L. & Inv. Co., 114 Iowa 485, 486, 87 N. W. 439, holding further that a deed with a defeasance is in effect only a mortgage, and that the grantor may recover any sum paid by mistake more than the debt it is given to secure.

Reaffirmed and narrowed in Haggerty v. Brower, 105 Iowa 400, 75 N. W. 323, holding that the delivering up for cancellation of a con-

tract to reconvey (or notes for which a deed absolute on its face is given to secure) does not deprive the wife of the grantor to homestead in the land conveyed by the deed which is in fact a mortgage.

Cited with approval in Caruthers v. Hunt, 18 Iowa 579 (abstract), a case wherein the title bond to reconvey upon the payment of a debt secured by a deed absolute on its face was not surrendered, the grantor agreed with the grantee that the latter might take possession of the land; that he (the grantor) "gave up all;" the evidence further showing the grantor to be of unsound mind, and the court holding that such agreement did not change the deed from a mortgage to an absolute title.

Unreported citation, 23 N. W. 286.

(Note.—See further, McClure v. Braniff, 75 Iowa 38, 39 N. W. 171; Richards v. Crawford, 50 Iowa 494; Burdick v. Wentworth, 42 Iowa 440; Chase v. Abbott, 20 Iowa 154, important cases not citing, but sustaining and analogous to the text.—Ed.)

NILES v. SPRAGUE, 13 IOWA 198.

1. Trial—Suggestion by Court to Jury as to Former Trials and Importance of Agreement—When not Error.—Where, after passing upon the instructions asked by the parties, the trial court tells the jury that the case has been twice tried, and that it is important that they agree, if they can satisfy their minds as to the rights of the parties, such suggestion is not reversible error, p. 203.

Reaffirmed and extended in German Sav. Bank v. Citizens' Nat'l Bank, 101 Iowa 547, 548, 70 N. W. 774, 63 Am. St. Rep. 399, holding further that where a jury has deliberated for about twenty-two hours and the foreman reports that they are unable to agree upon a verdict, it is not error for the court to say to them (before causing them to retire and further consider their verdict) that "this case is submitted to you for decision, and not for disagreement. I think I will let you give it a further trial."

Reaffirmed and extended in Delmonico Hotel Co. v. Smith, 112 Iowa 663, 664, 84 N. W. 908, holding further that it is not error for the trial court after a jury has been deliberating for more than thirty-six hours and have failed to agree upon a verdict, to give them an additional instruction in effect, that, the case must be determined by some jury, and upon the same pleadings and evidence; that a disagreement will simply add to the burden of the successful party; and they (the jury) will again retire for deliberation, and try to arrive at a verdict.

Reaffirmed and extended in State v. Richardson, 137 Iowa 594, 595, 115 N. W. 222, holding further that after the jury have been deliberating seventeen hours and have failed to agree, it is not error for the trial court to instruct them in effect that, the law requires an unanimous verdict; that such verdict must be the conclusion of each juror and not a mere acquiescence in that of other jurors; but that to

reach an agreement it is necessary for all the jurors to examine the issue submitted to them with candor and a proper regard and deference to the opinion of the others; that a proper regard for the judgment of other men will greatly aid us in forming our own; that every juror should listen to the arguments of other jurors with a disposition to be convinced by them, and if any of the jury differ in their views of the evidence from a larger number of their fellow jurors, such difference of opinion should induce the minority to doubt the correctness of their own judgments, and cause them to scrutinize the evidence more closely and to re-examine the grounds of their opinion; that it is the duty of the jury to decide the issues of fact submitted, if they can conscientiously so do; and that in conferring together they should bear in mind that the jury room is no place for pride of opinion, nor for espousing and maintaining in a spirit of controversy either side of a cause.

(Note.—See further, *State v. Tripp*, 113 Iowa 698, 84 N. W. 546; *State v. Hale*, 91 Iowa 367, 59 N. W. 281; *Frandsen v. C. R. I. & P. R. Co.*, 36 Iowa 372, important cases sustaining, explaining and extending, but not citing, the text.—Ed.)

Cross reference. See further as to misconduct of trial court, annotations under *Russ v. Steamboat War Eagle* (9 Iowa 374), Vol. I. p. 592.

2. Children—Illegitimacy—Evidence—Declarations of Father and Mother—When Competent and When Incompetent to Prove.—The declarations of a husband or wife cannot be received to bastardize a child begotten or born during wedlock. But declarations of a putative father or mother made about or after the birth of a child, are competent to prove that no lawful marriage existed, pp. 207, 208.

Reaffirmed and extended in *Watson v. Richardson*, 110 Iowa 678, 80 N. W. 409, holding further that declarations of a putative father referring to a child as his son are admissible to prove a general and notorious recognition by him of his bastard son, such as will allow the latter to inherit (under the statute) from such father.

SIBLEY v. VAN HORN, 13 IOWA 209.

1. Negotiable Instruments—Indorsement in Blank by One Not a Payee or Assignee—Necessity for Demand on and Refusal to Pay by Maker, etc.—Where one, not a payee or assignee, indorses a negotiable promissory note in blank, he is liable as guarantor thereon, without allegation or proof of demand on and refusal to pay by the maker, and reasonable notice thereof, when the allegation, in an action thereon against such indorser, is made and the proof shows that he was not thereby injured, pp. 209, 210.

Unreported citation, 86 N. W. 274.

Cross reference. See further, annotations, note and cross references under *Marvin v. Adamson* (11 Iowa 371) Vol. I, p. 828.

LE CLAIRE *v.* CITY OF DAVENPORT, 13 IOWA 210

1. **Cities and Towns—Public Markets—Regulation of By—Granting Right to Build.**—A city has power to grant authority to an individual to erect a public market house, may regulate the use and management thereof, the rate to be charged for rent of stalls and rooms therein, and may protect the owner of such house in the exclusive privilege to own and operate it, pp. 212, 214.

Reaffirmed and extended in State *v.* Smith, 123 Iowa 655, 96 N. W. 899, holding further a city has power to pass an ordinance establishing and regulating a city market, and that this power carries with it the power to prohibit the sale or weighing of commodities elsewhere than at such market: That a public market partially obstructing a street is not a nuisance *per se*.

Reaffirmed and varied in City of Dubuque *v.* Stout, 32 Iowa 84, 7 Am. Rep. 171, holding that where a charter of a city gives the city power and makes it its duty to establish wharves, docks, and landings, to fix the rate of wharfage and to regulate the stationary anchorage and moorings of all boats and rafts, it confers the power for the city to fix the location and limits of the wharves and landings, and to prohibit the use of any other place for such purpose.

(Note.—See further, Pettit *v.* Grand Junction, 119 Iowa 352, 93 N. W. 381; Miller *v.* City of Webster, 94 Iowa 162, 62 N. W. 648; Inc. Town of Spencer *v.* Andrew & McQueen, 82 Iowa 14, 47 N. W. 1007; Davis *v.* Town of Anita, 73 Iowa 325, 35 N. W. 244, important cases not citing, but sustaining, qualifying and analogous to the text.—ED.)

BATES *v.* KEMP, 13 IOWA 223.

1. **Promissory Notes—Indorsement After Maturity—Defenses in Action by Indorser.**—Where a promissory note is transferred by indorsement after its maturity, the indorsee takes it subject to any defenses existing at the time of the transfer, but not subject to those arising subsequently, p. 227.

Cited with approval in Zebley *v.* Sears, 38 Iowa 510, not in point.

Cross reference. See further specially, annotations under Shippman *v.* Robbins, (10 Iowa 208) Vol. I, p. 669.

DAVENPORT GAS LIGHT & COKE CO. *v.* CITY OF DAVENPORT, 13 IOWA 229.

(Later Appeal, 15 Iowa 6.)

1. **Trial—Selection of Jury—Challenges.**—In the formation of a jury the parties are required to alternate in challenges, the plaintiff first and the defendant afterward, until both have completed, or exhausted, their challenges, p. 232.

Cited in Fountain v. West, 23 Iowa 13, 92 Am. Dec. 405, holding that where in the selection of a jury to try a civil action, the plaintiff accepts the jury, whereupon the defendant peremptorily challenges a juror, that upon the panel being refilled, it is not error for the court to permit the plaintiff to peremptorily challenge a juror on the panel at the time he accepted the jury.

Distinguished and narrowed in State v. Bowers, 17 Iowa 49, holding that (under Chap. 10 Acts of 1864), in the selection of a jury to try an indictment, the State must entirely complete its challenges before the accused is required to exercise his right.

2. Trial—Challenge of Juror for Interest or Bias—Discretion of Trial Court—Abuse of.—If in the selection of a jury the court in the exercise of a sound discretion, is brought to the conclusion that a juror will not act with entire impartiality, a challenge to such juror should be sustained. In such a case the ruling of the trial court will not be cause for reversal, except where his discretion has been abused.

So, in an action between a city and another, it is not an abuse of discretion for the trial court to sustain a challenge, for cause, to a juror who is a citizen and taxpayer of the city, p. 231.

Reaffirmed and extended in Anson v. Dwight, 18 Iowa 243, holding further that where, in an action for the recovery of damages for sheep killed by dogs, a juror is asked if he has any bias or prejudice about the matter of dogs killing sheep, such as will prevent him from trying the case impartially, and answers that he has, that it is proper for the court to sustain a challenge to him for cause.

Reaffirmed and extended in Dively v. City of Cedar Rapids, 21 Iowa 567, holding further that in an action between a city and another, it is proper for the trial court to sustain a challenge to a juror who is a citizen and taxpayer of the city, and, upon the panel being exhausted, to direct the sheriff to summon talesmen who are not such citizens and taxpayers.

Reaffirmed and narrowed in Hollenbeck v. City of Marshalltown, 62 Iowa 23, 17 N. W. 156, holding that in an action between a city and another, citizens of the former who are not tax payers thereof are not disqualified as jurors by reason of citizenship.

Reaffirmed and narrowed in Johnson v. City of Waterloo, 140 Iowa 671, 119 N. W. 71, holding that in an action to sever agricultural lands from a city, citizens and taxpayers of the city are qualified jurors (the land being exempt from municipal taxation).

Distinguished and narrowed in Wilson v. Wapello County, 129 Iowa 79, 80, 105 N. W. 364, holding that in an action against a county the plaintiff cannot challenge jurors because of their being taxpayers; that in such case the plaintiff's remedy is by a change of venue to an adjoining county.

(Note.—See further, State v. John, 124 Iowa 230, 100 N. W. 193; Haggard v. Petterson, 107 Iowa 417, 78 N. W. 53; Geiger v.

Payne, 102 Iowa 581, 69 N. W. 554, and 71 N. W. 571; Cason v. City of Ottumwa, 102 Iowa 99, 71 N. W. 192; Kendall v. City of Albia, 73 Iowa 241, 34 N. W. 833; Wisehart v. Dietz, 67 Iowa 121, 24 N. W. 752; McGinty v. City of Keokuk, 66 Iowa 725, 24 N. W. 506; Cramer v. City of Burlington, 42 Iowa 315, important cases not citing, but sustaining, explaining and qualifying the text.—Ed.)

Cross references.

"Trial—Challenge to jury for bias"—See further annotations under Rule 2 of State v. Sater (8 Iowa 420); Rule 1 of State v. Thompson (9 Iowa 188); Rules 1 and 2 of State v. Gillick (10 Iowa 98); State v. Howard and Cress (10 Iowa 101), Vol. 1, pp. 523, 560, 649 and 650, respectively.

3. Demurrer — Waiver of Ruling on By Answering Over.—

Where a demurrer is sustained to defendant's answer and he thereupon files a further answer covering the same ground of his first answer, and issue is joined and trial is had on the latter, he thereby waives any error in the ruling of the trial court on the demurrer, p. 232.

Cited in Childs v. Griswold, 15 Iowa 440, holding that where allegations in a pleading are insufficient to constitute a cause of action or defense, it should be reached by demurrer and not by motion to strike.

Cross reference.

"Pleadings—Demurrer—Effect"—See further annotations, note and cross references under Eubank v. Whittaker (11 Iowa 197) Vol. 1, p. 802.

4. Municipal Indebtedness—Constitutional Limitation On—Contracts Before It Went Into Effect.—The constitutional limitation on the right of municipal corporations to incur indebtedness (provided by sec. 3, article 11, of the Constitution of 1857) does not affect the liability of a city under a contract entered into before the Constitution went into effect, p. 233.

Cited with approval in Dively v. City of Cedar Falls, 27 Iowa 233, holding that where a city has money in its treasury to pay its debts, that a contract creating an indebtedness above the constitutional prohibition is valid: That where a city contracts for an indebtedness to be paid in installments for a certain number of years, the indebtedness of the city is to be estimated as the amount to be paid each year, and not the whole amount of the debt.

5. Trial—Instructions—Exceptions to Those Given and Refused—Certainty Required—Review on Appeal.—Where on appeal it appears from the bill of exceptions that to the refusal of a certain number of instructions the defendant excepted, they will be reviewed.

Where such record shows that the charge of the trial court to the jury is voluminous, and the defendant excepted "to the giving of

each of the instructions," the errors in such charge will not (under the Code of 1860) be cause for reversal, where any part thereof is correct. In the last case the exception should definitely point out the particular part or parts of the charge relied on as error, pp. 236-238.

Reaffirmed in Loomis, Conger & Co. v. Simpson, 13 Iowa 533; Cousins v. Westcott, 15 Iowa 255; Jack v. Naber, 15 Iowa 452; Lyons v. Thompson, 16 Iowa 66; Brown v. Jefferson County, 16 Iowa 343; Spray v. Scott, 20 Iowa 473; Redman & Fear v. Malvin & Cloud, 23 Iowa 297; Carpenter v. Parker, 23 Iowa 452; McCaleb v. Smith, 24 Iowa 591, 592 (abstract); Little v. Martin, 28 Iowa 559; Brown v. Scott County, 36 Iowa 141; Cook v. Sioux City & Pac. R. R. Co., 37 Iowa 428; Rowen v. Sommers, 101 Iowa 735, 736, 66 N. W. 896, all holding that general exceptions to the instructions, or to the charge of the court given to the jury, when some of them, or some part thereof, are or is correct, will not authorize the appellate court to review specific errors therein.

Reaffirmed in Williamson v. C. R. I. & P. R. R. Co., 53 Iowa 143, 4 N. W. 885, 36 Am. Rep. 206; Harvey v. Tama County, 53 Iowa 232, 5 N. W. 232, holding that a general exception to the refusal of the court to give instructions asked, is sufficient; and that where an exception is taken at the time of such refusal, reasons therefor need not be stated, (as provided by Sec. 2787 of the Code of 1873)—And see Hawes v. B. C. R. & N. Ry. Co., below.

Reaffirmed and qualified in Eddy v. Howard, 23 Iowa 184, holding that where only one proposition is submitted to the jury, and it is misstated, an exception to the charge as a whole, is sufficient.

Cited with approval in Wilhelmi v. Leonard, 13 Iowa 336, the court holding the rule inapplicable to an action commenced prior to the taking effect of the Code of 1860.

Cited in Sherwood v. Snow, Foote & Co., 46 Iowa 482, 26 Am. Rep. 155, on the question of the requisite certainty in an assignment of errors.

Cited in Miller v. Gardner, 49 Iowa 236, a case turning on the fact that a motion for a new trial (under the Code of 1873) did not definitely specify the grounds of objections to instructions given to the jury.

Cited erroneously in Bartle v. City of Des Moines, 38 Iowa 416, the case turning on other questions.

Distinguished and narrowed in Hawes v. B. C. R. & N. Ry. Co., 64 Iowa 316-318, 20 N. W. 717, holding that where (under the Code of 1873) the charge of the court to the jury is in numbered paragraphs, and the party complaining excepts at the time it is given "to the giving of such instructions as given," such exception is sufficient to authorize a review on appeal of any errors in such charge: That where exceptions are taken at the time such charge is given no reasons therefor are required.

(Note.—See further, *Mann v. S. C. & P. R. R. Co.*, 46 Iowa 637.—Ed.)

Cross reference. See further in this connection, annotations under *Hawes v. Twogood* (12 Iowa 582) ante. p. 100.

DENEGRE v. HAUN, 13 IOWA 240.

(Later Appeal, 14 Iowa 240, 81 Am. Dec. 480.)

1. Judgment Liens on Real Estate—To What Interest Attaches.—Judgments are liens upon all real estate owned by the defendant, whether such interest appears of record or otherwise (under the Code of 1851), p. 243.

Reaffirmed and extended in *Lathrop v. Brown*, 23 Iowa 49, holding that a judgment is a lien upon all interests, legal or equitable, of the judgment debtor in real estate: That a judgment creditor whose judgment is first rendered has a superior lien to a subsequent judgment creditor.

Reaffirmed and extended in *Rand & Co. v. Garner*, 75 Iowa 313, 39 N. W. 516, holding further that the lien of a judgment creditor on the land of the judgment debtor is superior to that of a subsequent mortgagee of the latter.

Cross references. See further sustaining and explaining text, annotations under Rules 1, 2 and 5 of *Cook & Sargent v. Dillon* (9 Iowa 407), Vol. I, p. 598; *Norton, Jewett & Busby v. Williams* (9 Iowa 528), Vol. I, p. 620.

2. Judgment Liens—Limitation of—Revivor—Scire Facias—Remedies of Judgment Creditor.—The lien of a judgment continues ten years from the date of its rendition, but the right to enforce it by execution exists only five years, unless such right is revived by *scire facias*. But where more than five years have elapsed after the rendition of a judgment (but not ten years) and it has not been revived by *scire facias*, the judgment creditor may then so revive the writ, or may bring an action of debt upon the judgment, pp. 243, 244.

Reaffirmed in *Meek v. Meek*, 45 Iowa 296; *Lakin, Adm'r, v. McCormick & Bro.*, 81 Iowa 548, 46 N. W. 1062.

Reaffirmed and explained in *Bertram v. Waterman*, 18 Iowa 531, holding that where a judgment creditor obtains a judgment in a later action for the amount of such former judgment, the latter judgment discharges and extinguishes the lien of the former.

Reaffirmed and narrowed in *Hansen's Empire Fur Factory v. Teabout*, 104 Iowa 369, 73 N. W. 877, holding that a judgment lien ceases ten years from the date of rendition, and cannot thereafter be revived by execution upon *scire facias*; that it must be so revived within the ten years.

Unreported citation, 123 N. W. 200.

(Note.—See further, *Albee v. Curtis & Morey*, 77 Iowa 644, 42 N. W. 508; *Boyle v. Maroney*, 73 Iowa 70, 35 N. W. 145, 5 Am. St. Rep. 657; *Hendershott v. Ping*, 24 Iowa 134; *Postlewait & Creagan and Keeler v. Howes*, 3 Iowa 365, important cases on this question, not citing the text.—Ed.)

VANDALL v. VANDALL, 13 IOWA 247.

1. Appeal—Certainty of Record Required On—Certification of Evidence of Trial.—The transcript on appeal must purport to contain the evidence on the trial below, or errors of evidence will not be reviewed. A transcript of evidence not attached to that of the cause, nor certified as containing the testimony adduced, is insufficient, p. 249.

Reaffirmed and extended in *Lyons v. Thompson*, 16 Iowa 65, holding further that a writing, and in fact, any evidence on which a reversal is sought, should be copied at length in the bill of exceptions; but that in any case it (the writing or other evidence) must be identified with care and certainty therein, or it will not be considered on appeal.

Cross references. See further Rule 2 of *Mumma v. McKee* (10 Iowa 107), Vol. 1, p. 652. See also, annotations, notes and cross references under *Briggs & Sawyer v. Hartman* (10 Iowa 63); *Potter, et al, v. Wooster, et al* (10 Iowa 334); *State v. Lyon* (10 Iowa 340), Vol. 1, pp. 644, 697, and 700, respectively.

2. Fraudulent Conveyances—Deed From Child to Parent—Sufficiency of Evidence to Establish Fraud.—Where a child who is in debt conveys all of her real estate which is not exempt from execution to her father, which deed is hurriedly acknowledged and placed of record, and the father borrows all of the purchase price which he pays to his daughter (grantor), but returns the money borrowed to the lender in a few days thereafter, such facts are, when taken in connection with the relationship of the parties, sufficient to establish fraud in such conveyance, in an action by a creditor of the grantor (daughter) to set aside and cancel the conveyance, pp. 249, 250.

Cited with approval in *Brainard v. Van Kuran*, 22 Iowa 265, an action wherein a deed by a husband to his wife was held fraudulent in an action by a creditor of the husband to set it aside.

(Note.—See further, *Wolcot v. Rickey*, 22 Iowa 171; *Hatch & Thompson v. Gray*, 21 Iowa 29; *Hook v. Mowre*, 17 Iowa 195; *Wilson v. Horr*, 15 Iowa 489, some important cases on this subject.—Ed.)

Cross reference. See further, annotations, note and cross references under *Culbertson & Reno v. Luckey* (13 Iowa 12) ante. p. 109.

ALDEN & CO. v. CARVER, 13 IOWA 253, 81 Am. Dec. 430

1. Replevin—Issue In—What Entitles Plaintiff to Recover.—In order to entitle plaintiff to recover in an action of replevin he must have been entitled to the possession of the property involved, *at the time*

of the commencement of the action: The issue in such an action is as to who was entitled to possession at such time, p. 254.

Reaffirmed in Marshall v. Bunker, 40 Iowa 123.

Cross reference. See further, annotations, notes and cross references under Cassel v. Western Stage Co. (12 Iowa 47), ante. p. 7.

GRAYDON, SWANWICK & CO. v. PATTERSON & CO., 13 IOWA 256, 81 AM. DEC. 432.

1. Promissory Note—Payment in Currency to Agent—Effect.

—Payment of a promissory note should ordinarily be made in money or coin, and the holder is not bound to accept anything but such money at its true value: And where payment of a promissory note is made to an agent of the owner in *currency*, it does not discharge the note, unless such agent had authority to receive currency in payment, or his act is subsequently ratified by the principal (owner of the note), p. 258.

Reaffirmed in Drain v. Doggett, Bassett & Hills, 41 Iowa 684.

Reaffirmed and extended in Hakes v. Myrick, 69 Iowa 194, 28 N. W. 578, holding that one empowered to collect a note, has no authority to accept a note in payment thereof; and that the principal (owner of the first note) may repudiate such act within a reasonable time after he has knowledge of such transaction.

Reaffirmed and qualified in Harbach v. Colvin, 73 Iowa 640, 641. 35 N. W. 664, holding that where one empowered to collect a note, accepts a check therefor, which he deposits in bank to his credit, and it is paid by the bank on which it is drawn when presented, that such acceptance and payment of the check is a payment of the note.

Reaffirmed and qualified in Griffin v. Erskine and Andrews, receivers, 131 Iowa 451, 455, 109 N. W. 16, holding that where a bank to whom a note is sent for collection receives a check or draft in payment thereof, and such check or draft is thereafter paid, it constitutes a payment of the note.

Cited in British & American Mort. Co. v. Tibballs, 63 Iowa 473 (dissenting opinion), 19 N. W. 321, the majority court reaffirming the rule, but holding that a bank to whom a note is sent for collection may accept its own certificates of deposit in payment thereof, where it is solvent at the date of such payment, although it may become insolvent before it remits to the owner of the note.

(Note.—See further, Shay v. Callanan, 124 Iowa 370, 100 N. W. 57; Harrison et al Exr's v. Legore, 109 Iowa 618, 80 N. W. 670; Chamberlain v. Collinson, 45 Iowa 429; Eadie, Guilford & Co. v. Ashbaugh, 44 Iowa 519; Farwell & Co. v. Salpaugh, 32 Iowa 582; McLaren v. Hall, 26 Iowa 297; Kephart v. Butcher, 17 Iowa 240; McCarver v. Nealey, 1 G. Greene 360, important cases sustaining, explaining and qualifying, but not citing, the text.—ED.)

Cross references. See further, annotations under *Gower v. Hallo-way* (13 Iowa 154), ante. p. 131. See also, *Barnett v. Smith*, 64 Am. Dec. 290; *Lineweaver v. Slagle*, 54 Am. Rep. 775; *Hunter v. Wetsel*, 38 Am. Rep. 544.

WHITE v. HAMPTON, 13 IOWA 259

1. Trusts—Refusal of Trustee to Act—Effect.—Equity will not allow a trust to fail by reason of the refusal of the trustee to act; and the *cestui que trust* does not lose his right to enforce the trust in equity because of the disclaimer or refusal of the trustee to undertake his duties thereunder, p. 261.

Reaffirmed in *Wells v. German Ins. Co.*, 128 Iowa 653, 105 N. W. 124, holding that a trust does not fail for want of a trustee, and a court of equity will enforce it, either by decree, or by the appointment of another trustee.

2. Conveyances—Recording of—Sufficiency of Index Entry—Constructive Notice.—Where the index entry of a recorded conveyance is in every way regular, except that at the column where the description of the land conveyed should be, the recorder writes "see record," it is sufficient, and imparts constructive notice of such conveyance, p. 261.

Reaffirmed and explained in *Hodgson, Adm'r v. Lovell*, 25 Iowa 98, 95 Am. Dec. 775, holding that it is not essential to a valid registration that the index contain a description of the lands conveyed: It is sufficient if it points to the record with reasonable certainty.

(Note.—See further specially, *Jones v. Berkshire*, 15 Iowa 248, 83 Am. Dec. 412; *Bostwick v. Powers*, 12 Iowa 456.—Ed.)

Cross reference. See further, sustaining, explaining and qualifying the text, annotations and cross references under *Calvin v. Bowman and Neal* (10 Iowa 529), Vol. 1, p. 541.

3. Mortgage—Assignment of—Subsequent Acquisition of Title by Mortgagee—Effect—Merger of Estates.—Where the mortgagee of a mortgage on realty assigns it, and thereafter acquires the fee simple title to the property, it is still subject to the mortgage. The doctrine of merger of the lesser estate into the greater, does not apply except where both are in the same person, p. 262.

Cited with approval in *Bank of Indiana v. Anderson*, 14 Iowa 553, 554, 83 Am. Dec. 390, not in point.

Cited in *Vannice v. Bergen*, 16 Iowa 573 (dissenting opinion), 85 Am. Dec. 531, the majority court holding that where a mortgagee purchases the mortgagor's equity of redemption, and it is not the intention of the parties that the mortgage shall be merged, or where thereafter the mortgage may be enforced without prejudice to the mortgagor or third persons, equity will grant such relief.

Cross reference. See further, on this question, annotations under *Rule 2 of Wilhelm v. Leonard* (13 Iowa 330), *Infra*, p. 157.

4. Mortgages—Senior and Junior Incumbrancers—Redemption by Junior—Rights upon.—A junior incumbrancer may redeem from a sale of land under a foreclosure by a senior, by paying the amount of the senior's mortgage debt, and upon such redemption is entitled to be subrogated to the rights of the latter, as against a subsequent incumbrancer of such property, p. 263.

Reaffirmed in Johnson v. Harmon, 19 Iowa 61, holding that a junior mortgagee, not a party to an action of the senior mortgagee to foreclose, may bring his action to foreclose his lien and to redeem, after sale under decree in the senior mortgagee's action; but that redemption must be by paying the amount of the senior mortgagee's debt, and not the amount the mortgaged property brought under the foreclosure sale.

Cross references. See further, annotations under Rule 3 of Kramer v. Rebman (9 Iowa 114), Vol. I, p. 552; Stoddard v. Hays (12 Iowa 576), ante. p. 100.

5. Decree in Chancery—Enforcement of—Ordering Surrender of Land.—Where complainant is entitled to equitable relief, the chancellor may award such process as will execute the relief granted: And in a proper case the surrender of the possession of land may be so ordered, p. 265.

Reaffirmed in Martin v. Jones and Hildebrand, 15 Iowa 241.

CARUTHERS v. CARUTHERS, 13 IOWA 266

1. Divorce—Inhuman Treatment—What Sufficient as Ground for.—Conduct on the part of the husband such as will destroy his wife's peace of mind and thereby injure her health may constitute a ground for divorce, p. 268.

Reaffirmed and explained in Aitchison v. Aitchison, 99 Iowa 107, 68 N. W. 578, holding that treatment by the husband which is calculated to affect the mind of his wife so as to destroy her health and ultimately endanger her life, or which involves, by natural consequences, a permanently injurious and prejudicial effect upon her health, perilous to life, is sufficient to constitute a ground for divorce.

Special cross reference. See further, annotations under Beebe v. Beebe (10 Iowa 133), Vol. I, p. 659, where all other cases citing the text, and others will be found.

STATE v. JONES, 13 IOWA 269

1. Criminal Conspiracy—Indictment for—Allegations of.—An indictment for criminal conspiracy must allege and show that the object of the conspiracy, or the means to be employed in its accomplishment were unlawful, pp. 273, 274.

Reaffirmed in State v. Stevens, 30 Iowa 393-395; State v. Harris and Folsom, 38 Iowa 248; State v. Eno, 131 Iowa 620, 109 N. W. 119; State v. Loser, 132 Iowa 425, 104 N. W. 337.

Reaffirmed and extended in State v. Potter, 28 Iowa 557, holding further that an indictment for criminal conspiracy where the object is not criminal, must specifically charge the means by which it was to be accomplished, and thus show that the means to be employed were criminal.

Reaffirmed and narrowed in State v. Savoye, 48 Iowa 564, 565; State v. Loser, 132 Iowa 425, 104 N. W. 337, holding that an indictment for conspiracy to do a criminal act need only describe the act by the name and terms it is known in the law: That the gist of the offense in such a case, is the unlawful combination or agreement, and no overt act is necessary to complete the offense, and such an act need not be alleged in the indictment.

Reaffirmed and narrowed in State v. King, 104 Iowa 729, 74 N. W. 692, holding that in order to constitute criminal conspiracy, the combination must contemplate the accomplishment of the criminal purpose by the united energy of the accused persons, or active participation by them must be shown: That mere knowledge, acquiescence, or approval of an act, without co-operation or an agreement to co-operate, does not constitute the crime of conspiracy.

Unreported Citation, 120 N. W. 472, 473.

(Note.—See further sustaining, but not citing, the text, State v. Soper, 118 Iowa 1, 91 N. W. 774.—Ed.).

REEDER v. CAREY, 13 IOWA 274

1. Mortgage to Secure Several Sums of Indebtedness Payable at Different Times—Assignment of Part of—Priority.—Where a mortgage is given to secure several sums payable at different times, and some of such indebtedness is assigned, the owner of the sum first falling due has priority: But when part of a note or sum so secured and payable at a particular time is assigned, the assignee and the owner of the residue take *pro rata*, in case there is not a sufficiency of the proceeds of the mortgaged property to pay both, p. 275.

Special cross reference. See annotations under Rankin v. Major (9 Iowa 297), Vol. I, p. 578, where cases citing the text, and many others will be found.

Cross reference. See further, sustaining and extending text, annotations under Rule 4 of Grapengether v. Fejervary (9 Iowa 163), Vol. I, p. 556.

JONES v. JONES, 13 IOWA 276

1. Partnership—Liability of Individual Property of Members for Judgment Against Firm—Scire Facias.—A creditor of a partnership may sue each member of the firm, obtain judgment, and have execution against the individual property of any one of them, without *scire facias*: But where the creditor sues the partnership as such and

obtains judgment, then before he can have execution against the individual property of a member thereof, he must proceed by *scire facias* to make it liable, pp. 279, 280.

Reaffirmed in Markham v. Buckingham, 21 Iowa 497, 89 Am. Dec. 590, holding that where a creditor sues a firm by giving the individual names of the persons composing it, and serving all with notice, he may take the property of any member under his execution, without *scire facias*.

Cross references. See further, annotations under Davis & Co. v. Buchanan & Bone (12 Iowa 575), ante. p. 99.

2. Judgment Lien on Land—Equitable Interest of Third Person.—A judgment lien upon the lands of the debtor is subject to equities existing in favor of third persons against such lands at the time of the recovery; such a lien is limited to the interest of the judgment debtor, p. 280.

Special cross reference. See annotations under Norton, Jewett & Busby v. Williams (9 Iowa 528), Vol. I, p. 620, where cases citing the text and many more on this subject will be found.

WILTSE v. STEARNS, 13 IOWA 282

1. Attachment—Non-Residence of Defendant—Sufficiency of Allegation of, For Issuing Writ.—A petition for an attachment alleging that the defendant "is not now an inhabitant of this State," sufficiently alleges non-residence of the defendant and justifies the issuance of the writ, p. 282.

Cited in Mingus v. McLeod, 25 Iowa 455, holding that a petition for an attachment on the ground "that the defendant is in some manner about to dispose of his property without leaving sufficient remaining for the payment of his debts," must further allege an intention to defraud on the part of the defendant (debtor): "The writ," says the court, "has never been allowed unless the defendant (debtor) was either beyond the reach of process or about to abscond, or had disposed of, or was about to dispose of his property under such circumstances as amounted to actual or constructive fraud."

ALEXANDER v. DORAN, 13 IOWA 283

1. Usury—Allegation of in Answer—Failure to Deny—Effect.—An allegation in an answer charging usury will (under Sec. 1742 of the Code of 1851) be taken as true, if undenied, p. 284.

Reaffirmed and extended in Bolander v. Atwell, 14 Iowa 37, holding further that under Sec. 2917 of the Code of 1860, every material allegation in a bill which is not denied by answer is to be taken as true. —And this identical point was so held in Bloomer v. Glemdy; Douglas v. Goetz, 70 Iowa 757, 30 N. W. 486 (reaffirming text), under Sec. 2712 of the Code of 1873.

Reaffirmed and narrowed in Minear, et al v. Hogg, 94 Iowa 645, 63 N. W. 445, holding that the court may grant a decree upon the pleadings, without proof; but that upon a failure to deny allegations concerning value or damages they are not to be taken for confessed.

(Note.—See further, Walker v. Cameron, 78 Iowa 315, 43 N. W. 199; Singer Mfg. Co. v. Billings, 39 Iowa 347; Brown v. Mallory, 26 Iowa 469, important cases sustaining and analogous to, but not citing, the text.—Ed.)

Cross reference. "Plea of payment not to be taken as confessed although undenied"—See annotations under Powesheik County v. Mickel (10 Iowa 76), Vol. I, p. 646.

BROWNELL v. SMITH, 13 IOWA 287

1. Justice's Court—Pleadings in—Sufficiency of Statement.—

In an action in a justice's court the statement of the cause of action, where no petition is required, need only be sufficient to convey to the common understanding a reasonable certainty of its meaning, p. 288.

Reaffirmed in Shea v. Livingston, 32 Iowa 160.

(Note.—See further sustaining and explaining, but not citing, the text, Dilley v. Nusum, 17 Iowa 238; Hall v. Monahan, 1 Iowa 554; Sears v. Tubbs, 4 G. Greene 409; Packer v. Cockayne, 3 G. Greene 111.—Ed.)

CORIELLE v. ALLEN, 13 IOWA 289

1. Principal and Surety—Extension of Time of Payment—Release of Surety—Extrinsic Evidence of Suretyship.—Where a creditor, by an agreement based upon a sufficient consideration, extends the time of payment of a promissory note, without the consent of a surety thereon, the latter is released: And in an action at law on such a note the surety may prove the fact of his suretyship by other evidence than the note, where such fact is not thereby shown, pp. 290, 291.

Reaffirmed in Piper v. Newcomer & Campbell, 25 Iowa 222, holding that the fact of suretyship may be shown by extrinsic, or parol evidence.

Reaffirmed in Bonney v. Bonney, 29 Iowa 451, holding that a binding agreement to extend the time of payment made by the creditor and principal, without the consent of the surety, releases the latter, although he may not be thereby prejudiced.

Reaffirmed and extended in Chambers v. Cochran, 18 Iowa 165, holding further that whatever discharges the principal discharges the surety; and that reducing a note to judgment does not change the relation of the parties, take away any of the rights of the surety, or release the creditor from any duties imposed on him in consequence of the suretyship.

Cross reference. See further, sustaining text, annotations and notes under Kelly v. Gillespie (12 Iowa 55), ante. p. 9.

DEAN v. GODDARD, 13 IOWA 292, 81 Am. Dec. 433

1. Officers—Constable—Action on Official Bond of for Negligence in Care of Property Seized Under Execution—Defective Execution—Effect.—The fact that an execution does not show that it was issued upon a judgment rendered by an officer authorized so to do, it being otherwise regular and so describing and identifying the judgment as to render certain the authority upon which it was issued, is no defense in an action against a constable and the sureties on his official bond, for negligence in the treatment or care of personal property seized thereunder, pp. 294, 295.

Reaffirmed and extended in Williams v. Brown, 28 Iowa 249, holding further that a variance between the amount of the judgment and the amount commanded to be made by the execution issued thereon, nor the fact that the names of the parties to the action are not given in the execution as required by Sec. 3251 of the Code of 1860 (the name of the party recovering the judgment and against whom recovered being stated in the execution) will not affect its validity or prevent an officer from defending under it, in an action of replevin for personal property seized thereunder.

Reaffirmed and extended in Burdick v. Shigley, 30 Iowa 65, holding further that in an action of replevin for personalty seized by a constable under an execution from a justice's court, the execution is sufficient if it conveys to a common understanding, the parties to the action and judgment, the amount of the latter, the amount to be collected, and the venue to be within the State of Iowa: That such writs from such courts are to be construed with liberality.

Cited with approval in Cooley v. Brayton, 16 Iowa 15, holding that where an execution shows the amount of the decree and the amount still due thereon, and is otherwise specific and regular, that the fact that the clerk fails to fill in the amount in the commanding clause, will not invalidate a sale made thereunder.

Cited with approval in Cunningham v. Felker, 26 Iowa 119, holding that a variance of fifty cents between the amount of the judgment and the execution, will not invalidate a sale and deed made under the latter.

(Note.—See further, Finnegan v. Manchester, 12 Iowa 521; Sprott v. Reid, 3 G. Greene 489; Humphry v. Beeson, 1 G. Greene 200, important cases sustaining and analogous to, but not citing, the text.—Ed.)

STODDARD v. FORBES, 13 IOWA 296

1. Mortgages—Foreclosure—Redemption.—After a decree for sale of mortgaged premises and a sale made thereunder, the right of redemption is lost; and no particular words in the decree are necessary for this purpose, p. 298.

Reaffirmed and qualified in Hays v. Thode, 18 Iowa 55, holding that where an execution creditor buys land at the sale thereunder, a junior incumbrancer, not a party to the action in which the judgment is rendered, may redeem from the sheriff's sale by paying the amount of the purchase price, with ten per cent. interest and costs.

Cited and qualified in Johnson v. Harmon, 19 Iowa 60, 61, holding that a junior mortgagee, not a party to an action of the senior mortgagee to foreclose, may bring his action to foreclose his lien and to redeem, after sale under decree in the senior mortgagee's action; but that redemption must be by paying the amount of the senior mortgagee's debt, and not the amount the mortgaged property brought under the foreclosure sale.

Cross references. See further, annotations under Rule 3 of Kramer v. Rebman (9 Iowa 114), Vol. I, p. 552; Stoddard v. Hays (12 Iowa 576), ante. p. 100.

JOHNSON v. MONELL, 13 IOWA 300

1. Mortgages—Purchaser of Mortgaged Property—When Not Personally Liable for Debt.—No personal judgment must be rendered against the purchaser of mortgaged property in an action to foreclose, unless he specially contracted and agreed to pay the mortgage debt; in such an action in the absence of such a contract, the plaintiff's remedy is against the mortgaged property, p. 303.

Reaffirmed in Semple v. Lee, 13 Iowa 305; Aufrecht v. Northup, 20 Iowa 62; Lewis v. Day, 53 Iowa 579, 5 N. W. 756; Rice v. Hulbert, 67 Iowa 727, 25 N. W. 899; Johnson v. Foster, 68 Iowa 141, 26 N. W. 39; Sieffert & Weise Lumber Co. v. Hartwell, 94 Iowa 582, 63 N. W. 335, 58 Am. St. Rep. 413, all holding that a purchaser of mortgaged property who does not assume or agree to pay the mortgage debt, is not personally bound therefor.

Reaffirmed and extended in Day v. Baldwin, 34 Iowa 384, holding further that in an action to foreclose a mortgage, the purchaser of the mortgagor's equity of redemption may interpose the plea of the statute of limitation.

Reaffirmed and narrowed in Huston v. Stringham, Adm'r, 21 Iowa 42, holding that a mortgagor who has conveyed the mortgaged property may on his own motion or application, defend against the mortgage debt, where the purchaser does not agree to pay and assume the debt; and that this rule applies in favor of the administrator of such a mortgagor (decedent).

Distinguished and narrowed in Wightman v. Spofford, 56 Iowa 148, 8 N. W. 681, holding that where a purchaser of a contract to convey land accepts a transfer thereof from the vendee, he thereby becomes a party to the contract, and is personally liable for the purchase price, upon the vendor complying or offering to comply therewith.

Unreported citation, 122 N. W. 918.

(Note.—See further, *Myers, Adm'r v. Bowers*, 70 Iowa 95, 30 N. W. 24; *Cohrt v. Kock*, 56 Iowa 658, 10 N. W. 230; *Gilbert v. Sanderson*, 56 Iowa 349, 9 N. W. 293, 41 Am. Rep. 103; *Fuller & Co. v. Hunt*, 48 Iowa 163; *Hull & Co. v. Alexander*, 26 Iowa 569, important cases not citing, but sustaining, extending and explaining the text.—Ed.)

2. Mortgages—Action to Foreclose—Parties—Mortgagor who Sells Equity of Redemption.—A mortgagor who sells his equity of redemption in mortgaged realty, is not a necessary party to an action to foreclose, p. 303.

Reaffirmed in *Williams v. Meeker*, 29 Iowa 294; *Johnson v. Foster*, 68 Iowa 141, 26 N. W. 39.

Reaffirmed and extended in *Day v. Baldwin*, 34 Iowa 384, holding further that the admissions of a mortgagor who has sold his interest in the property, cannot be received against the purchaser in an action to foreclose.

—*Cited with approval in* *Semple v. Lee*, 13 Iowa 305, a case turning on another point.

Cited with approval in *Barrett v. Blackmar*, 47 Iowa 569, a case turning on another point.

Unreported citation, 122 N. W. 918.

Cross reference. See further, annotations under Rule 2 of *Semple v. Lee*, next succeeding.

SEMPLÉ V. LEE, 13 IOWA 304

1. Actions—Defective Service of Original Notice—Who can Complain of.—Where the service of an original notice on some of the parties to an action is erroneous or defective, only the parties so served may complain thereof, p. 305.

Reaffirmed in *Wright v. Mchaffey*, 76 Iowa 99, 40 N. W. 114.

2. Mortgages—Action to Foreclose—Parties—Mortgagor Who Sells Equity of Redemption and His Purchaser.—In an action to foreclose a mortgage, the purchaser of the mortgaged property is a proper party; but the mortgagor who has sold his equity of redemption is not, p. 305.

Reaffirmed and qualified in *Shields v. Keys, Adm'r*, 24 Iowa 307, holding that in an action to foreclose a mortgage, or to enforce a mechanic's or materialman's lien, subsequent mortgagees, or purchasers of the incumbered property, are proper, but not indispensable parties.

Special cross reference. See further, annotations under Rule 2 of *Johnson v. Monell* (13 Iowa 300), ante. p. 153, for other cases citing text.

3. Mortgages—Purchaser of Mortgaged Property—Agreement to Pay the Mortgage Debt.—Where a purchaser of mortgaged prop-

erty expressly agrees and assumes to pay the mortgage debt, he is personally bound therefor, p. 305.

Reaffirmed in Ream v. Jack, 44 Iowa 326.

Cross reference. See further, annotations under Rule 1 of Johnson v. Monell (13 Iowa 300), ante. p. 153.

WALKUP v. ZEHRING, 13 IOWA 306

1. Pleadings—Petition—Exhibits—What to be Filed with Petition.—Only written instruments which are the basis of an action are required to be filed with the petition. The rule does not apply to instruments of evidence. So, in an action to set aside an execution sale and deed thereunder, the execution and deed need not be filed with the petition as exhibits, p. 308.

Reaffirmed in Taylor v. Cedar Rapids and St. P. R. R. Co., 25 Iowa 378, holding that only instruments or writings which are the basis of the action are required to be copied in, or filed as exhibits with the petition: That the rule is inapplicable to writings of *evidence merely*.

Reaffirmed and extended in Vannice v. Green, Traer & Co., 14 Iowa 264, holding further that in an action to set aside a judgment rendered by confession because the statement therefor was insufficient, it is not necessary to file a copy of the statement with the petition as an exhibit.

Reaffirmed and extended in Boardman v. Beckwith, 18 Iowa 293, holding that in an action for the recovery of real property, the plaintiff is not required to file his title papers or copies thereof as exhibits with his petition.

(Note.—See further, Dorsey v. Patterson, 7 Iowa 420; Farwell v. Tyler, 5 Iowa 535.—Ed.)

Cross reference. See further, annotations and cross references under Rule 2 of Kingsbury v. Buchanan (11 Iowa 387), Vol. I, p. 830.

LEVERSEE v. REYNOLDS, 13 IOWA 310

1. Justice's Court—Attachment—Jurisdiction of Such Court in.—The jurisdiction of a justice's court in an attachment action is, (under Sec. 3853 of the Code of 1860) co-extensive with the county, p. 311.

Reaffirmed and extended in Biddle v. Allender, 14 Iowa 411, holding that the jurisdiction of a justice's court in an action of replevin is (under Sec. 3853 of the Code of 1860), co-extensive with the county.

Reaffirmed and extended in Craft v. Franks, 34 Iowa 505, holding further that the jurisdiction of a justice's court in an action of replevin is (under Sec. 3853 of the Code of 1860), co-extensive with the county; and that the defendant cannot in such case remove the property involved or any portion thereof, from the county after the commencement of the action, and thus defeat the jurisdiction of the court.

Reaffirmed and extended in Knowles v. Pickett, 46 Iowa 505, (cited in dissenting opinion, 508), holding further that in actions of attachment, or of replevin, the justice's court has (under Sec. 3511 of the Code of 1873) jurisdiction co-extensive with the county, without regard to the township of the residence of the parties, or of the one wherein the property is found—Overruling Meunch v. Breitenbach, 41 Iowa 527.

(Note.—See specially and compare, Anderson & Co. v. Un. Pac. Ry. Co., 77 Iowa 445, 42 N. W. 366.—Ed.)

Cited, doubted and narrowed in Gilman v. Heitman, 137 Iowa 351, 352, 113 N. W. 937, holding that under Sec. 4480 of the Code of 1897, the jurisdiction of a justice's court in an attachment action *against a non-resident* of this State, is limited to the county and township wherein the property attached is found.

2. Statutes—Construction of—Effect to be Given Each Word if Possible.—If a construction of a statute can legitimately be found which will give force to and preserve all the words used therein, it will be adopted, rather than one requiring the rejection of, as unmeaning and surplusage, some of its language, p. 311.

Reaffirmed and extended in Patterson v. Spearman, Clark and Seeley, 37 Iowa 42, 43, holding further that where a statute is susceptible of two constructions, one of which gives effect to the whole, and the other renders a part inoperative, the former construction will be adopted.

(Note.—See further, Rheim v. Robbins, 20 Iowa 45, and there are many others to the same effect.—Ed.)

MCCRANEY'S EX'X v. GRIFFIN, 13 IOWA 313

1. Contracts—Construction of—All Parts to be Considered and Weighed—Intention of Parties—How Arrived at.—In construing a contract the court will consider and weigh all its parts; and will arrive at the intention of the parties thereto by looking at the language employed, the object thereof, and all the circumstances attending it, pp. 316, 317.

Reaffirmed in Craven v. Winter, 38 Iowa 479.

Reaffirmed and extended in Shaw v. Brown, 13 Iowa 511, 512, holding further that the natural import of words used in a contract, is the safest criterion in arriving at the true sense thereof and of the intention of the parties thereto.

Reaffirmed and extended in Corbett, Adm'r v. Berryhill, 29 Iowa 159, 160; Ditson v. Ditson, 85 Iowa 283, 52 N. W. 204, holding further that courts should adopt the construction of a contract which is in accord with its terms as understood and adopted by the parties; that the intention of the parties will be followed unless violence is thereby done to the rules of language or to the rules of law; and that

in arriving at such intention the acts of the parties, and the circumstances surrounding the transaction will be considered.

(Note.—See further, *Jacobs v. Jacobs*, 42 Iowa 600; *McDaniels v. Whitney*, 38 Iowa 60; *Karmuller v. Krotz*, 18 Iowa 352; *Pilmer v. Branch of State Bank et al*, 16 Iowa 321; *Field v. Schricher*, 14 Iowa 119; *Rindskoff Bros. v. Barrett*, 14 Iowa 101, important cases not citing, but sustaining and explaining the text.—Ed.)

CLARKE v. BANCROFT, BEAVER & Co., 13 IOWA 320

1. Equity Practice—Marshaling Assets—When Allowed.—

Where in an action in equity there are two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund, but the other or others can come upon one only, equity may marshal the funds so as to enable the party or parties confined at law to the one fund, to receive satisfaction: Provided this can be done without injustice to the creditor having the double security, p. 327.

Reaffirmed in *Cutler v. Ammon*, 65 Iowa 284, 21 N. W. 606, holding that a person who has a claim upon two funds as security for his debt, cannot be required to exhaust one in preference to the other, except where it can be done without injustice to him.

KIMMANS v. CHANDLER & LOCKHART, 13 IOWA 327

1. False and Fraudulent Representations Inducing Contract—

Requisites—Injury to Party Suing for—Action at Law.—An action at law for damages for false and fraudulent representations inducing a contract, cannot be maintained where the plaintiff does not allege and prove that the representations were willfully made by the defendant, who, at the time knew them to be untrue, and that he (plaintiff) was thereby induced to contract, resulting in his injury, p. 329.

Reaffirmed and explained in *Mahoney v. State Ins. Co.*, 133 Iowa 580, 581, 110 N. W. 1044, 9 L. R. A. (New Series) 490, holding that fraud does not consist in mere intention, but in order to constitute it there must be something done which causes another injury.

Cross references. See further specially on this subject, annotations under *Holmes v. Clark* (10 Iowa 423), Vol. I, p. 719. See also, annotations under *Gates v. Reynolds* (13 Iowa 1), ante. p. 107.

WILHELMI v. LEONARD, 13 IOWA 330

1. Trial—Instructions—Exceptions to Those Given and Re-

fused—Certainty Required—Review on Appeal.—Where on appeal it appears from the bill of exceptions that the party complaining excepted generally to the charge of the court, or instructions to the jury, such general exception will not (under Code of 1860), authorize a review of errors in any portion thereof, where any part thereof, or any

one is correct. But the rule is inapplicable to actions commenced before the taking effect of the Code of 1860, as the Code of 1851 made a general exception to the whole of a charge sufficient to authorize a review of any portion thereof, pp. 336, 337.

Reaffirmed in *Wilhelmi v. Thorinton*, 14 Iowa 537.

Special cross reference. See further, annotations under Rule 5 of *Davenport Gas Light & Coke Co v. City of Davenport* (13 Iowa 229), ante. p. 140, where all other cases citing the text, and many more will be found.

2. Mortgages—Mortgagee Purchasing or Taking Release of Equity of Redemption—Merger of Estates—When.—Where a mortgagee of real estate purchases, or takes a release of the equity of redemption of the mortgagor, the lesser estate is merged into the greater, and the mortgage and mortgage debt is extinguished, unless it appears in such case, that it was the intention, or to the interest of the mortgagee that the mortgage and debt be kept alive; this intention may be express, or implied from circumstances surrounding the transaction, p. 338.

Reaffirmed in *State v. Lake*, 17 Iowa 221, holding that where a mortgagee obtains a judgment at law for his mortgage debt and purchases at a sale thereunder, giving for his title at such sale the full amount of his mortgage debt, such debt and mortgage is thereby satisfied, and neither the mortgagee nor his assignee can thereafter claim any rights under the mortgage.

Reaffirmed in *Lyon v. McIlvaine*, 24 Iowa 12, 13; *Deeter v. Crossley*, 26 Iowa 183; *Linscott v. Lamart*, 46 Iowa 315; *Shimer v. Hammond*, 51 Iowa 404, 1 N. W. 658; *First Nat'l Bank of Waterloo v. Elmore*, 52 Iowa 551, 3 N. W. 555; *Stimpson v. Pease*, 53 Iowa 574, 5 N. W. 762; *Woodward v. Davis*, 53 Iowa 697, 6 N. W. 75; *Smith v. Swan*, 69 Iowa 415, 29 N. W. 403, holding that where a mortgagee acquires the legal title to the mortgaged property, it will not operate as a merger, when the interest and intention of the mortgagee is otherwise.

Reaffirmed and extended in *Rankin v. Wilson*, 17 Iowa 466, holding further that when a greater estate and a less meet in the same person, the rule *at law* is that the less is merged into the greater; but that in equity it is controlled by the express or implied intention of the party in whom the estates unite; that in such case the owner of the estates may, until rights of third persons intervene, elect to treat the lesser estate merged, or alive as is most beneficial to him.

Reaffirmed and extended in *Stimpson v. Pease*, 53 Iowa 574, 5 N. W. 762; *Woodward v. Davis*, 53 Iowa 697, 6 N. W. 75, holding further that in the absence of proof to the contrary, a mortgagee who purchases the legal title will be presumed to intend that which is to his benefit, as to whether or not the mortgage is to be kept alive or to be merged.

Cited in Vanpice v. Bergen, 16 Iowa 573 (dissenting opinion), 85 Am. Dec. 531, the majority court reaffirming the text, and holding further that the purchase of the legal title by the mortgagee will not extinguish the mortgage, when it is the intention of the parties to keep it alive, or if this is to the interest of the mortgagee, and it can be done without prejudice to the mortgagor, or to the rights of third persons: Holding further that where a mortgagee of a recorded mortgage is induced by fraud of the mortgagor to purchase the legal estate, and the mortgage is not released of record, the mortgage will be revived in equity, as against the mortgagor and subsequent purchasers, or mortgagees of the property, and judgment creditors of the mortgagor.

(Note.—See further specially on this question, White v. Hampton, 13 Iowa 259; Wickersham v. Reeves & Miller, 1 Iowa 413.—Ed.)

3. Chattel Mortgages—Retention of Personalty by Mortgagor—When Badge of Fraud.—Although the retention of possession by the mortgagor of mortgaged personalty does not render the instrument fraudulent, still, such retention may be under such circumstances as will constitute a badge of fraud; as where it is inconsistent with the nature of the property and is long continued, the property meanwhile depreciating in value, the mortgagor getting the benefit of it, not reducing the debt, and other similar facts and circumstances: In such a case the jury might reasonably infer that such a mortgage was fraudulent, p. 341.

Reaffirmed and qualified in Reeves & Co. v. Sebern, 16 Iowa 238, 85 Am. Dec. 513, holding that where a sheriff at the time he levies on goods (in possession of the judgment debtor) under an execution, has actual notice that they are pledged to a third person by the judgment debtor under an unrecorded mortgage, that such pledgee, in the absence of actual fraud, has the better right: That actual notice is equivalent to recording, whether the transaction be a sale, a pledge, or a mortgage.

Reaffirmed and narrowed in Hughes v. Cory, 20 Iowa 409, holding that a right reserved in the mortgage for the mortgagor to sell the mortgaged goods in the usual course of retail trade, he agreeing to keep the stock up to the value at the time the mortgage is executed, does not render such instrument fraudulent; and that the recording of a bill of sale, pledge, or mortgage repels all imputations of fraud which may arise from the retention of possession by the vendor, pledgor, or mortgagor.

Special cross reference. See annotations under Torbert v. Hayden, sheriff (11 Iowa 435), Vol. I, p. 839, where all other cases citing the text, and many more will be found.

4. Fraudulent Judgment by Confession—When Question for Jury.—In an action at law wherein a judgment by confession is attacked as fraudulent, it is the province of the jury to determine whether or not the judgment was in fact fraudulent; but they are not to inquire

into whether the judgment was void on account of insufficiency of the statement on which it was based, pp. 341, 342.

Reaffirmed in Mason v. Messenger & May, 17 Iowa 275.

LEVI v. KARRICK, 13 IOWA 344

(Later Appeal, 15 Iowa 444; see 89 Iowa 380, 56 N. W. 516, a case arising out of this controversy.)

1. Settlement—Receipt—Force and Effect of.—A receipt for money in full settlement of accounts between parties, is *prima facie* evidence thereof, and the burden is on the party desiring to impeach it to show that it was executed by fraud, accident, or mistake; and where the evidence adduced to impeach and to sustain the receipt is equally balanced, it will be sustained and given its *prima facie* effect, pp. 348, 349.

Reaffirmed and extended in Hall v. Smith, 15 Iowa 589, holding further that an accord and satisfaction must be governed by the intention of the parties, to be evidenced by an unequivocal act or in any other clear manner.

Reaffirmed and extended in Rau, Adm'r v. Prudential Ins. Co., 129 Iowa 737, 106 N. W. 202, holding further that a receipt or a written surrender of a right, or a release of a subsisting cause of action, will be set aside upon sufficient proof of accident, mistake, or fraud, although the demand released is disputed and unliquidated.

(Note.—See further, Barton v. Fuson, 81 Iowa 575, 47 N. W. 774; Packer v. Packer, 24 Iowa 20; Sullivan v. Collins, 18 Iowa 228, important cases not citing, but explaining, sustaining and extending the text.—Ed.)

Cross references. "Accord and Satisfaction—What does and what does not constitute"—See annotations under Rule 2 of Hall v. Smith (10 Iowa 45), Vol. I, p. 640.

See also, on this question, Jordan v. Stevens, 81 Am. Dec. 556; State v. Paup, 56 Am. Dec. 303; Northrops, Ex'rs v. Graves, 50 Am. Dec. 264; Haven v. Foster, 19 Am. Dec. 353; Warder v. Tucker, 5 Am. Dec. 62; Berry v. Insurance Co., 28 Am. St. Rep. 548; Titus v. Insurance Co., 53 Am. Rep. 426, 28 L. R. A. 478; Redfield v. Insurance Co., 15 Am. Rep. 424.

2. Partnership—Compensation of Partner for Services Rendered—When Allowed.—As a general rule there is an implied obligation on every partner to devote his services and labors for the promotion of the common benefit and without extra compensation therefor, unless the contrary is expressly stipulated between the partners; but an agreement that a partner shall receive pay for his services may be implied from the course of business between the partners, and is a matter of evidence; and where a member of a firm is employed to render services not imposed upon him by law, or by agreement, he is entitled to pay therefor, pp. 349, 351.

Reaffirmed in *Morris v. Griffin*, 83 Iowa 330, 49 N. W. 847, holding that if an agreement that a partner shall be paid for his services can be fairly and justly implied from the course of business between the co-partners, he is entitled to recover therefor.

Reaffirmed in *Young, Adm'r v. Scoville*, 99 Iowa 188, 68 N. W. 673, and 115 N. W. 934, holding that where there are no facts from which it can justly and fairly be inferred that a partner is to receive compensation for his services, and there is no agreement express or implied therefor, he is not entitled to recover.

Reaffirmed and extended in *Sears v. Munson*, 23 Iowa 389, holding further that where a partner is entitled to pay for his services, and there is no agreement as to the amount thereof, the law will fix the amount at what is reasonable: Holding further that when one partner comes to Iowa and takes charge and management of the partnership business, at the instance of another who remains away attending to his private interests, the former is entitled to a reasonable compensation for his services.

Reaffirmed and qualified in *Boardman v. Close*, 44 Iowa 430, holding that where a contract of partnership is in writing, and it does not provide for compensation to the partners for their services, a strong presumption arises that they are not entitled thereto: But this presumption may be rebutted.

Reaffirmed and qualified in *Roth v. Boies*, 139 Iowa 264, 265, holding that where a partnership contract implies a difference in value of the services of the partners and adjusts the income accordingly, the mere fact that one partner does more of the partnership work, or that his labors are more valuable than the other partner, will not entitle him to receive more income from the firm than is provided by the contract.

Cited with approval in *Sioux City S. Y. Co. v. Sioux City P. Co.*, 110 Iowa 405, 81 N. W. 715, not in point.

3. Receiver—When May be Appointed.—A court of chancery may, by an interlocutory order, appoint a receiver and take possession of property which is the subject of litigation, pending the proceedings: But where the rights of third persons who are not parties to the record have intervened (as where they have purchased the property in good faith), such an order will not be made, pp. 352, 353.

Reaffirmed in *Brandt v. Allen*, 76 Iowa 54, 40 N. W. 83, 1 L. R. A. 653, a case wherein a receiver was properly appointed to take possession of a note in controversy, the defendants to the action being insolvent, and about to dispose of it and convert its proceeds to their own use.

4. Partnership—Liability of Partner for Fraud or Misconduct—Partner Dealing With or Using Firm Property.—Each partner must exercise towards the other or others, the utmost good faith in all matters relating to the partnership; and where one of them deals

with or uses the firm property, he is liable for all profits arising therefrom; and if loss occurs by reason of the fraud of a partner, he is liable to the other member or members therefor, p. 353.

Reaffirmed and extended in Wiggins v. Markham, 131 Iowa 107, 108 N. W. 115, holding further that a partner must keep an accurate account of all money which passes through his hands; that a partner owes to his co-partner the strictest good faith.

Cross reference. See Rule 5 hereof in this connection.

5. Partnership—Action to Settle—Fraudulent Use of Firm Property—Damages For—Pleadings.—In order to enable co-partners in an action to settle a partnership to recover damages of a partner for fraud, or failure to exercise good faith in the use or management of firm property, such fact must be specially pleaded, pp. 353, 354.

Distinguished in Phoenix v. Lamb, 29 Iowa 354, the court holding that in an action on a note given for fruit trees, where the defendant pleads that the trees were damaged by the fault and neglect of plaintiff, and were thereby rendered worthless by freezing, that the defendant may prove that the trees were improperly packed and boxed by plaintiff.

SELLON & CO. v. BRADEN, ADM'R, 13 IOWA 365

1. Joint Obligors—Action Against—Death of One Jointly Bound—Effect—Action Against Administrator of.—An action on a note or other contract on which two or more are jointly bound may (under Sec. 2764 of the Code of 1860) be brought against any or all of them; and where one of them dies, the action may be brought against any or all of the survivors, and against the administrator of the decedent, or against the latter alone, p. 367.

Reaffirmed in Smith v. McFadden, 56 Iowa 486, 9 N. W. 352, holding, (under Sec. 2550, of the Code of 1873) that the bankruptcy of one joint obligor does not affect the liability of the others.

Reaffirmed and extended in Martin & Bro. v. Davis & Co., 21 Iowa 537, holding further that a partner who is not made a party or included in a judgment in an action for a firm debt, is still liable therefor, under Sec. 2764 of the Code of 1860.

Reaffirmed and extended in Ryerson v. Hendrie, 22 Iowa 484, holding further that parties to every obligation who are jointly bound, whether their joint liability arises from the language of the instrument itself, or results from their previous relations to each other, may, under Sec. 2764 of the Code of 1860, be sued severally.

Cited in Turner v. Hitchcock, 20 Iowa 334 (dissenting opinion), the majority court holding that a person injured by the commission of a tort may sue any or all of the *tort-feasors*; he may maintain separate actions against the *tort-feasors* for his injury; but that a release of, or satisfaction by, one *tort-feasor* discharges all.

HALL v. DORAN & BAKER, 13 IOWA 368

1. Lands—Title to—Estoppel of Owner to Assert—When.—

Where the owner of a legal or equitable title to lands fails and neglects to assert his right and ownership for a long length of time, and allows the person in possession to make valuable improvements thereon, and exercise other acts of ownership, he will thereby be estopped from asserting his title thereto, pp. 370, 271.

Reaffirmed and extended in Adams County v. B. & M. R. R. Co., 39 Iowa 512, holding further that where a county recognizes a railroad company as the owner of swamp lands, thereby securing an advantage to itself, it will thereafter be estopped from denying the existence of the fact on which the advantage was secured: That one who remains silent when he should speak must continue silent when he desires to speak.

Reaffirmed and extended in Withrow v. Walker, 81 Iowa 657, 47 N. W. 895; Woodward and Scott v. Barr and Woodward, 128 Iowa 730, 105 N. W. 208, holding further that where the owner of land by his conduct induces the person in possession of or the holder of an inferior title thereto to believe that he (the owner) had no faith in his title, or would not urge it against him, that he is thereby estopped: That the owner of the title to land may be estopped by his negligence in failing to assert it; and that this is to be determined from the facts and circumstances of each case.

Reaffirmed and extended in Knapp v. Paine, 95 Iowa 67, 68, 63 N. W. 576, holding further that where a person and those through whom he claims have for about thirty years in good faith, under a patent from the Government, been the ostensible owners of land, that he is entitled to have his title quieted as against persons who have acquiesced in such ownership for such period.

(Note.—See further, Mickel v. Walraven, 92 Iowa 423, 60 N. W. 633; State v. Beckley, 79 Iowa 368, 44 N. W. 677; Ch. R. I. & P. Ry. Co. v. Allfree, 64 Iowa 500, 20 N. W. 779; Simplot v. City of Dubuque, 49 Iowa 630; Briggs v. Jasper County, 49 Iowa 481; Bullis v. Noble, 36 Iowa 618; Iowa Railroad L. Co. v. Story County, 36 Iowa 48; Davidson v. Follett, 27 Iowa 217; Lucas v. Hart, 5 Iowa 415, important cases sustaining, explaining, qualifying and analogous to, but not citing, the text.—Ed.)

KURZ v. BRUSCH, 13 IOWA 371, 81 Am. Dec. 435

1. Homestead — What it Embraces — Buildings Rented to Others.—The homestead embraces the dwelling house, other buildings on the same lot appurtenant thereto, and a building occupied by the debtor (head of a family) in the prosecution of his ordinary business; but it does not include a building on the homestead lot rented and yielding a revenue to the owner (debtor), p. 374.

Cited in Davis, Moody & Co. v. Kelley, 14 Iowa 527, a case involving the question of what constituted an abandonment of homestead.

Cross reference. "Homestead—Requisites—Occupancy"—See annotations under Williams v. Swetland (10 Iowa 51), Vol. I, p. 642.

KEENAN v. DUBUQUE MUTUAL FIRE INS. CO., 13 IOWA 375

1. Mutual Insurance Companies—Waiver of Condition as to Forfeiture.—The assessment and collection of a portion of a premium note by a mutual insurance company after it is advised of a violation by the insured of the provisions of a policy, thereby waives the right of forfeiture by reason thereof, pp. 380, 381.

Cited with approval in Ayres v. Hartford Fire Ins. Co., 17 Iowa 192, 85 Am. Dec. 553, holding that proofs of loss may be waived by an insurance company; and that if proofs of loss are furnished by the insured, and the insurer objects to them for specific reasons, it (the insurance company) cannot defeat recovery on other reasons or objections than those claimed at the time the proofs were furnished: Holding, however, that mere silence will not amount to a waiver of defective proofs of loss.

Cited in Viele v. Germania Ins. Co., 26 Iowa 70 (note), 96 Am. Dec. 83, the case reaffirming and extending the rule, and holding further that a forfeiture of a policy of insurance on account of breach of conditions thereof, may be waived by the insurer; that such waiver need not be in writing, but may be by parol, or by acts of an insurer inconsistent with a claim of forfeiture.

Cross references. See further specially, annotations under Rules 3, 4 and 5 of Keenan v. Mo. State Mut. Ins. Co. (12 Iowa 126), ante, p. 24. See Rule 2 hereof.

2. Insurance Companies—Notice to—Knowledge Acquired by Officer in Private Capacity Insufficient.—Knowledge acquired by an officer of an insurance company in his individual capacity, or as a matter of rumor, does not amount to notice to the company, p. 382.

Reaffirmed and extended in Ayres v. Hartford F. Ins. Co., 17 Iowa 187, 85 Am. Dec. 553, holding further that knowledge of an officer of an insurance company of a breach of a condition of a policy by the insured, does not, without more, amount to a waiver by the company to insist on its rights thereunder.

Reaffirmed and extended in Caffee v. Berkley, 141 Iowa 349, 118 N. W. 269, holding further that knowledge incidentally acquired by officers of a corporation when they are not acting officially does not constitute notice to it.

Cross reference. See also, Rule 1 hereof.

CONNELLY v. CARLIN, 13 IOWA 383

1. Pleadings—Verified Answer in Chancery—Effect.—An answer in chancery which is sworn to, but which is not so demanded by

the plaintiff, only puts in issue the averments of the bill which are thereby denied, pp. 383, 384.

Reaffirmed in Smith v. Phelps, 32 Iowa 539, 540.

Cross references. See further, annotations under Rule 2 of Wilson v. Holcomb (13 Iowa 110), ante. p. 126; Rule 2 of Shepard v. Ford (10 Iowa 502), Vol. I, p. 736.

BAKER v. KERR, 13 IOWA 384

1. Actions—Original Notice—Service on Agent of Defendant—Waiver of Objection to.—Where the defendant by his own act, or the act of his attorney recognizes the validity of service of original notice on his agent, he cannot thereafter object to the jurisdiction of the court for that reason, p. 385.

Reaffirmed and extended in Moffitt v. Ch. Chronicle Co., 107 Iowa 415, 78 N. W. 48, holding further that a general appearance to an action waives objection to jurisdiction of the person; that one cannot obtain the favorable action of a court, and thereafter claim want of jurisdiction of the person.

Cross reference. See further sustaining and explaining the text, annotations, note and cross references under Stockdale v. Buckingham (11 Iowa 45), Vol. I, p. 768.

STATE EX REL. BURLINGTON & MISSOURI RIVER R. R. CO. v. WAPELLO COUNTY, 13 IOWA 388

1. Counties—Power to Subscribe to or Issue Bonds for Stock in Railroads—Power of Legislature to Authorize.—Counties have no power to subscribe to stock in or to issue bonds in aid of railroads; and the Legislature has no power under the Constitution of 1857, to pass a law empowering counties to do such acts, p. 423.

Reaffirmed in Myers v. Johnson County, 14 Iowa 49, holding that counties have no authority to issue bonds in aid of a railroad.

Reaffirmed in Hanson v. Vernon, 27 Iowa 35, 38, 48, 63, 66, 72, 1 Am. Rep. 215, holding that the General Assembly has no power to authorize a county, city or other municipal corporation to issue bonds, borrow money, subscribe stock to, or otherwise aid in the construction of a railroad; that such an Act is unconstitutional, and proceedings thereunder will be enjoined—But in Stewart v. Board of Supervisors of Polk County, 30 Iowa 29-39, 1 Am. Rep. 238; Renwick, Shaw & Crosset v. D. & N. W. Ry. Co., 47 Iowa 512 (dissenting opinion 514, citing the text), the power of the General Assembly to enact such a law is upheld, and Hanson v. Vernon is overruled, and the text to this extent also.

Reaffirmed and extended in McMillan v. Boyles, 14 Iowa 107, holding further that injunction lies at the instance of a taxpayer to restrain the collection of a tax levied to pay interest, notes, and coupons attached to bonds issued by a county in aid of a railroad.

Reaffirmed and extended in Rock v. Wallace, county judge, 14 Iowa 593, 594 (abstract), holding further that injunction lies at the instance of a taxpayer to restrain the negotiation by a railroad company of bonds issued by a county in aid of a railroad, and to compel a redelivery and cancellation thereof by the company.

Reaffirmed and extended in Smith v. Henry County, 15 Iowa 386; McClure v. Owen, 26 Iowa 250, 252; Jefferson County v. B. & M. R. Ry. Co., 66 Iowa 388, 16 N. W. 562, and 23 N. W. 899, holding further that bonds issued by a county in aid of the construction of a railroad are void *ab initio*.

Reaffirmed and extended in Wapello County v. B. & M. R. R. Co., 44 Iowa 600 (cited in dissenting opinion, 604), holding further that the issuance of bonds by a county in aid of the construction of a railroad is *ultra vires*, the bonds are void, and the county is entitled to no certificates of stock therefor in the railroad company.

Reaffirmed and varied in Ten Eyck v. Mayor of Keokuk, 15 Iowa 486, 487, holding that a city has no authority to issue bonds to aid in the construction of a railroad, and that injunction lies to restrain the levying and collecting a tax in payment thereof.

Reaffirmed and varied in Chamberlain v. City of Burlington, 19 Iowa 401-403, holding that a charter of a city empowering it to borrow money "for public purposes," does not authorize it to issue bonds in aid of the construction of a railroad; and the levying and collection of a tax to pay such bonds may be enjoined by a taxpayer of the city.

Cited with approval in Ex parte Holman, 28 Iowa 124 (dissenting opinion), majority opinion involving a habeas corpus arising from a writ of mandamus to county officers to levy and collect a tax to pay a judgment recovered in the United States Court on bonds issued by a county in aid of the construction of a railroad, and the imprisonment of the officers for refusing to obey the writ (the United States Court upholding the validity of such bonds in the hands of innocent holders).

Cited in Iowa Railroad L. Co. v. Carroll County, 39 Iowa 166, holding that counties and other municipal corporations, such as cities, school districts, etc., may (under Chap. 87, Laws of 1872, amendment to Sec. 3275 of the Code of 1860) issue bonds in payment of a judgment, without submission of the question to a vote of the people.

(Note.—See further, sustaining but not citing the text, Stokes v. Scott County, 10 Iowa 166.)

Cross reference. See in this connection, annotations under Hull & Argalls v. Marshall County (12 Iowa 142), ante, p. 29. See further, annotations under Stokes v. Scott County (10 Iowa 166), Vol. I, p. 664.

2. Railroad Companies are Private Corporations.—Railroad companies organized under the laws of this state are private corporations, and have the same rights and privileges that belong to other private joint stock companies, p. 400.

Reaffirmed in Hanson v. Vernon, 27 Iowa 52, 1 Am. Rep. 215.

3. Constitutional Law—Bill of Rights—Construction of—Rights of People Not to be Impaired.—Courts will not adopt a construction of the bill of rights of our Constitution such as will impair or deny rights retained by the people, p. 412.

Reaffirmed and extended in Morrison v. Springer, 15 Iowa 343, holding further that the General Assembly possesses all legislative authority which is not delegated to the general government, prohibited by the Constitution, or retained by the people: Holding further that it may regulate elections and prescribe qualifications of voters.

Cited in Hanson v. Vernon, 27 Iowa 57, 65, 1 Am. Rep. 215; Stewart v. Board of Supervisors of Polk County, 30 Iowa 45, 47, 1 Am. Rep. 238.

(Note.—See Rule 1 for holding of these cases and citations.—Ed.)

BRADFORD v. LIMPUS, 13 IOWA 424

1. Execution Sales of Land—Separate Parcels or Tracts—Failure to Sell Separately Vitiates Sale.—Where land is sold as a whole under execution, when it is susceptible of being sold in separate parcels, the sale will be set aside, p. 425.

Reaffirmed in Lay v. Gibbons, 14 Iowa 378, 379, 81 Am. Dec. 487; Penn v. Clemans, 19 Iowa 379; Williams v. Allison, 33 Iowa closure of a mortgage, and to such sales for taxes.
closure of a mortgage, and to such sales for taxes.

Unreported citation, 128 N. W. 375.

Cross reference. See further, sustaining and explaining, but not citing, the text, annotations under Rule 6 of Boyd v. Ellis (11 Iowa 97), Vol. I, p. 782.

STATE v. MCCOMBS, 13 IOWA 426

1. Justice's Court—Appeals From to District Court in Criminal Prosecutions—Effect.—An appeal to the district court from a judgment in a justice's court in a criminal prosecution, waives errors as to regularity of proceedings in the inferior court: In such case the appeal is tried *de novo* in the district court, pp. 426, 427.

Reaffirmed and extended in State v. McEvoy, 68 Iowa 357, 27 N. W. 274, holding further that where accused prosecutes an appeal from a judgment in the justice's court, he thereby waives jurisdiction of the person by the inferior court.

Cross references. See further, annotations under State v. Malling (11 Iowa 239), Vol. I, p. 809; Taylor v. Rockwell (10 Iowa 530), Vol. I, p. 742; Rule 2 of Craine v. Fulton (10 Iowa 457), Vol. I, p. 729; Rule 1 of Dicks v. Hatch (10 Iowa 380), Vol. I, p. 780, and cross references under this last case.

2. Trial—Instructions in Criminal Prosecution—Requirement as to Court Signing—Effect of Failure.—The requirement of the statute that instructions are to be signed by the court in the trial of a criminal prosecution, is for the purpose of making them part of the record on appeal, without being embraced in the bill of exceptions: And where instructions in such case which are not signed, are read to, delivered to, and considered by the jury, and are embraced in the bill of exceptions, such failure to sign, will not be reversible error, pp. 427, 428.

Cited in Halley v. Tichenor, 120 Iowa 166, 94 N. W. 473, holding that instructions are not required to be signed in a civil case.

Distinguished in State v. Harding, 81 Iowa 602, 47 N. W. 878, holding that instructions to the jury in a criminal prosecution, must be in writing, and be delivered to them before they arrive at a verdict; and that where the jury in such a case are instructed orally, and upon their returning a verdict, written instructions are delivered to them, which they read, and thereupon again agree to their verdict, that such facts do not cure the error of failing to instruct in writing.

(Note.—See further, State v. Stanley, 48 Iowa 221.—Ed.)

3. Indictment—Trial—Verdict—Sufficiency of.—On the trial of an indictment where the jury returns a verdict that "we the jury find the defendant guilty," it is sufficient; the words "as charged in the indictment" after such a verdict are surplusage, p. 428.

Reaffirmed in State v. Collins, 32 Iowa 42, holding that the statute requires no particular form of words in which a jury shall declare their verdict upon the trial of an indictment; and that a verdict in such case of "guilty" imports a conviction of the defendant on every material allegation in the indictment.

LYON v. BARROWS, 13 IOWA 428

1. Evidence—Depositions—Requisites of Commission to Take.—Where a commission is issued to a notary public or other commissioner to take depositions in the United States or Canada, it is sufficient (under Sec. 4069, of the Code of 1860) for it to state the county and state in which the officer resides; but where depositions are to be taken elsewhere than above, the commission therefor (under Sec. of the Code mentioned) must state the residence of such officer, pp. 429, 430.

Reaffirmed in Sheriff v. Hull, 37 Iowa 176, holding that a commission directed to "any notary public in and for Davidson County in the State of Tennessee," authorized the taking of depositions thereunder by any such notary.

Reaffirmed and qualified in Levally v. Harmon's Adm'r, 20 Iowa 537, holding that a commission to take depositions in a state of the Union must name some particular officer, either by his name of office, or by his individual name and his official style, and must name the

county and state where he resides: that a commission to take depositions in such a case directed to several officers in the alternative, is not sufficient.

(Note.—See further, *Pilmer v. Branch of State Bank*, 16 Iowa 321; *Mumma v. McKee*, 10 Iowa 107; *Jones v. Smith*, 6 Iowa 229; *Plummer v. Roads*, 4 Iowa 587, important cases sustaining and analogous to, but not citing the text.—Ed.)

CHURCHILL *v.* LYON, 13 IOWA 431

1. Judgment—Confession of—Sufficiency of Statement—Validity of Judgment by Confession as Between Parties.—Where the written statement of the facts out of which the indebtedness arose is duly sworn to, and filed in open court, a judgment rendered thereon is, in the absence of actual fraud, good as between the parties although the statement may be insufficient to support the judgment as against creditors of the defendant (debtor), p. 433.

Reaffirmed and extended in *McMillan v. Craig*, 14 Iowa 593 (abstract), holding further that a judgment by confession may be entered by the clerk in vacation.

Special cross references. See annotations under *Vanfleet v. Phillips* (11 Iowa 558), Vol. I, p. 860; *Bernard & Co. v. Douglas & Watson* (10 Iowa 370), Vol. I, p. 706, where all other cases citing, reaffirming, etc., the text and many more will be found.

STATE *v.* HODNUTT, 13 IOWA 437

1. City Court of Dubuque—Appeal from Judgments in.—Under the Session Laws of 1857, p. 356, no appeal lies to the district court from a judgment of the city court of Dubuque, p. 438.

Impliedly overruled in *State v. Hoag*, 46 Iowa 338, holding that an appeal lies to the district court from a judgment in a mayor's court of a city or town incorporated under the general law.

HAMSMITH *v.* ESPY, 13 IOWA 439

1. Partnership—Actions Against—Judgment Against Firm—Liability of Individual Property of Members—Procedure.—If a partnership is sued in its firm name and judgment is rendered against the firm, *scire facias* is necessary in order to reach the individual property of the members of the firm. But a creditor of a partnership may sue the members thereof by giving their individual names, serve all with notice, and obtain his judgment against all, and subject the property of any member in satisfaction thereof, without *scire facias*, p. 441.

Reaffirmed in *Markham v. Buckingham*, 21 Iowa 496, 497, 89 Am. Dec. 590.

Reaffirmed and extended in *Ticonic Bank v. Harvey*, 16 Iowa 145, 146, holding further that where one partner has fraudulently con-

veyed his property, that a judgment creditor of the firm may proceed in equity to set aside such conveyance for fraud, and to subject the property to his debt, without first proceeding by *scire facias*.

Reaffirmed and extended in Lathrop v. Brown, 23 Iowa 46, holding that a judgment against a partnership, the names of the members not being disclosed, is not a lien on the property of the individual members.

(Note.—See further, Anderson v. Wilson, 142 Iowa 158, 120 N. W. 678; Levally v. Ellis, 13 Iowa 544; Davis & Co. v. Buchanan & Bone, 12 Iowa 575, important cases sustaining and explaining, but not citing the text.—Ed.)

· LEWIS v. DENTON, 13 IOWA 441

1. Promissory Notes—Action by Assignee—Set-off.—In an action by the assignee of a promissory note, the maker cannot set-off a demand against the assignor thereof, by simply averring that such assignor is *the real party in interest*, p. 442.

Reaffirmed and extended in Ryan & Louthan v. Chew, 13 Iowa 591, holding further that equities between the parties to a note arising from other and independent transactions, are not available against the note in the hands of an assignee thereof.

Reaffirmed and extended in Way v. Lamb, 15 Iowa 83, holding further that a set-off against the holder of a note is not an equity which attaches to it, so as to affect subsequent holders, whether it is indorsed before or after maturity.

Reaffirmed and qualified in Stannus v. Stannus, 30 Iowa 451, holding that where a negotiable note is transferred after maturity, the indorsee takes it subject to all defenses by way of counterclaim or otherwise that the maker has against the payee, which attach to the particular note, and would control, qualify or extinguish it, but not subject to set-offs of the maker against the payee arising from independent transactions.

Cross references. See further, annotations under Shipman v. Robbins (10 Iowa 208), Vol. I, p. 669; Trustees of Iowa College v. Hill (12 Iowa 462), ante. p. 75.

STATE v. FLEMING, 13 IOWA 443

1. Criminal Law—Control of District Attorney and of Attorney General in Criminal Case.—While a criminal case is in the district court it is under the control of the district attorney; but after judgment rendered and appeal to the Supreme Court is perfected, it is under the control of the Attorney General, p. 444.

Reaffirmed and extended in State v. Grimmell, 116 Iowa 598, 88 N. W. 343, holding further (under secs. 301, and 5449 of the Code of 1897), that the board of supervisors has no control over appeals in

criminal cases brought within the county, and the county attorney is not required to consult it before taking an appeal in such a case.

2. Appeals in Criminal Cases—Time in Which to be Taken.—

An appeal to the Supreme Court in a criminal case must be taken within one year after the judgment in the district court, or the former court has no jurisdiction thereof; and consent of the attorney for the State after such time cannot confer such jurisdiction, p. 444.

Distinguished and narrowed in State v. Brandt, 41 Iowa 639, holding that the Supreme Court can acquire jurisdiction of an appeal in a criminal case *before final judgment* in the district court, where both the State and the defendant consent thereto, or where no objection is made: Hence holding that an appeal may be taken by consent of the parties from a decision of the district court overruling a demurrer to an indictment, and a motion to quash it.

McHENRY v. DAY, 13 IOWA 445, 81 Am. Dec. 438

1. Husband and Wife—Conveyance by—False Representations of Husband Inducing Wife to Sign—Defective Certificate of Acknowledgment—Rights of Innocent Third Persons.—Where a husband induces his wife to sign a conveyance to homestead by false representations, such fact does not affect the rights of innocent parties to the transaction, who acted in good faith.

A defective acknowledgment of the signature of a wife to a conveyance and informality in taking it, is good against her and in favor of innocent persons who act thereon, when caused by her own act, pp. 447, 448.

Reaffirmed and extended as to first paragraph in Green & Densmore v. Scranage, 19 Iowa 465, 466, 87 Am. Dec. 447; Edgell v. Hagens, 53 Iowa 226, 5 N. W. 138, holding false representations made to the wife by the husband, or undue influence exerted by him to induce her to execute a mortgage, where she afterwards duly acknowledges it, does not affect or prejudice the mortgagee, if the conduct of the husband was without the instigation, procurement, knowledge or consent of the mortgagee; that in such case fraud must be brought home to the latter party.

Cited in Lake v. Gray, 30 Iowa 419, holding that a mortgage is good as between the parties, although neither signed or acknowledged: That an acknowledgment of a deed by a married woman is not necessary to release dower, or to convey her real estate.

Distinguished in Sims v. Hervey, 19 Iowa 288, 297, 298, holding that a deed, or mortgage, of lands by a husband and wife, intended to circulate or float in business channels and when it finds an owner to have her name inserted in the absence of the grantor (wife) is not effective as a conveyance, without authority in writing for the insertion of such name, though the transaction may, in certain cases, give

equitable right; but no equity will exist in favor of the owner of such an instrument, when the grantor (wife) receives and retains no benefits therefrom, and does not ratify the negotiation of the instrument and the filling in of the blank.

Cross references.

"Mortgage on or deed to homestead—Requisites"—See annotations and cross references under *Babcock v. Hoey* (11 Iowa 375), Vol. I, p. 829.

"Defective deed—When operates as covenant to stand seized"—See annotations under Rule 3 of *Switzer v. Knapps* (10 Iowa 72), Vol. I, p. 645.

IN RE PIERSON'S EXECUTORS, 13 IOWA 449

1. Administrators and Executors—Order Removing—Right of Appeal.—An appeal lies to the Supreme Court from an order discharging a rule to show cause why an appeal should not be allowed an administrator, or executor, who has been removed from office by order of the county court, pp. 451, 452.

Reaffirmed and extended in *George v. Parker*, county judge, 16 Iowa 533, holding further that an appeal lies to the District Court in favor of a guardian who is removed from office by order of a county court.

Cited in *McIntire v. Bailey*, Gd'n, 133 Iowa 424, 110 N. W. 590, holding that where there is a feeling of hostility existing between guardian and ward, and a condition existing such as that for the good of all concerned such fiduciary be removed, it should be done, another should be appointed, and the former be required to immediately file his final report, and, with the approval of the court, make settlement with his successor—Such proceedings to be had in the district court.

Distinguished in *Richards v. Burden*, 31 Iowa 309, 310, holding that an appeal does not lie from an interlocutory order or ruling; that appeals only lie from final orders affecting the substantial rights of the party appealing.

ABBOTT V. CHASE, 13 IOWA 453

1. Lands—Actions of Right—Legal and Equitable Title—Which Prevails.—The legal will prevail over the equitable title in an action of right, p. 454.

Reaffirmed in *Allyn v. Johnson*, 13 Iowa 604.

Reaffirmed and qualified in *Cole v. Gill*, 14 Iowa 529, 530, holding that where, in an action for the recovery of real estate, the defendant discloses an equitable title, or defense, he may have the action transferred to equity; but that on his failure to so proceed, the legal will prevail over the equitable title.

Overruled in Rosierz v. Van Dam, 16 Iowa 180, holding that under the Code of 1860, the defendant may plead equitable defenses in ordinary actions, and in actions of right, and that in such cases a transfer to equity is unnecessary.

(Note.—See further, Richards v. Crawford, 50 Iowa 494; Burdick v. Wentworth, 42 Iowa 440; Farley, Norris & Co. v. Goocher, 11 Iowa 570, important cases explaining the present *status* of this proposition.—Ed.)

HAYNES, HUTT & CO. v. SEACREST, 13 IOWA 455

1. Conveyances—Unacknowledged and Defectively—Validity and Effect of.—A deed or other conveyance is good as between the parties and all persons having actual knowledge of its existence, although defectively acknowledged, or without any acknowledgment, pp. 457, 458.

Reaffirmed in Lake v. Gray, 30 Iowa 419; Kruger v. Walker, 94 Iowa 511, 63 N. W. 322.

(Note.—See further, Hewitt v. Morgan, 88 Iowa 468, 55 N. W. 478; Simms v. Hervey, 19 Iowa 273; Brinton v. SeEVERS, 12 Iowa 389; Dussaume v. Burnett, 5 Iowa 95; Blain v. Stewart, 2 Iowa 378; Gould v. Woodward, 4 G. Greene 82, important cases sustaining and explaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Bell v. Evans (10 Iowa 353), Vol. I, p. 703.

2. Conveyances—Partnership—Conveyance of Land by One Member of Firm—Ratification by Member not Signing—Sufficiency of.—Where one member of a partnership executes a conveyance to partnership real estate, it is binding on the partner not signing, only upon a prior or subsequent ratification, express or implied, being shown.

A recognition which shall have the effect of making valid a deed, which, but for such ratification would be ineffective to pass the title, as against the party or subsequent incumbrancers, should be clear and express, or be implied from circumstances equally clear and undisputed; and the party alleging ratification must fail, unless he brings his proof up to this standard, pp. 458, 459.

Reaffirmed as to second paragraph in Sowden & Co. v. Craig, 26 Iowa 163, 96 Am. Dec. 125; Seiffert & Weise Lumb. Co. v. Hartwell, 94 Iowa 583, 63 N. W. 335, 58 Am. St. Rep. 313; Waughtal & Sons v. Kane, 108 Iowa 271, 79 N. W. 91.

Reaffirmed and extended in Britt v. Gordon, 132 Iowa 435, 108 N. W. 321, holding further that there can be no ratification by a party, who has not full knowledge of the facts of the transaction at the time of the alleged ratification.

Distinguished and narrowed as to first paragraph in Hubbard v. German Catholic Congregation, 34 Iowa 39, holding that the doctrine

that a deed may be ratified in parol, does not extend to cases other than partnership.

(Note.—See further, *Eggleston v. Mason & Co.*, 84 Iowa 630, 51 N. W. 1; *Hakes v. Myrick*, 69 Iowa 189, 28 N. W. 575; *First Nat'l Bank of Davenport v. Gifford*, 47 Iowa 575; *McLaren v. Hall*, 26 Iowa 297; *Curts v. Scoles and Turner*, 1 Iowa 471; *Mathews v. Gilliss*, 1 Iowa 242, important cases on the subject of ratification, not citing the text.—Ed.)

Cross references. See further on the subject of ratification, *Rese v. Medlock*, 84 Am. Dec. 611; *Trudo v. Anderson*, 81 Am. Dec. 595; *Milliken v. Coombs*, 10 Am. Dec. 70; *Moore v. Lockett*, 4 Am. Dec. 683; *Gunster v. Scranton Co.*, 59 Am. St. Rep. 650; *Innerarity v. Bank*, 52 Am. Rep. 710; *Fairfield Bank v. Chase*, 39 Am. Rep. 319; *Workman v. Wright*, 31 Am. Rep. 546.

LYSTER *v.* BREWER, 13 IOWA 461

1. Execution Sales—Motion to Set Aside—Notice to Adverse Party.—A motion to set aside a sale made under an execution can not be considered, without notice to the parties adversely interested; and an order setting aside such a sale, and all proceedings thereunder, had without such notice will be reversed on appeal, p. 461.

Reaffirmed in *Osborn v. Cloud*, 21 Iowa 239, holding that notice of a motion to set aside a sale under an execution, must be given to the purchaser thereat, or the order setting it aside will be reversed on appeal.

(Note.—See further, *Polk County v. Sypher*, 17 Iowa 358; *Ritter v. Henshaw*, 7 Iowa 97; *Wright v. Leclair*, 3 Iowa 221, important cases sustaining and explaining, but not citing, the text.—Ed.)

STATE *v.* KREIG, 13 IOWA 462

1. Intoxicating Liquors — Nuisance — Indictment—Keeping, etc., Building for Sale of—Sufficiency of Description.—It is a sufficiently definite description for an indictment for a nuisance in keeping and selling intoxicating liquors in a particular place, for the indictment to allege such acts as done by defendant in a "certain building or place," pp. 462, 463.

Reaffirmed in *State v. Schilling*, 14 Iowa 458; *State v. Shaw*, 35 Iowa 578; *State v. Waltz*, 74 Iowa 611, 38 N. W. 495, holding that an indictment for maintaining a nuisance, does not have to definitely describe or designate the building.

(Note.—And to the same effect is *State v. Freeman*, 27 Iowa 333, not citing the text.—Ed.)

Cited in *State v. Reid*, 20 Iowa 418, not in point.

Cross references. See further specially, annotations under *State v. Crogan* (8 Iowa 523); *State v. Middleton* (11 Iowa 246), Vol. I, pp. 533 and 811, respectively.

See also in this connection, annotations under *State v. Cooster* (10 Iowa 453); *State v. Myers* (10 Iowa 448); *State v. McGrew* (11 Iowa 112); *State v. Collins* (11 Iowa 141), Vol. I, pp. 728, 726, 784, 789, respectively.

NEWELL v. SANFORD & CHILDS, 13 IOWA 463

1. **Action on Contract—Attorney's Fee.**—In an action at law upon a contract, the successful party is not allowed an attorney's fee, at least in the absence of malice and want of probable cause on the part of the unsuccessful party, p. 466.

Reaffirmed in *Seeberger v. Wyman*, receiver, 108 Iowa 537, 79 N. W. 293, disallowing a successful party an attorney's fee in an action in equity to settle liability of parties on certain obligations.

Reaffirmed and extended in *Dorris, Ex'r v. Miller*, 105 Iowa 569, 75 N. W. 483, holding further that where a party has a legal right to institute an action or proceeding in which he is afterward unsuccessful, that the adverse party is not entitled to an attorney's fee, whatever the motive of the former.

Distinguished and narrowed in *Vorse v. Phillips*, 23 Iowa 342, 92 Am. Dec. 428, holding that in an action on the bond for the wrongful suing out of an injunction, the plaintiff may recover as part of the damages sustained, attorneys fees paid by him for obtaining the dissolution of the injunction.

(Note.—See further, specially, *Irlbeck v. Bierl*, 101 Iowa 240, 81 N. W. 465; *Jayne v. Drorbaugh*, 63 Iowa 711, 17 N. W. 433.—Ed.)

Cross reference. See further in this connection, annotations under Rule 2 of *Campbell v. Chamberlain* (10 Iowa 337), Vol. I, p. 698.

STATE v. GEBHARDT, 13 IOWA 473

1. **Appeal—Instructions—How to be Made Part of Record on—When Not Considered.**—Instructions given or refused, which are not signed by the trial court, or which it does not appear from the bill of exceptions are made part of the record, will not (under Code of 1860) be considered or reviewed upon appeal, p. 474.

Reaffirmed in *State v. Watrous*, 13 Iowa 495.

Reaffirmed and extended in *Lyons v. Thompson*, 16 Iowa 65, holding further that a writing, and, in fact, any evidence on which a reversal is sought, should be copied at length in the bill of exceptions, but that in any case it (the writing or other evidence) must be identified with care and certainty therein, or it will not be considered on appeal.

Cross references. See further, annotations and cross references under Rule 2 of *State v. McCombs* (13 Iowa 426), ante. p. 167; *Fletcher v. Burroughs* (10 Iowa 557), Vol. I, p. 748; *Mumma v. McKee* (10 Iowa 107), Vol. I, pp. 652, and 748, respectively.

FROMME v. JONES, 13 IOWA 474

1. Chattel Mortgage—Necessity of Recording—Possession by Mortgagee.—The object of the record of a chattel mortgage is to give notice thereof to creditors and purchasers, and that the right to the possession of the mortgaged property has passed from the mortgagor; so, where a mortgagee of a chattel mortgage takes possession of the mortgaged property, recording the instrument is unnecessary; and in such last case if the instrument is defectively acknowledged, or recorded, such fact is immaterial, p. 478.

Reaffirmed in Leggett & Meyer Tob. Co. v. Collier, Robertson & Hambleton, 89 Iowa 146, 147, 56 N. W. 418.

2. Partnership—Sale of Property by One Member to Pay or Secure Firm Debt.—As between creditors there is no doubt but that one member of a partnership may sell or dispose of the firm's property to pay or secure its debt, p. 479.

Reaffirmed and extended in Citizens' Nat'l Bank v. Johnson, 79 Iowa 294, 44 N. W. 552, holding further (as does the present case) that the right of a partner to sell or mortgage the firm property to pay, or secure its debt can only be questioned by other partners, or one claiming through them.

3. Mortgage—Insolvency of Mortgagee—Effect.—A debtor has a right to secure his creditor at any time by a sale, transfer, or mortgage of his property, and this without reference to other creditors, provided he acts in good faith and without fraudulent design; and the fact that the debtor is insolvent at the time, will not affect the validity of the transaction, or cause a mortgage so executed to be treated as an assignment for the benefit of all his creditors, p. 480.

Reaffirmed in Lampson & Powers v. Arnold, 19 Iowa 486; Davis & Co. v. Gibbon, 24 Iowa 263; Farwell & Co. v. Howard & Co., 26 Iowa 384; Kohn Bros. v. Clement, Morton & Co., 58 Iowa 593, 12 N. W. 552; Cadwell's Bank v. Crittenden, 66 Iowa 241, 23 N. W. 648; Gage & Co. v. Parry, assignee, 69 Iowa 609, 29 N. W. 824; Aulman v. Aulman, 71 Iowa 126, 127, 32 N. W. 241, 60 Am. Rep. 783; Bolles v. Creighton, 73 Iowa 205, 34 N. W. 818.

Reaffirmed in Buell v. Buckingham & Co., 16 Iowa 289, 95 Am. Dec. 516, holding that an absolute sale by an insolvent debtor of all of his property to a creditor, which is made in good faith and for payment of an antecedent debt, is valid and will not be treated as a general assignment for the benefit of creditors.

Cited with approval in Whittaker v. Lindley, 14 Iowa 600 (abstract) in a case where a deed of trust was executed to secure a present loan of money.

Cited with approval in Elwell v. Kimball & Champ, 102 Iowa 729, 69 N. W. 289, involving a general assignment for benefit of creditors.

Cross reference. See further in this connection, annotations under *Burrows v. Lehndorff* (8 Iowa 96), Vol. I, p. 496.

4. Chattel Mortgage—Retention of Property by Mortgagor.—The mortgagor of a chattel mortgage may, in good faith and in the absence of actual fraud, retain possession of and dispose of the mortgaged property by sale, pp. 480, 481.

Reaffirmed and extended in *Adler & Bro. v. Claflin, Mellin & Co.*, 17 Iowa 91, 92, holding further that mortgaged personalty may be turned over to one of the mortgage debtors for the honest purpose of paying the mortgage debt.

Cross references. See further, sustaining, explaining, extending and qualifying text, annotations under *Wilhelmi v. Leonard* (13 Iowa 330), ante. p. 157; *Kuhn v. Graves* (9 Iowa 303), Vol. I, p. 579; *Torbert v. Hayden* (11 Iowa 435), Vol. I, p. 839; *Campbell v. Leonard* (11 Iowa 489), Vol. I, p. 848.

5. Trial—Verdict—Reforming by Court—Extent Allowed.—Although a verdict does not conclude formally in the words of the issue, yet if the point in issue can be collected from the finding, the court will put the verdict into form. If, however, the amount found by the jury cannot be definitely ascertained by reference to the pleadings, or to some certain data given by the jury, the court cannot assume the power to fix the amount of the judgment. The court has no power to weigh evidence, or to go outside of the record, in order to ascertain the intention of a jury or to reform a verdict, pp. 482-484.

Reaffirmed in *Moore v. Devol*, 14 Iowa 114; *Armstrong v. Pier-son*, 15 Iowa 478; *Edwards v. McCaddon*, 20 Iowa 523.

Reaffirmed and explained in *State v. Funck*, 17 Iowa 371, 372, holding that formal defects in a verdict are immaterial, but it must be responsive to the issue, and so expressed as to show that the jury decided the questions submitted: If from the pleadings and the verdict the intention of the jury be shown, it is sufficient.

Reaffirmed and explained in *Lee & Co. v. Bradway*, 25 Iowa 218, holding that where there is no issue as to the *amount* of the plaintiff's claim, but only an issue as to his right to recover at all, a verdict simply "for the plaintiff" is as conclusive as if it stated the amount, and that in such case the jury may retire and correct it.

Cross reference. See further specially, annotations and note under Rule 1 of *Cassell v. Western Stage Co.* (12 Iowa 47), ante. p. 7.

STATE v. BITMAN, 13 IOWA 485

1. Assault and Battery — Information — Allegations — Sufficiency.—An information charging defendant with cruelly and inhumanly whipping his child, implies an unlawful and willful assault and battery, and is sufficient: But such information must state the name of the person on whom the assault was committed, pp. 486, 487.

Reaffirmed and extended in State v. Butcher, 79 Iowa 112, 44 N. W. 239, holding further that facts constituting the offense should be stated with as much precision in an information as in an indictment.

Reaffirmed and qualified in State v. Allen, 32 Iowa 492, 493, holding that if any one of the material facts constituting an offense be left out of an information, it fails to charge an offense, and no judgment can be rendered thereon upon a verdict of guilty: That the exact language of the statute denouncing an offense need not be used, in an indictment or information, but that the material facts constituting the offense must be stated with such conciseness and certainty as to enable a man of common understanding to know what is meant, and the court to pronounce judgment upon conviction according to the law of the case: Holding further that an indictment, or information, for selling intoxicating liquor to another must state the name of the person to whom it was sold, if known, and if not known it should be so stated.

(Note.—See further, State v. Brewer, 53 Iowa 735, 6 N. W. 62; State v. Curran, 51 Iowa 113; State v. Doe, 50 Iowa 541; State v. Murray, 41 Iowa 580; State v. Merchant, 38 Iowa 375; State v. Shaw, 35 Iowa 575; State v. Potter, 28 Iowa 554; State v. McCormick, 27 Iowa 402; State v. Hessekamp, 17 Iowa 25; State v. Baldy, 17 Iowa 39; State v. Watrous, 13 Iowa 489; State v. Cure, 7 Iowa 479, important cases on and analogous to this subject, not citing the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under State v. Middleton (11 Iowa 246), Vol. I, p. 811.

MCKELLAR, ET AL. v. STOUT, 13 IOWA 487

(Later Appeal, 14 Iowa 359.)

1. Demurrer—Certainty Required in.—Where a demurrer to a pleading in an action at law, fails to distinctly specify the grounds of objection, or the matter of error intended to be urged as a defect thereto, it must be disregarded, p. 489.

Reaffirmed and explained in Jones v. Brunskill, 18 Iowa 131; Chambers v. Ingham, 25 Iowa 222; Fockler v. Martin, 32 Iowa 119; McLaughlin v. Bascomb, 36 Iowa 593, holding that the statute condemns language in a demurrer which is so general as to leave the party filing the pleading demurred to ignorant of what the real objection is, until it is developed in the argument.

Reaffirmed and extended in Chambers v. Ingham, 25 Iowa 222, holding further that where a pleading demurred to is good as to objections specifically made, the court will not inquire as to whether it is otherwise defective.

(Note.—See further sustaining and explaining, but not citing, the text, *Davenport Gas Light & Coke Co. v. City of Davenport*, 15 Iowa 6; *Hill v. Sherman*, 15 Iowa 365.—Ed.)

STATE v. WATROUS, 13 IOWA 489

1. Willful Trespass—Indictment for—Sufficiency of Allegations in.—An indictment for willful trespass by accused cutting down or destroying trees on the land of another, is sufficient if it allege the offense with such certainty and conciseness as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to the law of the case. So, where in such an indictment the language is sufficient to enable any person giving it a fair and ordinary construction to know on whose land the timber alleged to be destroyed was situated, the venue is stated, and the land described with reasonable certainty, it is good, p. 493.

Reaffirmed in State v. Shaffer, 21 Iowa 487, 488.

(Note.—See further specially in this connection, *State v. Baldy*, 17 Iowa 39; *State v. Hessenkamp*, 17 Iowa 25.—Ed.)

Cross reference. See further, sustaining, explaining and analogous to, but not citing, the text, annotations and cross references under *State v. Bitman* (13 Iowa 485), ante. p. 177.

2. Indictment—Charging Offense in Different Forms.—An indictment may charge an offense in different forms to meet the testimony; and if it may have been committed in different modes or by different means, they may be alleged in the alternative; but in charging an offense in different forms, the pleader need not use the alternative form of expression, p. 494.

Reaffirmed in State v. Dillon, 74 Iowa 659, 38 N. W. 528.

Cross references. See further specially on this question, Rule 1 of *State v. Barrett* (8 Iowa 536), Vol. I, p. 535; *State v. McPherson* (9 Iowa 53), Vol. I, p. 543; Rule 1 of *State v. Cooster* (10 Iowa 453), Vol. I, p. 72.

3. Verdict on Indictment—Judgment Rendered on—Time to be Rendered—Effect of Rendering Judgment Before “Three Clear Days” After Verdict Where Court Remains in Session.—Where the record on appeal in a criminal prosecution shows that the court continued in session more than “three clear days” after the return of the verdict, and that the judgment was rendered thereon in less than “three clear days” thereafter, the cause will be remanded, not for a new trial, but for a judgment on the verdict, with leave to defendant to show cause against its rendition, except cause already shown by him, p. 495.

Reaffirmed and narrowed in State v. Uhser, 136 Iowa 611, 111 N. W. 812, holding that where the defendant in a criminal prosecution files his motion for a new trial and it is overruled before he is sentenced, that the fact that he is sentenced contrary to the provisions of

Sec. 5431 of the Code of 1897, (requiring the court to fix the day of pronouncing judgment in advance and at least three days after verdict, if the court continues in session that long) will not be ground for reversal, where the record on appeal fails to show that he was thereby prejudiced.

NORTH & SCOTT v. MUDGE & Co., 13 IOWA 496, 81 Am. Dec. 441

1. Actions Against Partnership—Confession of Judgment by One Member Without Authority from Firm—Validity.—Where in an action against a partnership, one member enters a confession of judgment without authority from the firm, the judgment is void as to the partnership and other members, but is binding on the partner so confessing, p. 498.

Reaffirmed in **Sherman v. Christy**, 17 Iowa 323-325.

Cross references. See further, annotations under **Christy v. Sherman** (10 Iowa 535), Vol. I, p. 743.

See also, in this connection, annotations under **Vanfleet v. Phillips** (11 Iowa 558), Vol. I, p. 860.

2. Debts and Demands—Merger.—If a debt or demand of an inferior degree is changed to one of a higher character, the former is merged in the latter, upon which the party owning it must alone rely, p. 498.

Reaffirmed in **Harford, Thayer & Co. v. Street**, 46 Iowa 595.

FORMHOLZ v. TAYLOR, 13 IOWA 500

1. Action on Contract—Pleadings—Special and Common Counts—Quantum Meruit.—Where a party seeks to recover for the reasonable value of services rendered or material furnished upon a special contract, he must either declare in general assumpsit, or unite the common with the special counts; he cannot recover therefor on the *quantum meruit* under a special count alleging the contract, pp. 502, 503.

Reaffirmed and qualified in **Ellwood and Lowrie v. Wilson**, 21 Iowa 528, 529, holding that where attorneys at law sue upon contract for services rendered in the Supreme Court, in an action therein pending, but which had been settled without their knowledge before the services were rendered, that they cannot recover upon the contract, but the judgment in such action will not bar them from thereafter suing and recovering upon *quantum meruit*.

SHAW v. BROWN, 13 IOWA 508

1. Appeal—Assignment of Errors—Failure to Argue Errors—Waiver—Presumption.—Where on appeal the party complaining assigns numerous errors, some of which he fails to argue or insist upon, the appellate court may presume that those not argued or insisted upon are waived, p. 510.

Reaffirmed and extended in Clise v. Freeborn, 29 Iowa 111, 112; Soward v. Ch. & N. W. R. R. Co., 30 Iowa 551; Snyder v. Eldridge, 31 Iowa 130; Hows & Olson v. Fostenson, 31 Iowa 600 (abstract); Melhop v. Doane & Co., 36 Iowa 632, holding further that it is not the duty of the Supreme Court to pass upon errors assigned, which are not presented and relied upon in argument, and such errors are regarded as waived.

Cited in Heaton v. Fryberger, 38 Iowa 207 (dissenting opinion) majority court opinion not in point.

(Note.—See further sustaining, but not citing, the text, Bodwell v. Bragg & Bro., 29 Iowa 232; Dubuque County v. Koch, 17 Iowa 229; Wilson v. Hillhouse, 14 Iowa 199, and there are others.—Ed.)

WURTZ, AUSTIN & McVEIGH v. HART, 13 IOWA 515

1. Equity—Insolvent Estates—Marshaling Assets—Priority of Creditors.—If a creditor has two funds out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien, p. 519.

Reaffirmed in In re Assignment of Doolittle, Carney, assignee v. Smith, 104 Iowa 408, 409, 73 N. W. 869.

Distinguished in Perry v. Murray, 55 Iowa 420, 421, 7 N. W. 681, the case turning on another question.

(Note.—See specially, Dickson v. Chorn, 6 Iowa 19.—Ed.)

Cross reference. See further specially, annotations under Clarke v. Bancroft, Beaver & Co. (13 Iowa 320), ante. p. 157. See also Rule 2 hereof.

2. Insolvent Estates—Settlement of—Practice Under Code of 1860.—In an action involving a contest between creditors of an insolvent debtor who has made an assignment for the benefit of creditors, any creditor may, under Chapter 77 of the Code of 1860, except to the correctness of the claim of any other creditor and have the question adjudicated: But if a creditor has securities which he has failed to exhaust, there is no plain, speedy and adequate remedy given (by the statute mentioned) to another creditor to compel the former to resort to such securities before taking dividends under the assignment, p. 519.

Reaffirmed and extended in Knoxville Nat'l Bank et al v. Hanirick, assignee, 67 Iowa 586, 25 N. W. 817, holding further (as does the present case) that an independent action may be maintained to determine the equities and priorities of creditors of a debtor who has made an assignment for the benefit of creditors: Holding further that the federal court has jurisdiction of such an action, where one of the parties thereto is a non-resident.

Cross reference. See further Rule 1 hereof, and cross reference there found.

McLENAN v. SULLIVAN, 13 IOWA 521

1. Limitation of Actions—Real Estate—Title Obtained by Fraud—Action to Recover.—An action by the owner to recover real estate against a person who obtained title thereto by fraud, may be instituted within five years after the discovery of the fraud, p. 526.

Reaffirmed in Cowin v. Toole, 31 Iowa 518.

Reaffirmed and extended in Relf v. Eberly, 23 Iowa 471, 472, holding further that the statute of limitation does not commence to run against the right of a purchaser to sue in equity to cancel and rescind a contract for sale of land and deed made thereunder, induced by the fraud of the vendor, until the time of the discovery of the fraud by the purchaser.

DYER v. MCHENRY & Co., 13 IOWA 527

1. Negotiable Instruments—Assignment or Transfer by Indorsement—Garnishment of Debt—Rights of Indorsee.—Where after a negotiable instrument is transferred by indorsement, the debt is garnished in the hands of the maker or drawer by a creditor of the payee or drawee, it is exempt therefrom in the hands of the indorsee. But this rule does not apply unless the transfer or negotiation is completed before the garnishment, p. 529.

Reaffirmed and extended in Allison v. Barrett, 16 Iowa 283, 284, holding further that where a note is assigned and is afterwards seized and sold under execution for a debt of the payee, but before the sale thereunder the maker promises to pay the amount of the note to the assignee, he is liable to him for its amount.

Cross references. See further specially, annotations, notes and cross references under Stevens v. Pugh (12 Iowa 430); McCoid v. Beatty (12 Iowa 299), ante. pp. 70 and 50; Burton & Stapleton v. District Township of Warren (11 Iowa 166), Vol. I, p. 795.

LOOMIS, CONGER & Co. v. SIMPSON, 13 IOWA 532

1. Trial—Instructions—Exceptions to Those Given—Certainty Required—Review on Appeal.—Where a party objects to the charge of the court or to instructions given as a whole, and some part of it, or some of them, is or are correct, specific errors therein will not be reviewed on appeal (under Code of 1860), p. 533.

Reaffirmed in Lyons v. Thompson, 16 Iowa 66; Carpenter v. Parker, 23 Iowa 452; Rowen v. Sommers, 101 Iowa 735, 736, 66 N. W. 896.

Cross reference. See further, sustaining and explaining, but not citing, the text, annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

DOWNING v. HARMON, 13 IOWA 535

1. Judgment by Default Erroneously Entered—Motion to Set Aside Necessary Before Appeal.—The correctness of the entry of a judgment by default will not be reviewed on appeal, unless the party complaining first makes a motion to set it aside in the trial court, p. 536.

Reaffirmed and extended in Pratt v. Western Stage Co., 27 Iowa 365, holding further that a motion to correct any irregularity must be made in the trial court before it will be reviewed on an appeal to the Supreme Court.

Special cross reference. See further, annotations under Pigman v. Denney (12 Iowa 396), ante, p. 66, for other cases citing text, and many more on the question.

SAMUELS v. DUBUQUE COUNTY, 13 IOWA 536

1. Attorney's Fees for Defending Criminals.—Section 4168 of the Code of 1860, establishing the maximum fee of an attorney who is appointed by the court to defend an accused person, who is unable to procure counsel (to be paid by the county), is constitutional, and such an attorney is entitled to such sum therefor, and to no more, pp. 537, 538.

Cited with approval in White v. Polk County, 17 Iowa 417, holding that the district court has authority to appoint a district attorney *pro tem.* when the district attorney is temporarily or necessarily absent, and that the county is liable to such *pro tem.* attorney for a reasonable compensation for his services while so acting.

Unreported citation, 90 N. W. 509.

(Note.—See further, Hall v. Washington County, 2 G. Greene 473.—Ed.)

DALTON v. LANE & GUYE, 13 IOWA 538

1. Intoxicating Liquors—Sale of for Purpose of Violating Law, is Void.—A contract made in another state for the sale of intoxicating liquors and for the purpose of and with the intent that the purchaser violate the laws of this state, is void; but in the absence of pleading and proof of such purpose and intention, the contract is valid, pp. 541, 542.

Reaffirmed in Whitlock v. Workman & Co., 15 Iowa 354, 355; Second Nat'l Bank of Louisville, Ky. v. Curren, 36 Iowa 557, 558.

2. Action at Law—Defense to—Failure to Interpose—Subsequent Action in Equity Involving Subject-Matter—When Law Defense Not to be Pledged in.—In an action in equity involving the subject-matter of a precedent action at law, the defendant cannot interpose a defense which he should have set up in the first action, in the absence of pleading and proof of fraud, accident or mistake preventing him from interposing it in the law action, p. 542.

Reaffirmed in Hackworth, Gd'n v. Zollars, 30 Iowa 436, 437; Lawrence Sav. Bank v. Stevens, 46 Iowa 432.

Reaffirmed and extended in Smith, Cleary & Enright v. Leddy, 50 Iowa 115; Ulber v. Dunn, sheriff, and Sutton, 143 Iowa 263, 119 N. W. 270, holding further that a party cannot attack a judgment on account of a defense which he might have interposed in the action wherein it is rendered.

Distinguished in Sketchley v. Smith & Co., 78 Iowa 548, 43 N. W. 526, turning on another question.

(Note.—See further specially, Warthen v. Himstreet, 112 Iowa 605, 84 N. W. 702; Fulliam v. Drake, 105 Iowa 615, 75 N. W. 349; Case v. Hicks, 76 Iowa 36, 40 N. W. 75; Hanson & Myer v. Manley, 72 Iowa 48, 33 N. W. 357; Merrill v. Bowe, 67 Iowa 636, 25 N. W. 840; Tredway v. Sioux City & P. R. Co., 39 Iowa 663; Dewey v. Peck, 33 Iowa 242; Doyle v. Reilly, 18 Iowa 108; Campbell v. Ayers, 1 Iowa 257, important cases sustaining and analogous to, but not citing, the text.—Ed.)

MASSIE v. SHARPE, 13 IOWA 542

1. Mortgage Debt—Assignment of Part of Notes Secured by—Priority.—Where several notes are secured by mortgage, and some are assigned, they will be paid out of the proceeds of the mortgaged property, in the order in which they fall due, p. 543.

Reaffirmed in Massie v. Mann, 17 Iowa 133.

Reaffirmed and extended in Isett & Brewster v. Lucas, 17 Iowa 506, 85 Am. Dec. 572, holding further that where several notes are given for the same indebtedness and a separate mortgage is executed to secure each note, that the rule is the same as to the priority, except in the case of a legal and binding agreement to the contrary.

Cross references. See further, sustaining and explaining, but not citing, the text, annotations under Rule 4 of Grapengether v. Fejervary (9 Iowa 163), Vol. I, p. 556; Rankin v. Major (9 Iowa 297), Vol. I, p. 578.

LEVALLY v. ELLIS, 13 IOWA 544

1. Partnership—Actions Against—Judgment Against Firm—Liability of Individual Property of Members—Procedure.—If a partnership is sued in its firm name and judgment is rendered against the firm, *scire facias* is necessary in order to reach the individual property of the members of the firm. But a creditor of a partnership may sue the members thereof by giving their individual names, serve all with notice, and obtain his judgment against all, and subject the property of any member in satisfaction thereof, without *scire facias*, p. 545.

Special cross reference. See annotations and note under *Ham-smith v. Espy* (13 Iowa 439), ante. p. 169, for cases citing text, and others on the subject.

WATSON v. HUNKINS, 13 IOWA 547

1. Lease—Assignment of—Rights of Assignee.—In this state a lease may be assigned, and the assignee thereof is given the right to recover the rent reserved without a sale or transfer of the reversionary interest, p. 550.

Reaffirmed and extended in *Riddle v. Dow*, 98 Iowa 14, 66 N. W. 1068, 32 L. R. A. 811, holding further that a mortgage given by a landlord on crops grown on leased premises, due him as rent, is superior to a subsequent garnishment of the rent, in the hands of the lessee, by a judgment creditor of the landlord.

Cited with approval in *Huntington v. Fisher*, 27 Iowa 279, holding that any one for whose benefit a bond or other obligation is made, and who is injured by its breach, may maintain an action thereon.

(Note.—See further specially on this question, *Lufkin & Wilson v. Preston*, 52 Iowa 235, 3 N. W. 58 and 57 Iowa 28, 10 N. W. 290; *Haywood & Son v. O'Brien*, 52 Iowa 537, 3 N. W. 545.—Ed.)

Cross reference. See further in this connection, annotations under *Fanning v. Stimson* (13 Iowa 42), ante. p. 116.

COLE v. DEALHAM, 13 IOWA 551

1. Assignment for Benefit of Creditors—What Constitutes—Unlawful Preference—Effect.—When a debtor in contemplation of insolvency executes a mortgage (or mortgages) to secure a particular creditor (or creditors) files it (or them) of record without his (or their) knowledge, and on the same date as that on which the instrument (or instruments) is (or are) acknowledged, executes and files a general assignment of his property for the benefit of creditors, the two transactions will be considered one, and the assignment is void for unlawfully preferring creditors, pp. 552, 553.

Reaffirmed and qualified in *Gray v. McCallister*, 50 Iowa 503, holding that a partial assignment of a debtor's property, made in good faith, preferring certain creditors, is valid.

Distinguished in *In re Assignment of Guyer*, 69 Iowa 587, 588 29 N. W. 827, holding that where a debtor enters into an agreement with a creditor to execute a mortgage on specific property upon the happening of a particular event, that a mortgage executed on such property upon the happening of the event, is valid: That in such case the assent of the mortgagee thereto, will be presumed.

Special cross reference. See annotations under *Burrows v. Lehn-dorff* (8 Iowa 96), Vol. I, p. 496, for other cases citing text, and many more on the question.

Cross reference. See further in this connection, annotations under Rule 3 of *Fromme v. Jones* (13 Iowa 474), ante. p. 176.

2. Mortgage—Agreement to Execute—Enforcement in Equity.—A valid, enforceable agreement to execute a mortgage may be specifically enforced in equity against the party making it, a subsequent purchaser with notice, or a general assignment; but a promise by a debtor to secure a loan, made at the time money is borrowed, is not such an agreement, p. 553.

Reaffirmed and explained in *Day v. Griffith*, 15 Iowa 106, 107, holding that an agreement by a debtor to a creditor to execute a mortgage where no particular property on which the mortgage is to be executed is stated, is unenforceable.

DUBUQUE FEMALE COLLEGE v. DISTRICT TOWNSHIP OF CITY OF DUBUQUE, 13 IOWA 555

1. Schools—Board of Directors of School Districts—Term of Office—Contracts by.—Under Chapter 62, Sec. 8, Laws of 1858, the board of directors of a school district hold office for one year and *until their successors are elected and qualified*, and contracts made by incumbents during such period, although after the election of their successors, under a change of law, are binding, p. 557.

Cited in *Burkhead v. Indep. Sch. Dist. of Independence*, 107 Iowa 32, 77 N. W. 492, holding that the board of directors of a school district cannot employ a teacher for a longer period than one year.

2. Schools—Invalid or Unconstitutional School Law—Acts of Board of Directors or Other Officers Under—Legalizing and Curative Act of Board of Education.—The Board of Education may pass an act legalizing and confirming the acts of the board of directors or other officers of a school district, elected and transacting business under an unconstitutional or invalid law: Such directors, etc., of the school district are officers *de facto*, p. 559.

Reaffirmed and extended in *Iowa Railroad L. Co. v. Soper*, 39 Iowa 119, 120; *Palmer v. Howard County*, 45 Iowa 64, holding further that the Legislature may pass an act legalizing and curing the acts of officers, on any question in which it may confer the power to do the acts so legalized and cured, and where vested rights are not thereby impaired.

Cited with approval in *Bennett v. Fisher*, 26 Iowa 500, 501, holding that retrospective laws are valid, unless they violate some of the provisions of the National or State Constitutions.

(Note.—See further, *State v. Squires*, 26 Iowa 340; *Newman v. Samuels*, 17 Iowa 528; *Jones v. Berkshire*, 15 Iowa 248; *Brinton v. Seevers*, 12 Iowa 389; *McMillen v. Boyles*, county judge, 6 Iowa 305, important cases on this subject, not citing text.—Ed.)

Cross reference. See further on this subject, annotations under Rule 2 of *Brinton v. Seevers* (12 Iowa 389), ante. p. 64.

3. Corporations, Municipal and Private—School Districts—Ratification of Acts of Agent or Officer—Extent of Rule—How Done.—A corporation, whether municipal or private, may ratify the unauthorized act of its agent, or officer, which is equivalent to prior authority; and an act done by such an agent, or officer, before incorporation may be ratified after incorporation. Ratification in such cases may be proven by acceptance of benefits, or by acts and declarations of the *de jure* officers of the corporation, recognizing as valid the unauthorized act. The rule applies to school districts, pp. 560, 561.

Reaffirmed and extended in Sackett v. Osborn, 26 Iowa 147, 148, holding further that ratification of a contract by a person gives it the same force as if originally executed by him.

Reaffirmed and extended in Frost v. Clark, 82 Iowa 303, 304, 48 N. W. 84, holding further that the performance by an executor of a voidable contract concerning land, and the subsequent approval thereof by the orphans' court, has the same effect as if it were so originally executed and approved, and renders it binding.

Reaffirmed and extended in Johnson v. Sch. Corp. of Cedar, 117 Iowa 326, 90 N. W. 715; Kagy v. Ind. Dist. of West Des Moines, 117 Iowa 699, 89 N. W. 972; Bobzin v. Gould Valve Co., 140 Iowa 749, 750, 118 N. W. 42, holding further that, either at law or in equity, the fact that a contract is contrary to public policy, or otherwise illegal, does not relieve a corporation (municipal or private) from liability thereunder, when it accepts and retains its benefits.

(Note.—See further, Weitz v. Indep. Dist. of Des Moines, 87 Iowa 81, 54 N. W. 70; Western Pub. House v. Dist. Township of Rock, 84 Iowa 101, 50 N. W. 551; Everts v. Dist. Township of Rose Grove, 77 Iowa 37, 41 N. W. 478, 14 Am. St. Rep. 264; Bellows v. Dist. Township of Westfork, 70 Iowa 320, 30 N. W. 582; Mills & Co. v. Collins, 67 Iowa 164, 25 N. W. 109; Moore v. Indep. Dist. of Toledo City, 55 Iowa 654, 8 N. W. 631; Athearn v. Indep. Dist. of Millersburg, 33 Iowa 105; Boardman v. Hayne, 29 Iowa 339; Attix, Noyes & Co. v. Pelan, 5 Iowa 336; Merrick v. B. & W. Plank R. Co., 11 Iowa 74, important cases on and analogous to this subject, not citing the text.—Ed.)

KURZ v. HOLBROOK, 13 IOWA 562

1. Pleadings—Usury.—In an action on a promissory note (or other contract) the defendant may plead usury by alleging facts in his answer constituting it, without specifically denominating and pleading it as usury, p. 563.

Cited with approval in Sexton v. Murdock, 36 Iowa 518, holding that the receiving, in money or goods, of interest more than the legal rate without any contract, does not work a forfeiture to the school

fund as provided by the statute; but the money or goods thus received will, after paying the legal rate of interest, be applied as a payment on the principal of the debt; but if an illegal rate of interest be contracted for, then the forfeiture to the state for the use of the school fund will follow, whether the illegal interest has been received or not.

Cross references.

"Who can interpose plea of usury"—See annotations under *Perry v. Kearns* (13 Iowa 174), ante. p. 134; *Hollingsworth v. Swickard* (10 Iowa 385), Vol. I, p. 709.

"Usury—Contract—Evidence"—See annotations under Rule 3 of *Smith et al v. Coopers et al* (9 Iowa 376), Vol. I, p. 593.

WHEELER v. SMITH, 13 IOWA 564

1. Evidence—Depositions Taken by One Party—Introduction by Adverse Party.—A deposition taken by one party may be read as evidence by the party adverse, p. 564.

Reaffirmed in *Citizens' Bank v. Rhutasel*, 67 Iowa 319, 25 N. W. 262.

Reaffirmed and extended in *Hale & Bro. v. Gibbs*, 43 Iowa 382, holding further that where a deposition is taken for and offered in evidence by the defendant, he may refuse to read, or may withhold any part of it, and that upon the plaintiff offering to read the part withheld, the defendant may object to it as other evidence.

(Note.—See further sustaining, but not citing, text, *Howe, Ex'r v. Mut. Re. F. L. Ass'n*, 115 Iowa 285, 88 N. W. 338; *Pelamourges v. Clark* 9 Iowa 1; *Crick v. McClintic*, 4 G. Greene 290.—Ed.)

2. Appeal—Instructions—Bill of Exceptions—Certainty Required.—Where a reversal is sought on appeal for errors in giving or refusing instructions on the trial, the bill of exceptions must embody the instructions given or refused, or refer to them in such a manner as to leave no doubt of their identity and genuineness, p. 564.

Reaffirmed and extended in *Pharo v. Johnson*, 15 Iowa 561, holding further that an objection to a deposition of a witness which was rejected on the trial below cannot be considered on appeal where the record, other than appellant's motion for a new trial, nowhere shows that such deposition ever had an existence, or was ever used or offered to be used as testimony.

Cross references. See further specially, on this question, annotations and notes under *White v. Tucker* (9 Iowa 100), Vol. I, p. 549; *Rule 2 of Mumma v. McKee* (10 Iowa 107), Vol. I, p. 652.

3. Trial—Evidence—Time and Order of Introduction—Discretion of Trial Court—Abuse of—Reversal on Appeal.—The time and order of introduction of testimony on the trial of a cause, is within the sound judicial discretion of the trial court, and his ruling thereon will

not be cause for reversal except in case of abuse thereof and resulting prejudice to the substantial rights of the party complaining, p. 565.

Reaffirmed in Donaldson, et al, Adm'rs v. M. & M. R. R. Co., 18 Iowa 289, 290, 87 Am. Dec. 391.

Cross reference. See further specially on this question, annotations under Rule 1 of Rutledge v. Evans, sheriff (11 Iowa 287), Vol. I, p. 818.

NOYES, ADM'R v. HORR, 13 IOWA 570

1. Conveyance—Record of—Sufficiency of Index Entry—Constructive Notice.—Where an index entry to a recorded mortgage on two tracts of land, describes only one of them, constructive notice is not imparted as to the tract not described in the entry, p. 571.

Reaffirmed and extended in Stewart v. Huff, 19 Iowa 560, 561, holding further that where the description in an index entry of land conveyed, is so defective as not to put a reasonably cautious man upon inquiry, it does not impart constructive notice.

Reaffirmed and extended in Howe v. Thayer, 49 Iowa 165, holding further that where an index entry of a mortgage recited the name of the mortgagor as "William H. Freeman" when his name was "William H. Furman," that it did not impart constructive notice: That a subsequent purchaser, or mortgagee of mortgaged property is not bound to look beyond the record for information concerning conveyances.

Reaffirmed and extended in Koch v. West, 118 Iowa 471, 472, 92 N. W. 664, 96 Am. St. Rep. 394, holding further that a prior purchaser, or incumbrancer, of a recorded conveyance must show that the instrument under which he claims, when recorded, was properly indexed, or his right will be inferior to that of a subsequent purchaser, or mortgagee.

(Note.—This last case, however, turned more properly on an insufficient acknowledgment, and other questions.—Ed.)

Cross references. See further on this question, annotations and cross references under Calvin v. Bowman and Neal (10 Iowa 529), Vol. I, p. 541; Scoles v. Wilsey (11 Iowa 261), Vol. I, p. 812; Miller v. Bradford (12 Iowa 14), ante. p. 2.

GRAVES & CO. v. ALDEN, 13 IOWA 573

1. Chancery Practice—Sworn Answer—Effect—Burden of Proof.—When an answer in chancery is demanded under oath by the petition, such sworn pleading has not the weight of two witnesses, or one witness and strong corroborating circumstances; but it casts upon the plaintiff the burden to prove the material charges which form the basis of his prayer for relief, p. 575. •

Cited with approval in Mitchell & Sons v. Sawyer and Wife, 21 Iowa 585, holding that where the allegations of a bill in chancery alleging fraud is denied generally and specifically by answer, the burden is on the plaintiff to overcome the denials by proper testimony.

Impliedly overruled in Smith v. Phelps, 39 Iowa 539, 540, holding that an answer in chancery in order to be taken as evidence, must be called for by the petition, and be under oath, otherwise its only effect is to put in issue the allegations of the bill.

(Note.—See further specially, Wilson v. Holcomb, 13 Iowa 110; Vandall v. Vandall, 13 Iowa 247.—Ed.)

Cross reference. See further, Rule 2 of Shepard v. Ford (10 Iowa 502), Vol. I, p. 736.

WADSWORTH & WELLS v. CHEENEY & STINSON, 13 IOWA 576

1. Attachment—Petition or Affidavit—Amendment of.—The plaintiff in an attachment action may amend his petition, or the affidavit on which it is based, upon such terms as the court may impose, and shall not, after amendment, be prejudiced on account of the defect, p. 578.

Reaffirmed in Gourley v. Carmody, 23 Iowa 213, 214, holding that where, before dissolution of an attachment, the plaintiff asks leave to amend his petition in order to make it more specific, and his bond as to the amount of penalty therein, such amendments must be allowed: And it is reversible error for the court to refuse such permission and thereafter dissolve the attachment for such defects.

Reaffirmed in Shaffer v. Sundwall, 33 Iowa 582, holding that any defect in form of an affidavit, or bond in an attachment action may be amended at any time before or during trial.

Reaffirmed and extended in Dixon v. Dixon, 19 Iowa 514, holding further that amendments may be allowed by the trial court at any time in furtherance of justice, upon such terms as are proper, within a large judicial discretion vested in him, and that his ruling on such a question will not be ground for reversal, except in case of abuse of such discretion and resulting prejudice to the party complaining.

Cross references. See further, annotations, note and cross references under Langworthy et al v. Waters et al (11 Iowa 432), Vol. I, p. 838.

See also, annotations under Rule 2 of Seevers, Adm'r v. Hamilton (11 Iowa 66), Vol. I, p. 773.

2. Attachment Writ—Recitals in—Requisites.—It is not necessary that the causes of the issuance of the attachment be stated in the writ, p. 578.

Reaffirmed in Westphal, Hinds & Co. v. Sherwood & Chapman, 69 Iowa 365, 28 N. W. 641.

LARSON v. REYNOLDS & PACKARD, 13 IOWA 579, 81 Am. Dec. 444

1. Homestead—Mortgage by Husband Without Concurrence of Wife, Void—Effect of Death of Wife and Re-marriage of Husband—Decree of Foreclosure—Conclusiveness.—Where a mortgage

is executed on homestead by the husband, and the wife does not join therein, it is void; and the subsequent death of the wife and re-marriage of the husband does not render the instrument valid; and in such case a sale of the homestead under a foreclosure of such mortgage, is void as against the second wife and should be set aside, where she is not made a party to the action: But the decree therein is good as against the husband as to the amount found to be due, and so far as it forecloses his interest in the mortgaged premises, when he fails to make the defense of its invalidity, pp. 581-583, 587.

Reaffirmed in Burnap v. Cook, 16 Iowa 153, 85 Am. Dec. 507; Morris v. Sargent, 18 Iowa 100.

Reaffirmed and explained in Sharp v. Bailey, 14 Iowa 389, 81 Am. Dec. 489, holding that where, in a deed of the husband to his land, the wife's name does not appear as a party to the granting clause, that her relinquishment of her dower right in a clause at the end of the deed and signing and acknowledging it, does not pass the homestead in the land to the grantee.

Reaffirmed and varied in Barnett v. Mendenhall, 42 Iowa 298, holding that a contract to convey homestead which the wife does not concur in and sign, is invalid, and will not support an action for specific performance.

Reaffirmed and qualified in Morris v. Sargent, 18 Iowa 100, holding that a deed or other conveyance by the husband must be signed and acknowledged by the wife; and that such an instrument executed for her by the husband, is of no effect to convey homestead, in the absence of facts constituting estoppel.

Reaffirmed and narrowed in Way v. Scott, 118 Iowa 198, 91 N. W. 1034, holding that a mortgage by the husband on homestead in which the wife does not join, is void; and all proceedings thereon or thereunder are of no effect.

Cited in Edwards v. Sullivan, 20 Iowa 504, holding that where a wife joins in the granting and covenanting parts of a deed of her husband to real estate, and signs and acknowledges the instrument in due form, she thereby conveys all her interest therein.

Unreported citation, 13 N. W. 309.

Cross references. See further specially, annotations under Rule 1 of Yost v. Devault (9 Iowa 60), Vol. I, p. 544; Alley v. Bay (9 Iowa 509) Vol. I, p. 615; Babcock v. Hoey (11 Iowa 375), Vol. I, p. 829.

See also Rule 2 hereof.

2. Actions—Foreclosure of Mortgage on Homestead—Parties.

—A wife is not a necessary party to every action affecting homestead: But where she is a party to a mortgage on it, then if she is not a party to the foreclosure action thereunder, she is not estopped by anything done therein from afterwards setting up her rights, p. 586.

Reaffirmed in Burnap v. Cook, 16 Iowa 158, 85 Am. Dec. 507.

Reaffirmed in Chase v. Abbott, 20 Iowa 159, 160, holding that the wife has a vested right to homestead in land owned by the husband of which she cannot be completely divested or barred, unless she is made a party to judicial proceedings concerning it; and that in all actions concerning homestead it is the safer practice to make her a party, and generally she should be a party.

Reaffirmed and extended in Haynes, Hutt & Co. v. Meek, 14 Iowa 321; Oleson v. Bullard, 40 Iowa 14, holding further that the homestead right must be pleaded by the parties, defendant, (husband and wife, mortgagees) to the action to foreclose a mortgage thereon, or they will be concluded by a decree therein, and cannot thereafter set it up in a collateral action.

(Note.—See further, Sloan v. Coolbaugh, 10 Iowa 31, 74 Am. Dec. 370.—Ed.)

Cross reference. See Rule 1 hereof in connection herewith.

WARREN v. CHICKASAW COUNTY, 13 IOWA 588

1. Written Instruments—Alterations—Burden of Proof.—The burden of proof is on a party alleging a material alteration of a written instrument without the knowledge or consent of the maker, to prove it. So, in an action on a county warrant where the objection is made by the county to the introduction thereof in evidence that it was materially altered (by inserting the words "or bearer" after the name of the person to whom it was payable) after its issuance, it must satisfactorily prove that this was done and was without its knowledge or consent, p. 588.

Reaffirmed in Potter v. Kennelly, 81 Iowa 97, 46 N. W. 856, holding that the burden of proving the alleged material alteration of a mortgage after its execution, is on the party setting it up.

Reaffirmed and extended in Shroeder v. Webster, 88 Iowa 631, 55 N. W. 570, holding further that in an action on a promissory note where the maker (defendant) pleads and proves a material alteration without his knowledge or consent after its execution, the law presumes that it was done fraudulently, and the burden of proof thereupon shifts to the plaintiff (payee or holder) to disprove such fraudulent purpose (in this case to prove that the alteration was made with the consent of the maker).

(Note.—See further, specially, Hagan v. Merchants' & Bankers' Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Robinson v. Reed, 46 Iowa 219.—Ed.)

Cross reference. See further, annotations and note under Van Horn and Clark, Adm'rs v. Bell (11 Iowa 465), Vol. I, p. 844.

RYAN & LOUTHAN v. CHEW, 13 IOWA 589

1. Negotiable Instruments—Indorsement and Transfer as Collateral Security for Pre-existing Debt—Indorsee Not Holder for

Value.—Where a negotiable note is indorsed or transferred as collateral security for a pre-existing debt, the indorsee or transferee is not a *bona fide* holder for value, in the usual course of trade, p. 590.

Reaffirmed in Flannigan v. Althouse, Wheeler & Co., 56 Iowa 515, 9 N. W. 382; Union Nat'l Bank of Chicago v. Barber, 56 Iowa 561, 9 N. W. 891.

Special cross reference. See annotations under Rule 3 of Trustees of Iowa College v. Hill (12 Iowa 462), ante. p. 75, for other cases citing the text, and many more on the question.

2. Negotiable Promissory Notes—Indorsement of—Defenses Against Indorsee.—In an action on a negotiable promissory note by an indorsee thereof, it is subject to all defenses by way of counterclaim or otherwise that the maker has against the payee, which attach to the particular note, and would control, qualify or extinguish it; but it is not subject, in such an action to set-offs of the maker against the payee arising from independent transactions, p. 591.

Reaffirmed in Stannus v. Stannus, 30 Iowa 451, holding that where a negotiable note is transferred after maturity the indorsee takes it subject to all defenses by way of counterclaim or otherwise that the maker has against the payee, which attach to the particular note, and would control, qualify or extinguish it, but not subject to set-offs of the maker against the payee arising from independent transactions.

Cross references. See further specially, annotations under Lewis v. Denton (13 Iowa 441), ante. p. 170; Shippman v. Robbins (10 Iowa 208), Vol. I, p. 669.

STATE v. UTLEY, 13 Iowa 593

(Abstract.)

1. Contempt—Punishment for by Court—What Record Must Show.—Where a person is ruled and required by a court to appear and show cause why he should not be fined for contempt in disobeying the orders of the court, his response thereto is adjudged insufficient and he is fined, the record must (under Sec. 2694 of the Code of 1860) show the nature of the contempt, the facts on which it is founded, or it will be corrected by *Certiorari*, p. 593.

Reaffirmed in State v. Folsom, 34 Iowa 584 (abstract), holding that where contempt proceedings do not state the evidence or the facts upon which the order fining for contempt is founded, and the warrant of commitment does not state the facts, or whether they were within the knowledge of the court or proved by witnesses, *Certiorari* will lie from the Supreme Court in favor of the person fined.

Reaffirmed and explained in Lutz v. Aylesworth, 66 Iowa 632, 633, 24 N. W. 246, holding that where a witness is fined for contempt in refusing to answer a question propounded, and the notes of the stenographic reporter is afterwards transcribed, filed and preserved,

it is a sufficient compliance with Sec. 3497 of the Code of 1873, requiring a statement of facts on which the commitment is founded to be preserved.

Reaffirmed and extended in State v. Dougherty, 32 Iowa 261; State v. District Court of Taylor County, 124 Iowa 190, 99 N. W. 713, holding further that the record in a contempt proceeding must show either the facts or the evidence upon which the court acted, or the order fining for contempt will be reversed on appeal.

(Note.—See further specially, Dorgan v. Granger, 76 Iowa 156, 40 N. W. 697; Skiff v. State, 2 Iowa 550.—Ed.)

KNAPP v. MILLER, 13 IOWA 596

(Abstract.)

1. Contracts and Notes—Interest—Failure to Stipulate Rate—Rate Allowed.—A contract or note for the payment of money which fails to stipulate the rate of interest, bears six per cent. per annum from maturity, p. 596.

Reaffirmed in Vennum v. Gregory, 21 Iowa 328, holding further that the legal rate of interest is six per cent. per annum, unless a higher rate be agreed upon and expressed in writing; and that in the absence of a written agreement therefor the court cannot allow a rate higher than the legal, *as damages*.

Cross reference. See further, annotations under Rule 2 of Thrift v. Redman (13 Iowa 25), ante. p. 112.

MORTON & Co. v. CHASE & KING, 13 IOWA 597

(Abstract.)

1. Chancery Practice—Sworn Answer Not Called for by Petition—Effect.—A sworn answer in chancery not so called for by the petition, is not evidence, p. 597.

Reaffirmed in Smith v. Phelps, 32 Iowa 539, 540, holding that an answer in chancery in order to be taken as evidence, must be called for by the petition, and be under oath, otherwise its only effect is to put in issue the allegations of the petition which are denied.

Cross reference. See further, annotations, note and cross reference under Graves & Co. v. Alden (13 Iowa 573), ante. p. 189.

WAGNER v. GALYEAR, 13 IOWA 598

(Abstract.)

1. Mortgage—Foreclosure—Right of Redemption.—After land has been sold under a decree foreclosing a mortgage, neither the debtor nor any of his creditors have a right to redeem, p. 598.

Reaffirmed in Stoddard v. Forbes, 13 Iowa 298, holding that a decree in an action of foreclosure need not use any express language in order to cut off the right of redemption.

Cross reference. See further on this question, annotations under Rule 3 of *Kramer v. Rebman* (9 Iowa 114) Vol. I, p. 551.

LODGE *v.* REZNOR, 13 IOWA 600

(Abstract.)

1. New Trial—Verdict Against Evidence—Discretion of Trial Court—Review on Appeal.—The appellate court will not interfere with the ruling of the trial court in granting or refusing a new trial because the verdict was against the evidence, unless it is made manifest that such court abused its discretion on such ruling, and that the verdict is clearly against the evidence, resulting in injustice, p. 601.

Reaffirmed in *Brainard v. Van Kuran*, 22 Iowa 266; *Worthington v. Olden*, 31 Iowa 421; *Lester & Bro. v. Sallack*, 31 Iowa 478; *McCarthy v. C. R. I. & P. Ry. Co.*, 83 Iowa 491, 50 N. W. 23.

Cross references. See further, annotations and cross references under *State v. Tomlinson* (11 Iowa 401), Vol. I, p. 833; *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764.

PICKETT *v.* HAWES, 13 IOWA 601

(Abstract.)

1. Change of Venue in Civil Cases—Conditional Order of—Failure to Comply With—Procedure.—Where an order for a change of venue in a civil action is entered, upon a condition to be complied with by the applicant, who fails to comply therewith, the court granting the change may thereupon re-docket and try the cause, p. 601.

Unreported citation, 124 N. W. 202.

Cross reference. See further in this connection, annotations under *Farr v. Fuller* (12 Iowa 83), ante. p. 16.

KEY *v.* HAYDEN, 13 IOWA 602

(Abstract.)

1. Judgment by Default While Demurrer Pending.—A judgment by default cannot be entered while the defendant has a demurrer pending, p. 602.

Reaffirmed and extended in *Douglass v. Langdon & Bro.*, 29 Iowa 246, 247, holding further that a judgment by default cannot be entered while defendant has an answer undisposed of.

Cross reference. See further, annotations and cross reference under *Levi v. Monroe* (11 Iowa 453), Vol. I, p. 842.

STATE *v.* STIEFLE, 13 IOWA 603

(Abstract.)

1. Criminal Law—Judgment upon Conviction for Misdemeanor.—When the defendant is indicted, tried and convicted of a misdemeanor, the judgment rendered thereon, nor the record, need not

show that the defendant was asked if he had any legal cause to show why judgment should not be pronounced against him, p. 603.

Reaffirmed and extended in State v. Schlagel, 19 Iowa 170, holding further that in the absence of a showing or complaint in the court below, the appellate court will presume that the jury were duly sworn to try an indictment.

SWORDS v. RUSS, 13 IOWA 603
(Abstract.)

1. Practice — Pleadings — Petition Stating More Than One Cause of Action in Same Count.—Where a petition states more than one cause of action in the same count, it may be reached by motion, but not by demurrer, p. 603.

Reaffirmed and extended in Hayden v. Anderson, 17 Iowa 163, holding further that where an entire pleading is impertinent or immaterial, it may be stricken from the files: Holding further that where matter in a pleading is redundant, or irrelevant, it may be stricken out on motion, but cannot be reached by demurrer; and that statements in a pleading which are not sufficiently specific, and matter pleaded in one count which properly belongs in another, must be reached by motion and not by demurrer.

Cross reference. See further, annotations and cross references under Rule 1 of Keeney v. Lyon (10 Iowa 546), Vol. I, p. 744.

HAYDEN & BUTTERWORTH v. WILTSE, 13 IOWA 604
(Abstract.)

1. Actions in Equity—Appeal—Trial De Novo on—When Not so Tried—Injunction Actions.—In order to have a hearing *de novo* on an appeal in an action in chancery, the appellant must bring all the pleadings and evidence considered below before the appellate court. So, where an injunction action is heard upon the pleadings, and evidence introduced by both parties, the appellate court will not decide whether or not the court erred in making the injunction perpetual, where it does not appear affirmatively that all the evidence adduced below is before it, p. 604.

Reaffirmed and qualified in Winslow, Harris & Co. v. Turner, 20 Iowa 295, holding that where objection to a trial *de novo* on an appeal in a chancery action (on the ground that the pleadings and evidence are not part of the record), is made on the hearing, after appellant's argument is filed and in the absence of his counsel, the appellate court should affirm without prejudice to the right of appellant to prosecute another appeal.

Cross references. See further on this question, annotations and note under Garner v. Pomroy (11 Iowa 149), Vol. I, p. 791.

See also, annotations under Rule 2 of Blake v. Blake (13 Iowa 40), ante. p. 115.

ALLYN v. JOHNSON, 13 IOWA 604

(Abstract.)

1. Lands—Actions of Right—Legal and Equitable Title—Which Prevails.—In an action of right, the legal will prevail over the equitable title, p. 604.

Overruled in Rosierz v. Van Dam, 16 Iowa 180, holding that under the Code of 1860, the defendant may plead equitable defenses in ordinary actions, and in actions of right, and that in such cases a transfer to equity is unnecessary.

Cross reference. See further, note under Abbott v. Chase (13 Iowa 453), ante. p. 172.

Annotations to Decisions Reported in Volume 14 Iowa.

COWLES v. GRAY, 14 IOWA 1

1. Cities and Towns—Streets—Dedication of—Presumption as to.—The owners of land in laying off a town on a navigable river may withhold from public use whatever ground, and wherever situate, that they choose; and as a matter of fact and law such is withheld, unless it affirmatively appears from the plat or map of dedication that it is set apart for the public use. So, where a town is laid off on a tract of land bordering on the Mississippi River, and the surveyed plat or map thereof does not show any land between the town plat or map and the river, a strip of land there lying is not dedicated to the public for the purpose of a front or water street, pp. 4, 5.

Reaffirmed and extended in Grant v. City of Davenport, 18 Iowa 186, 187, holding further that the words "Reserved Landing" on a plat of land dedicated to public use along a navigable river front, means reserved to the dedicator.

Cited in Ware v. Thompson, 29 Iowa 68, not in point.

Distinguished and narrowed in Boehler v. City of Des Moines, 111 Iowa 421, 82 N. W. 916, holding that where a recorded plat or map of land dedicated to public use, shows a street along a navigable river front, such street is part of the city and is dedicated to public use.

Unreported citation, 87 N. W. 446.

WRIGHT & WHITE v. WHEELER, 14 IOWA 8

1. Fraud—Burden of Proof.—The burden of proof is on the party alleging fraud to sustain his allegations, upon issue being joined thereon: In such case if the party alleging fails to introduce proof to support it, judgment must be rendered against him, p. 14.

Reaffirmed in Mitchell & Sons v. Sawyer, 21 Iowa 585.

Cross reference. See further, annotations, notes and cross references under Johnson v. McGrew (11 Iowa 151), Vol. I, p. 792.

WASHINGTON COLLEGE v. DUKE; SAME v. TEDFORD, 14 IOWA 14

1. De Facto Corporation—Person Contracting With Cannot Set up the Fact.—A person sued upon a contract entered into by him with a *de facto* corporation, cannot set up the want of its legal organization, as a defense thereto, p. 20.

Reaffirmed and extended in Courtright v. Deeds, 37 Iowa 511, holding further that where a person subscribes a sum of money to aid in the construction of a railroad, to be paid *as soon as the cars shall run* to a definite place, a certificate of stock to be thereupon issued for such amount to the subscriber, that upon the railroad company constructing its road, the subscriber, when sued upon such subscription, cannot set up as a defense thereto, that the company is violating the law by failing to manage and conduct its business at places required by law and by officers resident in this state.

Cited with approval in Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 245, 91 N. W. 1085, turning on another question.

Distinguished in Kirkpatrick v. U. P. Church of Keota, 63 Iowa 377, 19 N. W. 274, a case wherein the organization claimed to be a *de facto* corporation, never exercised such powers or did such acts as constitute one.

(Note.—See further specially on this question, Howe Machine Co. v. Snow, 32 Iowa 433.—Ed.)

Cross references. See also on this question, Cahill v. Ins. Co., 43 Am. Dec. 457; Cotton Manufactory v. Davis, 7 Am. Dec. 459.

CROSS v. DISTRICT TOWNSHIP OF DAYTON, 14 IOWA 28

1. School Districts—Actions Against for Debt, or on Order of President—Mandamus to Collect.—A school district may be sued, like any other corporation, for debt, or on an order drawn by its president, and property liable to execution be levied on and sold under a judgment in such an action.

Although mandamus lies in favor of a creditor, either before or after judgment, to compel the levying and collection of a tax to pay his debt, such remedy is not exclusive, and is no defense to such an action by the creditor, p. 30.

Reaffirmed and extended in Boynton v. District Township of Newton, 34 Iowa 514, 517, holding further (as does the present case) that the drawing of an order by the president of a school district for a debt, does not discharge it.

GUEST v. BYINGTON, 14 IOWA 31

1. Practice—Motion—Waiver of—Presumption as to On Appeal.—Where a motion is made in the district court to strike the petition from the files, because it is not signed, etc., and it is never called to the court's attention, nor any ruling made thereon, it will, on appeal, be presumed to have been waived, p. 31.

Reaffirmed in First Nat'l Bank of Dubuque v. Carpenter, Stibbs & Co., 41 Iowa 521, holding that where the record on appeal fails to show the ruling of the district court on a motion therein, it will be presumed to have been waived; that an erroneous ruling of the trial court will not be presumed on appeal, but must appear affirmatively.

(Note.—See further sustaining and explaining, but not citing, the text, *Gantz v. Clark*, 31 Iowa 254; *Weaver v. Coolege*, 15 Iowa 244; *Barker v. Brown*, 15 Iowa 70.—Ed.)

Cross reference. See in connection herewith, annotations and cross references under *Jewett & Lovejoy v. Miller & Fuller* (12 Iowa 85), ante. p. 17.

2. Mortgages—Action at Law on Note Secured by, no Bar to Action to Foreclose—When.—An action pending at law on notes secured by a mortgage brought by the payee (mortgagee) is no bar to an action to foreclose the mortgage brought by the assignee thereof, p. 32.

Reaffirmed and extended in *State v. Clough*, 111 Iowa 717, 83 N. W. 728, holding further that the rule that the court acquiring jurisdiction of a particular case will retain it to the exclusion of another court of concurrent jurisdiction, applies only where the actions (in the two courts) are between the same parties, seeking the same remedy.

3. Lands—Vendor's Lien—Title Bond—Assignment of Purchase Money Notes and Conveyance of Legal Title to Assignee—Foreclosure by.—Where purchase money notes for land sold by title bond are transferred, and the legal title conveyed to the assignee by the vendor, the assignee may sue in equity for foreclosure of the lien given by the title bond on the land, p. 35.

Reaffirmed in *Zebley v. Sears*, 38 Iowa 512, holding that the assignee of a note secured by a lien on land in a title bond, has the same rights and remedies as the payee (vendor), and may sue in his own name for foreclosure of the bond or contract to sell.

Cross references. See further on this question, annotations under *Blair & Co. v. Marsh* (8 Iowa 144), Vol. I, p. 501; *Rankin v. Major* (9 Iowa 297), Vol. I, p. 578.

BOLANDER v. ATWELL, 14 IOWA 35

1. Default Judgments—Motion to Set Aside—Judicial Discretion of Trial Court—Reversal for Abuse of.—The trial court has a large judicial discretion on the question of a motion to set aside a judgment by default, and his refusal to so do will not be cause for reversal except in case of abuse thereof, and resulting prejudice to the party complaining, p. 36.

Reaffirmed and extended in *Ordway v. Suchard & Gebhard*, 31 Iowa 487, holding further that the judicial discretion of the trial court in acting upon a motion to set aside a judgment by default should never be exercised in favor of a party who is in default through the negligence of himself, or his attorney.

Reaffirmed and qualified in *Gilbert, Hedge & Co. v. Wilcox*, 33 Iowa 594 (abstract), holding that in acting upon an application to set aside a default during the term at which the judgment is rendered

thereon, the trial court has a large judicial discretion which will not be interfered with on appeal, unless for a clear abuse thereof, or for disregard of some legal requirement.

(Note.—See further sustaining, explaining, extending and qualifying, but not citing, the text, *Simmons v. Church*, 31 Iowa 284; *McNulty v. Everett & More*, 17 Iowa 581; *Kreisinger v. Icarian Community*, 16 Iowa 586; *Harper v. Drake*, 14 Iowa 533.—Ed.)

Cross references. See further sustaining, etc., but not citing, the text, annotations and cross references under Rule 2 of State v. Elgin (11 Iowa 216), Vol. I, p. 805. See also, in this connection, annotations under *Pigman v. Denney* (12 Iowa 396), ante. p. 66.

SPENCER v. WHEATON, 14 IOWA 38

1. Tax Illegally Levied—Injunction.—Injunction lies at the instance of a tax payer to restrain the collection of tax illegally levied, and to prevent an officer from selling property for such purpose, pp. 39, 40.

Reaffirmed in *Zorger v. Township of Rapids, and B. C. R. & Minn. Ry. Co.*, 36 Iowa 180.

Reaffirmed and explained in *Rood v. Board of Supervisors of Mitchell County*, 39 Iowa 446, holding that where a tax is illegal, and not merely irregular, injunction lies to restrain its enforcement.

(Note.—See further sustaining and explaining, but not citing the text, *Williams v. Peinny*, 25 Iowa 436; *Olmstead v. Board of Supervisors of Henry County*, 24 Iowa 33; *Chamberlain v. City of Burlington*, 19 Iowa 395; *Litchfield v. Polk County*, 18 Iowa 70; *Macklot v. City of Davenport*, 17 Iowa 379.—Ed.)

PECK v. HENDERSHOTT, 14 IOWA 40

1. Appeal and Error—Questions Not Raised Below.—A question raised for the first time in the Supreme Court will not there be considered, p. 44.

Reaffirmed in *McClintock v. Sutherland*, 35 Iowa 490; *Stanberry, Gibson & Stanberry v. Dickerson*, 35 Iowa 494.

(Note.—See further sustaining, but not citing, the text, *Barlow, Wood & Co. v. Brock*, 25 Iowa 308; *Finley v. Brown*, 22 Iowa 538, and there are others.—Ed.)

2. Trial—Instructions—Pertinency to Issue and Facts—Immaterial Instructions.—Instructions are to be confined to the issue and the facts proven; and the refusal of the court to give an immaterial or irrelevant instruction, is not error, p. 44.

Reaffirmed and extended in *Robinson v. Ill. Cent. R. R. Co.*, 30 Iowa 404; *Todd v. Branner*, 30 Iowa 441, 442, holding further that it is not error for the court to refuse to give an instruction which is already substantially covered by others given.

Cross references. See further, annotations and note under Rule 3 of State v. Hockenberry and Brandt (11 Iowa 269), Vol. I, p. 814; Rules 3 and 4 of Moffitt v. Cressler (8 Iowa 122), Vol. I, p. 499.

3. Husband and Wife—Wife May Acquire and Hold Property Under Code of 1851—Choses in Action of Wife in Possession of Husband.—Under Sec. 1453 of the Code of 1851, the wife may acquire and hold choses in action; and the delivery of notes payable to her, to her husband, and his possession as agent for the purpose of collection, does not vest title thereto in him, pp. 44, 45.

Reaffirmed and extended in Mitchell & Sons v. Sawyer and Wife, 21 Iowa 583, holding further that where a wife has separate property she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of her husband.

Reaffirmed and qualified in King v. Gottschalk, 21 Iowa 514, holding that a wife may *give* and *deliver* to her husband notes or other choses in action; and that in such case the husband may sue thereon in his own name.

Cross reference. See further on this question, annotations, note and cross reference under Rule 4 of Suiter v. Turner (10 Iowa 517), Vol. I, p. 739.

4. Appeal—Instructions—Assignment of Errors—Certainty Required.—An assignment of errors as to instructions given or refused, must specifically point out the error or errors claimed, and designate the instruction or instructions, or part of the trial court's charge where found, or it will be disregarded on appeal, p. 45.

Reaffirmed in Albrosky v. Iowa City, 76 Iowa 302, 41 N. W. 23; *Faivre v. Mandercheid and Arnesdorf*, 117 Iowa 733, 90 N. W. 79, holding that the Supreme Court will only consider errors definitely designated in the assignment of errors.

Reaffirmed and narrowed in Sherwood v. Snow, Foote & Co., 46 Iowa 482, 483, 26 Am. Rep. 155, holding that where an assignment of errors specifically points out several instructions, it is sufficient, and that reference does not have to be made to each instruction in a separate assignment.

Cited with approval in Carpenter v. Parker, 23 Iowa 452; McCaleb v. Smith, 24 Iowa 592 (abstract), on the question of a general exception to the charge of the court.

(Note.—See further specially, *Koenigs v. Ch. M. & S. P. Ry. Co.*, 98 Iowa 569, 65 N. W. 314, and 67 N. W. 399; *Wicke v. Iowa State Ins. Co.*, 90 Iowa 4, 57 N. W. 632; *Blair v. Madison County*, 81 Iowa 313, 46 N. W. 1093; *Oschner v. Schunk*, 46 Iowa 293; *Reilly v. Ringland*, 44 Iowa 422; *Arnold v. Arnold*, 20 Iowa 273; *State v. Sater*, 8 Iowa 420.—Ed.)

Cross references. See further, sustaining, extending and qualifying, but not citing, the text, annotations and note under *Hawes v. Twogood* (12 Iowa 582), ante, p. 100.

See also, in this connection, annotations and note under Rule 5 of *Davenport Gas Light & C. Co. v. City of Davenport* (13 Iowa 229), ante, p. 140.

MYERS v. JOHNSON COUNTY, 14 IOWA 47

1. *Res Adjudicata—Estoppel—Extent of Judgment As.*—In order for a plea of *res adjudicata* to be available in a subsequent action, the former adjudication must be *between the same parties*, and have the effect of estopping both parties as to the matters therein involved, p. 48.

Reaffirmed in *McDonald & Co. v. Gregory*, 41 Iowa 516; *Stoddard v. Burton*, 41 Iowa 585.

Reaffirmed and extended in *Woodin v. Clemons*, 32 Iowa 287, 288, holding further that any one claiming through or under a party to a former action, has the same right to claim the benefit of a former adjudication (in a subsequent action, involving the subject-matter) as the original party thereto.

Reaffirmed and extended in *City of Davenport v. C. R. I. & P. R. Co.*, 38 Iowa 640, 642, holding further that taxes for several years constitute a cause of action as to each year, and that a judgment in an injunction action to restrain the collection of taxes for two-several years, is no bar to an action to recover taxes for other, or subsequent years.

Reaffirmed and extended in *Woodward v. Jackson, sheriff*, 85 Iowa 435, 52 N. W. 359, holding further that in order for *res adjudicata* to apply as to a subsequent action, it must appear that the former action was between the same parties or their privies, that the question in issue was the same, and that it was determined on its merits in the former.

(Note.—See further specially on this question, *Hahn v. Miller*, 68 Iowa 745, 28 N. W. 51; *Eckert & Williams v. Pickel*, 59 Iowa 545, 13 N. W. 708; *Goodenow v. Litchfield*, 59 Iowa 226, 9 N. W. 107, and 13 N. W. 86; *Stodghill v. C. B. & Q. Ry. Co.*, 53 Iowa 341, 5 N. W. 495; *Bettys v. C. M. & St. P. Ry. Co.*, 43 Iowa 602; *Gardner v. Jaques*, 42 Iowa 577; *Griffith, Adm'r v. Lovell*, 26 Iowa 226; *Huntington et al. v. Jewett, et al.*, 25 Iowa 249; *Dorr, Ex'r v. Stockdale*, 19 Iowa Iowa 268; *Keater & Skinner v. Hock, Musser & Co.*, 16 Iowa 23; *Griffin v. Seymour*, 15 Iowa 30.—Ed)

Cross reference. See further, sustaining and explaining, but not citing, the text, annotations under *Whitaker v. Johnson County* (12 Iowa 595), ante, p. 102.

2. *Counties—Power to Subscribe to, or to Issue Bonds for Stock in or in Aid of Railroads.*—Counties have no power to sub-

scribe to stock in, or to issue bonds in aid of the construction of railroads, p. 49.

Special cross reference. For cases citing the text and many others on the question, see annotations under Rule 1 of State ex rel. B. & M. River R. R. Co. v. Wapello County (13 Iowa 388), ante. p. 165.

THORN v. THORN, 14 IOWA 49, 81 Am. Dec. 451

1. Homestead—Joint Tenants and Tenants in Common—Right to Claim.—A joint tenant, or tenant in common may claim homestead in the land so held by him with others, pp. 54, 56.

Reaffirmed in Wertz v. Merritt, 74 Iowa 687, 39 N. W. 105, holding that where a son occupies land as homestead as tenant of his father, and after the death of the father continues to so occupy it, but in the latter time as heir, that such son's interest therein is subject to the satisfaction of a debt created by him before the death of his father.

Reaffirmed and extended in Hewitt v. Rankin, 41 Iowa 44, 45, holding further that a joint tenant, or tenant in common may claim homestead in land so held under an equitable title.

Reaffirmed and extended in Thompson v. Rogers, Richardson & Co., 51 Iowa 337, 1 N. W. 684, holding further that a debtor has a homestead in a one-half undivided interest in a lot which he received in exchange for a prior homestead.

Reaffirmed and extended in Fordyce v. Hicks, 80 Iowa 276, 45 N. W. 751, holding further that a conveyance by a joint tenant, or a tenant in common, of his homestead interest in lands so held, cannot be attacked as fraudulent by his creditor.

Cited with approval in Yates v. McKibben, sheriff, 66 Iowa 359, 23 N. W. 753, holding that a life tenant is entitled to homestead in the estate so held, but that the value thereof is to be determined by the value of the fee simple title and not by the value of the life estate therein.

Cited with approval in Bolton v. Oberne, Hosick & Co., 79 Iowa 281, 44 N. W. 548, turning on another question.

Cross references. See other rules hereof. See also, annotations under Pelan v. De Bevard (13 Iowa 53), ante. p. 117.

2. Action of Right Involving Lands Held by Joint Tenants or by Tenants in Common—Homestead of Such a Tenant in—Defense—Procedure.—Where an action of right is pending involving lands held by joint tenants, or tenants in common, one of such tenants may have the proceeding suspended until the parties interplead as in partition, and have his homestead allotted to him, as provided by Sec. 4178 of the Code of 1860, and may thereafter plead the exemption in the action of right: But if in such case it should transpire that no partition can be made without great prejudice to the parties interested, he may be compelled to accept compensation to be awarded by the

court and referees, according to the circumstances of the case, p. 56.

Reaffirmed and extended in Killmer v. Wuchner, 79 Iowa 725, 45 N. W. 300, 18 Am. St. Rep. 392, 8 L. R. A. 289, holding further that where in an action for the partition of land, held by tenants in common, or joint tenants, it appears that it cannot be divided without prejudice to the parties, it must be sold and its proceeds be divided according to the interests of the parties; and that in such case such a tenant is entitled to be paid out of such proceeds for valuable improvements made by him on the land.

MAYER v. WOODBURY AND STRAHM, 14 IOWA 57

1. Promissory Notes—Assignment of For Purpose of Fixing Venue—Action on—Change of Venue.—Where a note is assigned for the purpose of fixing the venue in a county other than the county of the maker's residence, in an action thereon in the county other than the defendant's (maker's) residence, the venue may be changed on his motion to the latter county, p. 58.

Cited with approval in Armstrong v. Borland, 35 Iowa 539, holding that the liability of assignors of an instrument sued on, cannot be determined on a motion for a change of venue.

(Note.—See further sustaining, but not citing, the text, Troy Portable Grain Mill Co. v. Bowen & Co., 7 Iowa 465.—Ed.)

2. Pleadings—Amendments—Judicial Discretion.—If a proposed amendment is but a substantial repetition of a former pleading, the trial court may, in his discretion, refuse to permit it to be filed, p. 59.

Reaffirmed and explained in State ex rel. Floyd v. Mayor and City Council of City of Keokuk, 18 Iowa 389, 390, holding that the right of a party to amend is not absolute, but is within the sound judicial discretion of the trial court; and that it is not an abuse of such discretion for such court to refuse to permit a party to file a pleading which, if filed, would be insufficient and unavailing.

Reaffirmed and extended in Robinson v. Erickson, 25 Iowa 86, holding further that after a pleading, which is a repetition of a former pleading, is filed, by leave of court, it may be stricken on motion.

Reaffirmed and extended in Hoyt v. Beach, 104 Iowa 259, 73 N. W. 493, 65 Am. St. Rep. 461, holding further that where a demurrer is sustained to a pleading and thereafter an amendment thereto is filed which is a repetition of the former, the latter may be stricken on motion: And this is the rule, although the pleading adjudged insufficient on demurrer be thereafter withdrawn from the files.

(Note.—See further sustaining and explaining, but not citing, the text, Epley v. Ely, 68 Iowa 70, 25 N. W. 934; Phoenix Ins. Co. v. Findley, 59 Iowa 591, 13 N. W. 738.—Ed.)

Cross references. See further specially on this question, annotations, notes and cross references under *Williams v. Miller* (10 Iowa 344), Vol. I, p. 701; *Seever, Adm'r v. Hamilton* (11 Iowa 66), Vol. I, p. 773.

TEMPLIN *v.* IOWA CITY, 14 IOWA 59, 81 Am. Dec. 455

1. Liability of Municipal Corporation for Carelessness or Wrong-Doing of Agent in Prosecution of Public Work.—A municipal corporation is liable for the malfeasance, or negligence of its agents in the construction of public improvements upon the same principle and under the same circumstances as the individual citizen, and the law will protect a party who is injured by the negligence, unskillful or wrongful act of another, whether it be the negligence, etc., of a public corporation or a private individual, p. 60.

Special cross reference. For cases citing and sustaining the text, and many others on the question, see annotations under Rule 2 of *Cotes & Patchin v. City of Davenport* (9 Iowa 227), Vol. I, p. 568.

2. Appeal—Verdict Against Weight of Evidence—When Not Ground for Reversal—Conflicting Evidence.—Where the evidence on the trial below was conflicting, its sufficiency was a question for the jury, and the refusal of the trial court to grant a new trial in such case will not be a ground for reversal, p. 61.

Reaffirmed and qualified in *Conner & Co. v. Mountain*, 28 Iowa 593 (abstract), holding that where the evidence is conflicting, and the trial court refuses to set the verdict aside on the ground that it is against the evidence, there must be a very strong and clear case of the verdict being against the weight of the evidence made out on appeal, or the judgment will not be reversed for such cause.

Cited with approval in *Barnes v. McDaniels*, 35 Iowa 382, upholding ruling of trial court in setting aside a verdict on other grounds.

Cross references. See further, sustaining and explaining, but not citing, the text, annotations, notes and cross references under *Newell v. Sanford* (10 Iowa 396), Vol. I, p. 712; *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764.

JOHNSON *v.* COLLINS, 14 IOWA 63

1. Promise or Agreement for Benefit of Third Person—Person Benefited May Sue on.—A person for whose benefit a valid promise is made may sue thereon, p. 65.

Reaffirmed in *Ross v. Kennison, and Taggart*, 38 Iowa 397; *Knott v. D. & S. C. Ry. Co.*, 84 Iowa 468, 51 N. W. 59; *M. E. Church v. Sweny*, 85 Iowa 633, 52 N. W. 548; *First Nat'l Bank of Pipestone Minn. v. Rowley, Driggs & Humphreys*, 92 Iowa 535, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186; *Beeson v. Green*, 103 Iowa 408, 72 N. W. 555; *Leach v. Hill, et al*, 106 Iowa 179, 76 N. W. 610;

C. R. I. & P. Ry. Co. v. City of Ottumwa, 112 Iowa 320, 83 N. W. 1081, 51 L. R. A. 763; Mueller Lumber Co. v. McCaffrey, 141 Iowa 736, 118 N. W. 905, and 130 N. W. 390.

Reaffirmed and extended in In re Estate of Youngerman, 136 Iowa 496, 114 N. W. 10, holding further that a person for whose benefit a contract is made is the "real party in interest" as to an action for breach thereof.

Cited with approval in Shaw v. Gardner, 30 Iowa 113, holding that where a note deposited in lieu of money on a bet or wager, is delivered to the winner who collects it, that the loser may recover against the winner the amount of such note which is in excess of the bet or wager.

(Note.—See further sustaining and explaining, but not citing, the text, Daily v. Minnick, 117 Iowa 563, 91 N. W. 913, 60 L. R. A. 840; German State Bank v. N. W. Water & Light Co., 104 Iowa 717, 74 N. W. 685; Gooden v. Rayl, 85 Iowa 592, 52 N. W. 506; Knott v. D. & S. C. Ry. Co., 84 Iowa 462, 51 N. W. 57; Thomas v. Schee, 80 Iowa 237, 45 N. W. 539; Becker v. Keokuk Water Works, 79 Iowa 419, 44 N. W. 694, 18 Am. St. Rep. 377; McHose v. Dutton, 55 Iowa 728, 8 N. W. 667; Johnson v. Knapp, 36 Iowa 616; Rice v. Savery, 22 Iowa 470; Scott's Adm'rs v. Gill, 19 Iowa 187; Thompson v. Bertram, 14 Iowa 476; Moses v. Clerk of Dallas District Court, 12 Iowa 140; Mills v. Brown, 11 Iowa 314; Corbett v. Waterman, 11 Iowa 87.—Ed.)

Cross references.—See further, annotations, notes and cross references under Mills v. Brown (11 Iowa 314); Corbett v. Waterman (11 Iowa 87), Vol. I, pp. 820, and 778.

PLUMMER v. DOUGLAS & WATSON, 14 IOWA 69, 81 Am. Dec. 456

1. Confession of Judgment—Sufficiency of Statement for—Validity as Between Parties—Estoppel.—A statement of facts as to indebtedness for a confession of judgment, although insufficient as to creditors, is good as between the parties; and a judgment rendered thereon is binding on them, p. 73.

Reaffirmed in Thorp v. Platt, 34 Iowa 316.

Reaffirmed and extended in McMillan v. Craig, 14 Iowa 593 (abstract), holding further that a judgment by confession may be entered by the clerk in vacation.

Special cross reference. For other cases citing text, and many more on the question, see annotations under Vanfleet v. Phillips (11 Iowa 558), Vol. I, p. 860.

HOPKINS v. GRIMES, 14 IOWA 73

1. Wills—Construction of—Intention of Testator.—To discover the intention of the testator is the object of all rules of the construction of wills; and this is to be determined from a consideration of the entire instrument, p. 77.

Reaffirmed in Westcott v. Binford, 104 Iowa 652, 74 N. W. 20, 65 Am. St. Rep. 530.

Reaffirmed in Benkert v. Jacoby, 36 Iowa 276; Pellivarro v. Reppert, 83 Iowa 501, 50 N. W. 21; Kiene v. Gruehle, 85 Iowa 316, 52 N. W. 233, holding that the intention of the testator is the object of the court in construing a will, and that each case is to be determined according to its facts, circumstances and language of the instrument; that other cases may be cited as guides and as general rules, but no previous case will have much weight, unless it be exactly like the case to be determined.

Reaffirmed, varied and extended in Pilmer v. Branch of St. Bank at Des M., 16 Iowa 329, 335, holding further that the intention of the parties to a written contract is to be determined from the instrument itself: That words therein are to be understood in their ordinary and popular sense, unless they have by the known usage of trade, or the like, acquired a peculiar sense—In which last case parol evidence is admissible to prove the known usage or custom and the meaning thereby given.

(Note.—No fraud, accident or mistake was pleaded or proven in this last case.—Ed.)

Reaffirmed and varied in Ault v. Hillyard, 138 Iowa 241, 242, holding the rule to apply to a conveyance; the grantor's intention to be determined by the language employed in the instrument.

(Note.—No fraud, accident or mistake was pleaded or proven in this last case.—Ed.)

Cited with approval in Eckford v. Eckford, 91 Iowa 74 (dissenting opinion), 58 N. W. 1099, 26 L. R. A. 370, the majority court holding that extrinsic evidence is admissible to correct a mistake in description to land in a devise thereof.

Cited with approval in Meyer, Ex'r v. Weiler, 121 Iowa 70 (dissenting opinion), 95 N. W. 261, the majority court reaffirming and applying the rule.

Cross reference. See Rule 2 hereof.

2. Wills—Construction of—Meaning of Word "Homestead" in, Before Homestead Statute—Extrinsic Evidence.—A devise of "homestead" before the homestead statute giving it a technical and determinate meaning, is to be construed in its usual or popular sense; and where the testator lived on a farm, his devise of the homestead is to be construed as meaning all the land appurtenant thereto, used and considered by him as making up the farm which he cultivated, and upon which he resided; and extrinsic evidence is admissible in such case to prove the quantity of land and its description, used and considered by the testator as homestead, pp. 77, 78.

Reaffirmed and extended in Flynn v. Holman, 119 Iowa 734, 735, 94 N. W. 448, holding further that extrinsic evidence is admissible to identify and make definite a description in a devise of land.

Cited with approval in Pilmer v. Branch of State Bank at Des M., 16 Iowa 335, not in point, but upon analogy as to the meaning of words in a contract.

Unreported citation, 53 N. W. 349.

Cross reference. See Rule 1 hereof.

BRENNER & CO. v. GUNDERSHIEMER, 14 IOWA 82

1. Pleadings—Amended Petition—Demurrer to Overruled—Defendant Failing to Answer—Effect—Judgment by Default.—Where after the defendant has filed an answer, under oath, to the original petition, the plaintiff files an amended petition to which the defendant demurs, upon the demurrer being overruled the defendant must answer the amended petition, or judgment by default will be entered against him. The amended petition substitutes the original and demands an answer, p. 83.

Reaffirmed and extended in Lauman v. Des Moines County, 29 Iowa 311, holding further that where the defendant files an amended answer, and not an *amendment to* the original, the court will look to the *substituted* answer in determining the issue joined.

Cited with approval in Thayer v. Smoky Hollow Coal Co., 129 Iowa 553, 105 N. W. 1025, holding that where a party files a substitute to a pleading, he may, thereafter, by leave of court, withdraw it, and file an amendment to the original pleading setting up additional facts supporting his cause of action or defense.

Cross reference. See further, annotations and note under Rule 1 of Bates v. Kemp (12 Iowa 99), ante. p. 18.

KRAFT v. CITY OF KEOKUK, 14 IOWA 86

1. Mistake of Law—Money Paid Under Cannot be Recovered—Tax Paid Under Invalid or Unconstitutional Law.—Money paid under a mistake of law cannot be recovered. Hence, where a person voluntarily pays taxes under a law previously declared unconstitutional, it cannot be recovered, p. 87.

Reaffirmed in Espy v. Town of Ft. Madison, 14 Iowa 228; H. L. & B. Co. v. City of Marion, 110 Iowa 471, 81 N. W. 720; Ahlers v. City of Estherville, 130 Iowa 274, 104 N. W. 454.

Reaffirmed in Painter v. Polk County, 81 Iowa 245, 47 N. W. 66, 25 Am. St. Rep. 489, holding the rule to apply to money voluntarily paid by a public officer under a mistake of law—But see State v. Young below.

Reaffirmed and explained in Dubuque & Sioux City R. R. Co. v. Board of Supervisors of Webster County, 40 Iowa 17; Bailey v. Town of Paullina, 69 Iowa 464, 29 N. W. 419, holding that where one voluntarily pays money with full knowledge of all the facts, under a mistake as to the law, he cannot recover it.

Reaffirmed and qualified in Wapello County v. B. & M. R. R. Co., 44 Iowa 607, 608, holding that money paid under a mistake as to the existence of a fact, may be recovered.

Distinguished and narrowed in State v. Young, 134 Iowa 514, 515, 110 N. W. 296, impliedly overruling Painter v. Polk County above, and holding that money voluntarily paid by a public officer may be recovered.

(Note.—And see Heath v. Albrook, 123 Iowa 559, 98 N. W. 619, expressly overruling Painter v. Polk County, above, and sustaining this distinguished case.—Ed.)

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, Newcomb v. City of Davenport, 86 Iowa 291; Oden-dahl v. Rich, 112 Iowa 182, 83 N. W. 886; N. W. Un. Packet Co. v. City of Muscatine, 45 Iowa 185.—Ed.)

Cross references. See further on this question, annotations under Espy v. Town of Ft. Madison (14 Iowa 226), *Infra*, p. 231. See, as to remedies against illegal taxation, annotations under Rule 1 of Morford v. Unger (8 Iowa 82), Vol. I, p. 495; Langworthy v. City of Dubuque (13 Iowa 86), *ante*, p. 121.

LEWIS v. BARMBY, 14 IOWA 88

1. Usury—Mortgage to Secure Usurious Note or Contract—Foreclosure of—Forfeiture to State.—Lien of Judgment.—Where in an action to foreclose a mortgage on land, executed to secure a note or contract tainted with usury, the court enters judgment in favor of the State for the benefit of the school fund for the ten per cent. prescribed by statute, such judgment is a lien from the time of its rendition; but the state has no right to a judgment for a lien on the mortgaged premises therefor. In such an action the mortgagee is entitled to a judgment of foreclosure on the premises, for the principal of his debt, pp. 90, 91.

Reaffirmed in Lewis v. Barmby, 14 Iowa 91; McManus v. Rud-dick, trustee, 14 Iowa 92.

Cited in McIntosh v. Likens, 25 Iowa 560, holding that in an action on a promissory note tainted with usury, against principal and surety thereon, judgment for the statutory forfeiture mentioned in the text, may be rendered against the surety in favor of the State for the use of the school fund.

Cross references. See further on the question of usury, annotations and cross references under Powell v. Hunt (11 Iowa 491), Vol. I, p. 838; Hollingsworth v. Swickard (10 Iowa 385), Vol. I, p. 709.

LAUGHLIN v. GREENE & WEARE, 14 IOWA 92

1. Voluntary Associations—Action by Trustee.—Under Sec. 2758 of the Code of 1860, the trustee of an unincorporated voluntary

association may maintain an action in his own name, for its benefit, on a contract or transaction between the association and another, p. 94.

Reaffirmed in Arts v. Guthrie, 75 Iowa 677, 37 N. W. 396.

(Note.—See further specially, Dist. Township of White Oak v. Dist. Township of Oskaloosa, 44 Iowa 512.—Ed.)

Cross references. See in this connection, annotations under Byington v. M. & M. R. R. Co. (11 Iowa 502), Vol. I, p. 850; Keller & Bennett v. Tracy et al (11 Iowa 530), Vol. I, p. 855.

REYNOLDS' HEIRS v. MILLER, ADM'R, 14 IOWA 97

(Former Appeal, 6 Iowa 459.)

1. **Action at Law—Trial by Court—Finding of Facts—Motion for New Trial, etc.—Review on Appeal.**—When in an action at law, a jury is waived and a trial is had by the court, and no finding of the facts is made by the court, and no motion for a new trial presents the ground that the judgment is contrary to the evidence, it will not be reviewed on appeal, unless the finding of the trial court on the evidence be presented as a matter of law, p. 99.

Special cross reference. For cases citing text, and many others, see annotations under Warner, Adm'r v. Pace (10 Iowa 391), Vol. I, p. 710.

2. **County Court—Appeal From—Time of—Limitation of—Procedure.**—Unless a party appeals from an order or judgment of the county court within thirty days after it is made or rendered, he must, in order to perfect an appeal, make application therefor by petition to the district court within one year after the rendition thereof, and if the latter court be satisfied that the failure was without the fault of the applicant, he will grant the appeal, pp. 99, 101.

Reaffirmed and extended in Burns v. Keas, Adm'x, 20 Iowa 18, holding further that if the application and petition for appeal be filed in the district court within the year after the making or rendition of the order or judgment of the county court, that the appeal may be granted after the expiration of the year.

RINDSKOFF BROS. v. BARRETT, 14 IOWA 101

(Former Appeal, 11 Iowa 172.)

1. **Trial—Instructions—Refusal of Instructions Which Are Immaterial or Covered by Others Given.**—It is not error for the court to refuse to give an instruction which is already substantially covered by one given, p. 104.

Reaffirmed in Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404; Todd v. Branner, 30 Iowa 441, 442.

Cross references. See further, Rules 3 and 4 of Moffitt v. Cressler (8 Iowa 122), Vol. I, p. 499; Rule 3 of State v. Hockenberry and Brandt (11 Iowa 269), Vol. I, p. 814.

2. Contracts—Construction of—Custom.—Parties to a contract, will be presumed to have used the language therein according to its ordinary and received acceptation, or that to which the law gives it: Unless such language be controlled by a general, or local custom in the trade or business, or by persons similarly dealing, to which the contract relates.

Contracting parties are presumed to know a general custom; but knowledge of a local custom must be proven.

The elements of a good custom are, that it must be uniform, general, and known to the parties; but the *degree* in which all these must attach depends upon the circumstances of each case, p. 105.

Reaffirmed in Pilmer v. Branch of State Bank at Des M., 16 Iowa 326, 327; Woods & Bradley v. Miller & Co., 55 Iowa 172, 173, 7 N. W. 486, 39 Am. Rep. 170; Frum v. Keeney, 109 Iowa 399, 80 N. W. 509.

Reaffirmed and explained in Citizens' State Bank of Perry v. Chambers and Wimmer, 129 Iowa 421, 105 N. W. 695, holding that a trade usage by which words are given an unusual or arbitrary meaning in a particular line of business generally or in a locality where parties, sought to be thereby bound, reside, must be shown to be of such definite character and of such general acceptance, that knowledge thereof by the parties may be reasonably inferred.

Reaffirmed and extended in Pilmer v. Branch of State Bank at Des Moines, 16 Iowa 334, 335, holding further that a special or local custom, and likewise the acceptation of a word according to it, may be proven by witnesses of the business, or trade in the locality where the custom prevails: And that the popular meaning of the word "currency" and what it includes in a particular place, may be proven by bankers and other business men thereof.

Reaffirmed and extended in American Emigrant Co. v. Clark, 47 Iowa 672, holding further that an instrument payable in "current funds" is negotiable when supported by proof of a custom showing that such term meant "money"; and that in such case parol evidence is admissible to prove that the parties understood the term to mean *money*.

Reaffirmed and extended in Goode v. C. R. I. & P. Ry. Co., 92 Iowa 373, 374, 60 N. W. 631, holding further that parties to a contract are *conclusively* presumed to have known and dealt in relation to a *general* custom, which fixes the terms of their contract; unless the contract expressly negatives this fact.

Reaffirmed and qualified in Sherwood v. Home Sav. Bank, 131 Iowa 530, 109 N. W. 10, holding that a local custom as part of a contract and knowledge thereof by the parties sought to be thereby bound, must be specifically pleaded and proven.

Cited with approval in Craven v. Winter, 38 Iowa 479, holding that in construing a contract the court will consider and weigh all its parts; and will arrive at the intention of the parties thereto by looking

at the language employed, the object thereof, and all the circumstances attending it.

Cited in *Cash v. Hinkle*, 36 Iowa 628 (dissenting opinion), the majority court holding that extrinsic evidence is not admissible to prove a custom that words used in a contract have a different meaning, when it is apparent that they are not used in a new, peculiar, or technical sense: Hence, holding that in an action on a contract to deliver sixty-five fat hogs, to weigh 225 pounds and over, evidence of a custom that they were to *average* 225 pounds, is inadmissible.

(Note.—See further sustaining, explaining, extending and qualifying, but not citing the text, *Eller v. Loomis*, 106 Iowa 276, 76 N. W. 686; *Smith v. Hess*, 83 Iowa 238, 48 N. W. 1030; *Lindley v. First Nat'l Bank*, 76 Iowa 629, 41 N. W. 381, 14 Am. St. Rep. 254, 2 L. R. A. 709; *Underwood v. Iowa Legion of Honor*, 66 Iowa 134, 23 N. W. 300; *Bradford v. Homestead F. Ins. Co.*, 54 Iowa 598, 7 N. W. 48; *Had-dock v. Wood*, 46 Iowa 433; *Hughes v. Stanley*, 45 Iowa 622; *Murray v. Brooks*, 41 Iowa 45; *Willmering v. McGaughey*, 30 Iowa 205; *Beatty v. Gregory*, 17 Iowa 109; *Rindskoff Bros. & Co. v. Barrett*, 11 Iowa 172.—Ed.)

Cross references. See further, annotations, notes, etc., under *Hopkins v. Grimes* (14 Iowa 73), ante. p. 207; *Field v. Schricher* (14 Iowa 119), *Infra.* p. 214; *Rindskoff Bros. & Co. v. Barrett* (11 Iowa 172), Vol. I, p. 795; *McCraney's Ex'x v. Griffin* (13 Iowa 313), ante p. 156.

MCMILLAN v. BOYLES, 14 IOWA 107

1. Counties—Power to Subscribe to Stock in or to Issue Bonds in Aid of Construction of Railroad—Injunction.—A county has no power to subscribe to stock in, or to issue bonds in aid of the construction of a railroad. Injunction lies at the instance of a tax payer to restrain the levying and collection of a tax for such purpose, pp. 107, 108.

Reaffirmed in *McClure v. Owen*, 26 Iowa 250.

Special cross reference. For other cases citing the text, and many others on the question, see annotations under Rule 1 of State ex rel. B. & M. Riv. R. R. Co. v. Wapello County (13 Iowa 388) ante. p. 165.

Cross reference. See further on this question, annotations under Rule 1 of *Stokes v. Scott County* (10 Iowa 166), Vol. I, p. 664.

MOHN v. STONER, 14 IOWA 115

1. Tender—What Constitutes—Keeping Good—Procedure.—In order to constitute a valid tender, the money must, immediately after the commencement of an action, be brought into court and kept there. Where in an action for debt, the defendant tenders money (previously tendered to plaintiff before commencement of the action) into

court during the trial term of the court and just immediately before the commencement of the trial, it is not *kept good*, and is of no effect, p. 116.

Reaffirmed and qualified in Walde v. Joy, 45 Iowa 283, 284, holding that where money is tendered by defendant to plaintiff before the latter commences action in a justice's court, and it is tendered and deposited in that court by the defendant within a reasonable time after being served with notice, it is *kept good*, and is valid; and the fact of the justice failing to transmit the money to the clerk of the district court upon an appeal, does not affect it.

Special cross reference. See further, for other cases citing text, annotations under Mohn v. Stoner (11 Iowa 30), Vol. I, p. 765.

Cross references. See further on this question, annotations under Freeman v. Fleming (5 Iowa 460), Vol. I, p. 371; Rule 2 of Sloan v. Coolbaugh (10 Iowa 31), Vol. I, p. 637.

FIELD v. SCHRICHER, 14 IOWA 119

1. Contracts—Construction of—Intention of Parties—How Ascertained.—In construing contracts courts will consider the subject-matter, situation and purpose of the parties, and its whole scope and meaning, in order to ascertain the intention of the parties thereto: And words therein will be so construed as to bring it as near the actual meaning of the parties as is possible and as is consistent with the rules of language and of law, pp. 123, 124.

Reaffirmed in Noy v. D. & S. City R. R. Co., 20 Iowa 354; Jacobs v. Jacobs, 42 Iowa 605; Foley, Adm'r v. Hamilton, 89 Iowa 689, 690, 57 N. W. 440; In re Estate of Allen, et al v. Allen, Ex'x, 116 Iowa 701, 88 N. W. 1092; Pratt v. Prouty, 104 Iowa 422, 73 N. W. 1036, 65 Am. St. Rep. 472.

Reaffirmed and extended in Ditson v. Ditson, 85 Iowa 282, 283, 52 N. W. 204, holding further that the interpretation upon a contract by the parties thereto will, also, be considered by the court in construing it, and in arriving at their intention.

Unreported citation, 128 N. W. 557.

Special cross reference. See further, annotations, note and cross references under Rindskoff Bros. v. Barrett (14 Iowa 101), ante. p. 211, for further cases citing text, and many others on and analogous to, the question.

DRAKE v. LOWRY, 14 IOWA 125

1. Usury—Who Can Interpose Plea.—A plea of usury may only be interposed by a party to the alleged usurious contract, p. 127.

Reaffirmed in Allison & Crane v. King, 25 Iowa 58; Carmichael v. Bodfish, 32 Iowa 419.

Cross references. See further sustaining text; annotations under *Hollingsworth v. Swickard* (10 Iowa 385), Vol. I, p. 709; *Powell v. Hunt* (11 Iowa 430), Vol. I, p. 838.

2. Usury—Penalty—From What Date Computed—Change of Evidence of Debt Tainted With Usury—Effect.—The penalty of ten per cent. per annum to be adjudged the State for the benefit of the school fund, in an action on a usurious contract, or note, is to be computed from the date of the original contract, or note, irrespective of substitutions or changes, p. 127.

Reaffirmed and extended in *Brown v. Cass County Bank*, 86 Iowa 542, 53 N. W. 413, holding further that the forfeiture is to be determined by computing ten per cent. per annum on the amount of the original loan, tainted with usury, after deducting therefrom payments made.

(Note.—See further as to computation of penalty, *Lombard v. Gregory*, 81 Iowa 569, 47 N. W. 298; *Sheldon v. Mickel & Head*, 40 Iowa 19.—Ed.)

Cross references. See further on the question of usury, annotations under *Campbell v. McHarg* (9 Iowa 355), Vol. I, p. 588; *Smith et al v. Coopers et al* (9 Iowa 376), Vol. I, p. 592.

See Rule 1 hereof and cross references there found.

CURTIS v. MILLARD & Co., 14 IOWA 128, 81 Am. Dec. 460

1. Judgment Lien on Real Estate—Rights of Purchaser at Execution Sale—Subsequent Judgment Before End of Redemption Period.—A purchaser of land at an execution sale acquires only a lien on the land for the amount of his bid and interest during the period allowed for redemption; and if during this time another judgment is rendered against the judgment debtor, it attaches as a lien on the debtor's interest, and the last judgment creditor, or a purchaser at a sale thereunder, may redeem from the first sale: And if thereafter the debtor sells his interest, the purchaser takes subject to the rights under and liens of both judgments as above stated.

The legal title of a judgment debtor to land is not divested, under our statute, under a sale on execution until after the expiration of the period of redemption, and the sheriff has executed a deed to the purchaser, pp. 129, 130.

Reaffirmed in *Hawkeye Ins. Co. v. Maxwell*, 119 Iowa 674, 94 N. W. 207.

Reaffirmed as to first paragraph in *People's Sav. Bank v. McCarthy & Head*, 119 Iowa 587, 588, 93 N. W. 584.

Reaffirmed and extended in *Greenlee v. Mercantile Ins. Co.*, 102 Iowa 429, 430, 71 N. W. 535, 63 Am. St. Rep. 455, holding further that a decree for a sale of land and a sale thereunder, does not before the end of the period of redemption avoid a policy of fire insurance

with a provision forbidding a "change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

Reaffirmed and extended as to last paragraph in Everingham v. Braden, 58 Iowa 134, 12 N. W. 143, holding further that where land with growing crops thereon, is sold under execution, and at the time of the deed of the sheriff to the purchaser, the crops are ripe, the conveyance does not pass title to them.

Reaffirmed and extended as to last paragraph in Varnum v. Winslow, 106 Iowa 292, 76 N. W. 710, holding further that the owner of the fee simple title to land sold under a decree of foreclosure is entitled to the rent thereof, to the date of the execution of the deed by the sheriff to the purchaser.

Unreported citation, 88 N. W. 1077.

2. Judgment Liens on Land—Subsequent Judgment Creditor Failing to Redeem from Sale Under Prior Judgment.—Where land is sold under execution, and thereafter a judgment is rendered against the debtor in favor of another creditor, the latter has a lien on the interest of the debtor in the premises sold, and may, during the period of redemption, redeem therefrom; but his failure to do so does not render his lien inoperative as against the judgment debtor or his grantee in case either redeems within the statutory period, p. 130.

Reaffirmed in Hayes v. Thode, 18 Iowa 55, holding that where an execution creditor buys land at the sale thereunder, a junior incumbrancer, not a party to the action in which the judgment is rendered, may redeem from the sheriff's sale by paying the amount of the purchase price, with ten per cent. interest and costs.

Reaffirmed in People's Sav. Bank v. McCarthy, 119 Iowa 587, 590, 93 N. W. 584, 585, holding that a subsequent judgment creditor, or an assignee thereof may redeem from a sale under a prior judgment at any time before the expiration of the period of redemption and execution of the sheriff's deed thereunder.

Reaffirmed and explained in Crosby v. Elkader Lodge, 16 Iowa 405, holding that where a judgment debtor, or his grantee redeems land which has been sold in part satisfaction of a subsisting judgment, the property at once becomes liable to satisfy the unpaid balance of the execution, on the judgment, from the moment of the redemption: That a purchaser of land from a judgment debtor, takes it subject to all liens and incumbrances thereon.

Reaffirmed and extended in Stein v. Chambless & Banford, 18 Iowa 476, 87 Am. Dec. 411, holding further that a purchaser of land from a judgment debtor, takes it subject to all liens and incumbrances thereon.

Reaffirmed and extended in Sullivan v. Leekie, Adm'r, 60 Iowa 329, 14 N. W. 356, holding further that the purchaser of land from

a judgment debtor, takes it subject to all liens and incumbrances; but a judgment lien does not attach to the proceeds of land thereunder.

Distinguished and explained in Clayton v. Ellis, 50 Iowa 593, 595 (Opinion on Re-hearing), holding that, the lien of the judgment as to the unsatisfied balance on the real estate sold, is, as to all persons and in all cases, divested by the sale: That the judgment debtor may sell his redemption, and his purchaser may redeem by paying the amount of the bid, interest and costs: But if redemption of the whole or of any parcel of land sold under execution or decree, is made by the debtor, the judgment to the extent of the balance thereon, would constitute a lien on the premises in his hands, and it may again be sold on execution based on the judgment.

BAKER v. MYGATT, 14 IOWA 131

1. Judicial Notice—Record of Another Cause—Memory of Judge.—The court cannot in one action take judicial notice of an affidavit filed in another cause, or admit it in evidence because he remembers that it was therein filed; but the execution of such affidavit in order to be admissible in evidence, must be proven, pp. 133, 134.

Reaffirmed and extended in Loomis v. Griffin, 78 Iowa 484, 485, 43 N. W. 297, holding further that the court cannot take judicial notice of the fact that an assignment for the benefit of creditors involved in a prior action is the same involved in a subsequent action.

Reaffirmed and extended in Haaren v. Mould, judge, 144 Iowa 301, 122 N. W. 922, holding further that the court cannot take judicial notice of its orders, judgments, or other record in other cases than the one being tried or determined.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, Ferguson v. Wheeler, 126 Iowa 111, 101 N. W. 638; Kenosha Stove Co. v. Shedd, 82 Iowa 540, 48 N. W. 933; Conlee v. District Court, 69 Iowa 240, 28 N. W. 551; Jordan v. Circuit Court, 69 Iowa 177, 28 N. W. 548; Enix v. Miller, 54 Iowa 551, 6 N. W. 722; State v. Clare, 5 Iowa 509.—Ed.)

Cross references. See also, Hollenbach v. Schnabel, 40 Am. St. Lumber Co. v. Meyer, 74 Iowa 403, 38 N. W. 117; Poole, Gilliam & Co. v. Seney, 70 Iowa 275, 24 N. W. 520, and 30 N. W. 634; Manderscheid Rep. 57; State v. Porter, 13 L. R. A. (New Series) 462.

2. Appeal—Verdict Against the Weight of Evidence—When Not Ground for Reversal—Conflicting Evidence.—Where the evidence on the trial is conflicting the Supreme Court will not interfere with the discretion of the trial court in refusing to grant a new trial because the verdict (or judgment where the trial was by the court) was against the weight of the evidence, p. 135.

Cited with approval in Barnes v. McDaniels, 35 Iowa 382, upholding the ruling of the trial court in setting aside a verdict on other grounds.

Cross reference. See further annotations and cross references under Rule 2 of *Templin v. Iowa City* (14 Iowa 59), ante. p. 206, for many other cases on this and analogous questions.

CLAUSSEN & KUEHL *v.* RAYBURN, 14 IOWA 136

1. **Tax Sales of Land—Reimbursement for Taxes Paid by Purchaser at, Upon Eviction by Owner.**—A purchaser at a tax sale of land may maintain an action against the owner for taxes paid thereon, after the owner of the land has, by action of right, set aside the tax sale and deed made thereunder and evicted him, pp. 137, 138.

Reaffirmed and extended in *Orr v. Travacier*, 21 Iowa 70; *Stewart v. Corbin*, 38 Iowa 572, holding further that where the owner of land sues and obtains a cancellation of a tax deed, that the grantee therein is entitled to a lien thereon for taxes paid by him in good faith.

Distinguished and narrowed in *Garrigan v. Knight*, 47 Iowa 528, holding that where one claiming land under color of title pays taxes thereon, he cannot recover from the owner therefor, although so paid with the knowledge of the latter.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, *Thompson v. Savage*, 47 Iowa 522; *Hunt v. Rowland*, 28 Iowa 349; *Stewart v. Corbin*, 25 Iowa 144; *Banford v. Stein*, 24 Iowa 595 (abstract).—Ed.)

Cross reference. See further on this question, annotations, note and cross references under Rule 2 of *Byington v. Woods* (13 Iowa 17), ante. p. 110.

2. **Lands—Occupying Claimants—Improvements—Recovery for—Who Can Recover.**—An action cannot be maintained against the owner of real estate by a party out of possession thereof for the value of improvements made by the latter thereon, under the occupying claimant statute: Unless, perhaps, in a special case, as where the owner obtained possession thereof by fraud, violence, etc., pp. 138, 139.

Reaffirmed in *Banford v. Stein*, 24 Iowa 595, 596 (abstract).

Reaffirmed and extended in *Lindt v. Uihlein*, 116 Iowa 58, 89 N. W. 217, 218, holding further that the loss of possession by action, or its surrender under a writ in an action, without attempt to prevent the proceedings, or to appeal therefrom, loses to the party the right to be regarded as an occupying claimant, or the right to claim the value of improvements on the land lost or surrendered: That the claim for improvements should be set up by the occupying claimant in the action by the owner to recover the land.

(Note.—See further sustaining, explaining etc., but not citing, the text, *Strabala v. Lewis*, 80 Iowa 510, 45 N. W. 871; *Read v. Howe*, 49 Iowa 65; *Blanchard v. Ware*, 43 Iowa 530; *Lunquest v. Ten Eyck*,

40 Iowa 213; Dungan v. Von Puhl, 8 Iowa 263; Webster v. Stewart, 6 Iowa 401.—Ed.)

Cross reference. See further on this question, annotations under Dungan v. Von Puhl (8 Iowa 263), Vol. I, p. 509.

RAKESTRAW v. HAMILTON, 14 IOWA 147

1. **Personal Property—Judicial Sale of—Right of Purchaser at—Rights of Prior Purchasers.**—The purchaser of the equitable title to personal property from a debtor, who at the time obtains the possession thereof, has a superior right to that of the purchaser thereof at a subsequent sale under execution against the vendor (debtor), p. 151.

Reaffirmed and qualified in Allison & Crane v. King, 21 Iowa 304, holding that where a prior purchaser of a note obtained by a verbal transfer from a debtor, afterwards sold under execution and bought by another, seeks to set aside the execution, or decretal sale, he must allege and prove that the execution, or decretal, purchaser took with notice of the prior transfer.

Cited with approval in Rippe v. Badger, 125 Iowa 727, 101 N. W. 642, 106 Am. St. Rep. 336, holding that although *caveat emptor* applies to sales under execution, still a purchaser of land thereat takes it only subject to prior rights and equities of which he is either actually, or constructively notified, or as to which he is put upon inquiry by the possession of such facts as would cause a person of reasonable prudence to make inquiry.

Cross references. See further, annotations under Baily v. Harris (8 Iowa 331), Vol. I, p. 515; Cameron v. Logan (8 Iowa 434), Vol. I, p. 525; Norton, Jewett & Busby v. Williams (9 Iowa 528), Vol. I, p. 620.

2. **Real Estate—Vendor's Lien—Rights of Assignee of Purchase Money Notes.**—Where purchase money notes for land are assigned by the vendor, the lien passes with them; but the assignee must enforce his lien by proper proceedings, pp. 151, 152.

Reaffirmed in Paramore v. Nabers, 42 Iowa 660; Bills v. Mason, 42 Iowa 333, 334.

Reaffirmed and extended in State Bank of Iowa Falls v. Brown, 142 Iowa 196, 119 N. W. 83, holding further that the vendor has an implied lien on land sold, for the purchase money, and that the lien passes to an assignee of the purchase money notes as an incident of the debt; and that the rule obtains whether the title has passed or not.

Reaffirmed and varied in Farwell v. Grier, 38 Iowa 85, 86, holding that where a note is executed for rent and the payee (landlord) transfers it to another, with recourse, and upon its non-payment again becomes the owner by paying his transferee, that the payee (landlord) does not lose his lien for the rent.

Cited with approval in Porter v. City of Dubuque, 20 Iowa 443, holding that where a vendor of city lots, for a valuable consideration agrees to release all claims thereon, he thereby loses his lien.

(Note.—See further sustaining, but not citing, the text, Reynolds v. Morse, 52 Iowa 155, 2 N. W. 1070; Blair v. Marsh, 8 Iowa 144.

See also, in this connection, Hodgson v. Smith Bros., 136 Iowa 515, 114 N. W. 39; Owen, trustee, v. Higgins, 113 Iowa 735, 84 N. W. 713; Zook v. Thompson, 111 Iowa 463, 82 N. W. 930; Gnash v. George, 58 Iowa 492, 12 N. W. 546; Jordan v. Wimer, 45 Iowa 65; Johnson v. McGrew, 42 Iowa 555.—Ed.)

Cross reference. See further, sustaining text, annotations under Blair & Co. v. Marsh (8 Iowa 144), Vol. I, p. 591.

TRUSTEES OF OSKALOOSA COLLEGE v. STAFFORD; SAME v. MYERS, 14 IOWA 152

1. Written Contracts — Construction of — Contemporaneous Agreement and Statements.—Where a contract is in writing and is unambiguous, it is a fair expression of the agreement of the parties at the time of its execution, and contemporaneous statements or agreements are (in the absence of fraud, accident or mistake), inadmissible to vary, or control its terms, p. 154.

Reaffirmed in Paddock et al, trustees, v. Bartlett, 68 Iowa 19, 25 N. W. 908.

Cross reference. See further on this question, annotations under Field v. Schricher (14 Iowa 119), ante. p. 214.

DAVIS v. SIMMA, 14 IOWA 154, 81 Am. Dec. 462

1. Evidence—Cross Examination—To What to be Confined—Control of by Trial Court—Reversible Error.—Cross examination of a witness must be confined to facts and circumstances in relation to the matters introduced in chief; but its latitude may be controlled by the trial court, subject to reversal for erroneous ruling resulting in prejudice to the party complaining.

So, where the trial court refuses to permit a party to cross examine on a proper matter, but thereafter rules that the witness may be recalled for such purpose, upon the failure of the party to so do, he cannot complain on appeal to the Supreme Court, p. 155.

Reaffirmed and extended in Glenn v. Gleason et al, Ex'rs, 61 Iowa 32, 15 N. W. 661, holding further that on the question of what are proper matters for cross examination, very much is to be left to the judicial discretion of the trial court, subject to reversal in case of its abuse, and resulting prejudice: Holding, however, that if a party desires to examine an opposing party's witness on other than concerning the facts and circumstances of facts brought out in chief, he must make the witness his own by calling him later in the trial.

2. Justice's Court—Verdict in—Entry of "Forthwith"—Compliance With Statute.—Although under Sec. 3895 of the Code of 1860, judgment upon a verdict in a justice's court is to be entered by the justice "forthwith," still where a verdict is returned at 10.30 O'clock P. M. of one day, and the justice before whom it is returned enters judgment thereon the following day at 11 O'clock A. M., the statute is sufficiently complied with. Such statutes will be given a liberal construction, pp. 156, 157.

Reaffirmed in Knox v. Nicoli, 97 Iowa 689, 66 N. W. 876, holding that the provision of the statute, that the judgment upon a verdict in a justice's court must be entered "forthwith," is to be reasonably construed: Hence holding that where a verdict is returned at 9 O'clock at night, judgment may be entered thereon the following morning.

Reaffirmed, extended and qualified in Burchett v. Casady, 18 Iowa 344, holding that the word "forthwith" in Sec. 3895 of the Code of 1860 (as to entry of judgment) means "within a reasonable time": But that even if the justice before whom the verdict is returned fails to enter judgment thereon "within a reasonable time," it is, as between the parties to the action, not *void*, but *voidable*, and can not be attacked by them collaterally, but must be set aside by writ of error, or other proper and direct proceeding.

Reaffirmed and narrowed in Tomlinson v. Litze, 82 Iowa 34, 47 N. W. 1015, 31 Am. St. Rep. 450, holding that a judgment entered by a justice of the peace ninety days after verdict, is void, and may be set aside and canceled by a court of equity at the instance of the judgment debtor.

Reaffirmed and narrowed in Worrall v. Chase & Co., 144 Iowa 668, 669, 123 N. W. 340, holding that where a cause is submitted to a justice for judgment without the intervention of a jury, he must, under Sec. 4522 of the Revision of 1897, enter judgment therein within three days after the cause is submitted; and that a judgment in such case entered after such period is *void*: That where a statute requires a justice to do an act within a fixed time, he has no jurisdiction to act in the premises after the time fixed.

Cited and narrowed in Gates v. Knosby, 107 Iowa 242, 77 N. W. 864, holding that where on a trial before a justice of the peace the jury fails to agree and is discharged, the justice can not two days thereafter order a second *venire*, in the absence of an agreement of the parties, and without further notice, as the law requires the second *venire* to be summoned "immediately."

Cross reference. See further, annotations and note under Rule 1 of Harper v. Albee (10 Iowa 389), Vol. I, p. 709.

See also, annotations under Lyon v. Comstock (9 Iowa 306), Vol. 1, p. 580.

MCDOWELL v. BARTLETT, 14 IOWA 157

1. Actions—Parties—"Real Party in Interest"—Money Loaned by One Person—Note Taken in Name of Another—Indorsement of to Former by Husband of Latter After Her Death.—Actions must be brought in the name of the real party in interest. So, where money is loaned by one person and a note therefor taken in the name of a married woman, the indorsement thereof to the lender by the husband of the latter after her death, entitles the lender (indorsee) to sue thereon in his own name, pp. 159, 160.

Reaffirmed and extended in Conyngham v. Smith, 16 Iowa 473, 474, holding further that the assignee of a judgment may see thereon in his own name; and that it is not necessary for such purpose that the judgment be assigned *on the record* thereof.

Reaffirmed and extended in Gree v. Marble, 37 Iowa 96, holding further that the verbal assignment of a note and guaranty thereof, entitles the assignee to sue on the guaranty in his own name.

Cited in King v. Gottschalk, 21 Iowa 514, not in point.

(Note.—See further sustaining and explaining, but not citing, the text, Pearson v. Cummings, 28 Iowa 344; Rice v. Savery, 22 Iowa 470; Cottle v. Cole, 20 Iowa 482; Younger v. Martin, 18 Iowa 143, and there are others.—Ed.)

STURGEON v. FERRON, 14 IOWA 160

1. New Trial—Newly Discovered Evidence, Cumulative in Character Not Ground for.—Under Sec. 3116 of the Revision of 1860, newly discovered evidence which is cumulative, is not a ground for a new trial, p. 162.

Reaffirmed and extended in Alger v. Merritt, 16 Iowa 125, 126, Darrance v. Preston, 18 Iowa 403, 404; Bingham v. Foster, 37 Iowa 341; Cohol v. Allen, 37 Iowa 451, holding further that a new trial will not be granted for newly discovered evidence which is merely cumulative, immaterial, or which tends only to impeach or contradict a witness; nor unless the applicant shows that he used diligence to ascertain the existence of the newly discovered evidence before the trial, or that diligence in this respect would have been useless; and he must state the facts constituting the diligence.

Reaffirmed and extended in German v. Maquoketa Sav. Bank. 38 Iowa 369, 371, holding further that a party cannot be charged with lack of diligence in failing to discover evidence to disprove a fact, which he, at the time of the commencement of the trial, did not know any one claimed to exist.

Reaffirmed and qualified in Stineman v. Beath, 36 Iowa 78, 79, holding that although newly discovered evidence is in some respects cumulative is no objection to its sufficiency as a ground for new trial, if it has in any degree an independent and distinct bearing on the issue;

and that where a petition for a new trial, on its face does not show such evidence to be merely cumulative, a demurrer thereto on that ground is not good: Holding further that the applicant is only required to use reasonable diligence to discover evidence before the trial.

Reaffirmed and qualified in Wayt v. B. C. R. & M. R. R. Co., 45 Iowa 219, 220, holding that where a party moving for a new trial on the ground of newly discovered evidence, sets out facts constituting reasonable diligence to discover it before the trial, and shows that it is material and on a new fact not testified to on the trial, his motion must prevail.

Cited in Robb v. McDonald, 29 Iowa 332, 4 Am. Rep. 211, on the general question of a motion for a new trial, the case involving the power of the court to punish for contempt.

Cross references. See further on this question, annotations under Rules 7 and 8 of Pelamourges v. Clark (9 Iowa 1), Vol. I, p. 539; Lisher v. Pratt (9 Iowa 59), Vol. I, p. 544.

STATE EX REL. LOCKWOOD AND SCHOLFIELD v. KIRKWOOD, GOVERNOR,
14 IOWA 162

1. Railroad Lands—Act of Congress of May 15, 1856, and Chapter 37, Laws of 1860 in Aid of Railroads—Mandamus by Railroad for Certificate to Land Under—When Does Not Lie.—Mandamus will not lie in favor of the Cedar Rapids and Missouri River Railroad Company to compel the Governor to issue to it certificates for the acquisition of lands under Chapter 37, Laws of 1860, held by the State under Act of Congress of May 15, 1856, in aid of the construction of railroads, until the company has complied with Secs. 6 and 7 of the Act of 1860 by building the road as therein required, pp. 166, 169, 170.

Reaffirmed and extended in Goodrich v. Beman, 37 Iowa 564, holding further that although the Cedar Rapids and Missouri River Railroad Company may have constructed the number of miles of railroad to entitle it to a certain number of sections of land under the acts mentioned in the text, still such lands were not taxable against it until compliance by it with Secs. 6 and 7 of Chap. 37, laws of 1860.

Distinguished in C. R. & M. R. R. Co. v. Carroll County, 41 Iowa 163, 189, holding that where, under an act of Congress, a railroad company is entitled to certain lands upon completing a certain number of miles of railroad, that upon its completing the distance prescribed, the land becomes subject to taxation, although a patent therefor be not issued until after it is assessed.

Distinguished and explained in Courtright v. C. R. & M. Riv. R. Co., 35 Iowa 395, the court holding that a grant of land from the general government, or from a state upon a condition is in the nature of a contract, irrevocable upon the performance of the condition by the person to whom granted: Hence holding that where under the

Act of Congress mentioned in the text, the state was authorized to dispose of 120 sections of the land therein mentioned before the railroad was built, that by its grant to the Iowa Central Air Line R. R. Co., of its rights and privileges thereunder by Act of the General Assembly, it vested the title in and to such sections in the company, to be selected as it is deemed proper, within the limits prescribed by the act, and the subsequent act mentioned in the text (Chap. 37, Laws of 1860) or any other subsequent acts did not divest the company of title thereto.

Cross references. See further, annotations under Des Moines N. & R. Co. v. Polk County (10 Iowa 1), Vol. I, p. 634; Tallman v. Treasurer of Butler County (12 Iowa 531), ante. p. 91; Stockdale v. Treasurer of Webster County (12 Iowa 536) ante. p. 93.

MAHASKA COUNTY v. INGALLS, 14 IOWA 170

(Case arising out of same facts, 16 Iowa 81.)

1. County Treasurer—Liability of Sureties on Bond.—The bond of the county treasurer binding him to perform all the duties "now or hereafter required of his office by law," makes the sureties thereon liable for his failing to account for state, county, road, and school taxes collected by him, p. 172.

Cited in Estep v. Keokuk County, 18 Iowa 200, the court holding that a county is not liable for money wrongfully collected and appropriated to his own use by the county treasurer.

2. Demurrer—Waiver of by Answering Over.—Where a demurrer to a petition is overruled, and the defendant thereupon files his answer, the ruling on the demurrer is waived, p. 171.

Reaffirmed in Melhop & Kingman v. Doane & Co., 31 Iowa 399, 7 Am. Rep. 147; Phillips v. Hosford, 35 Iowa 593, 594.

Cross reference. See further, sustaining, but not citing, the text, annotations and cross references under Eubank v. Whittaker (11 Iowa 197), Vol. I, p. 802.

STADLER BROS. & CO v. PALMLEE & WATTS, 14 IOWA 175

(Former Appeal, 10 Iowa 23.)

1. Garnishment—Judgment Against Garnishee—Requisites and Effect.—A judgment against a garnishee upon his answer, condemning the property or debt in his hands, satisfies, to the extent thereof, the indebtedness between the garnishee and the defendant (debtor), although the judgment does not expressly recite such satisfaction, p. 177.

Reaffirmed and varied in Bowen v. Port Huron Engine & Thresher Co., 109 Iowa 257, 259, 80 N. W. 346, 77 Am. St. Rep. 539, holding that a judgment against a solvent garnishee operates to the extent thereof, as a satisfaction of the debt due by the defendant (debtor) to the attaching creditor.

Distinguished in Searle v. Fairbanks, Morse & Co., 80 Iowa 311, 45 N. W. 571, holding that a judgment against a garnishee does not bind the principal debtor who is not served with notice of the attachment action: That such judgments are not binding on strangers thereto.

(Note.—See further specially, Peck v. Parchen, 52 Iowa 46, 2 N. W. 597.—Ed.)

Cross references. See further in this connection, annotations under Smith et al Clarke et al (9 Iowa 241), and Fifield v. Wood (9 Iowa 249), Vol. I, p. 571.

2. Garnishment—Debt Garnished Payable in Property—Judgment.—Where a debt garnished was evidenced by note and was to have been payable in “merchandise” at a store of the garnishee, the judgment against the garnishee should be for the amount of the debt, but to be discharged in goods or merchandise at a fair value, to be placed at the disposal of the sheriff, on failure whereof the judgment, on motion, to become absolute, and for which a general execution may issue, p. 178.

Reaffirmed and qualified in Ransom & Co. v. Stanberry, 22 Iowa 336, holding that a judgment against a garnishee on a note payable in specific property, should be for the property as payable by the note; unless the note has been converted into a money demand.

STOCKDALE v. JOHNSON, 14 IOWA 178

1. Records—Amendment of or Supplying Omissions in—Motion for—Review on Appeal.—The ruling of the trial court on a motion to amend a record, or to supply an omission therein, will not be reversed by the Supreme Court when the record on appeal shows the evidence on the motion to have been conflicting, and the trial court must have had a personal knowledge concerning the question, p. 180.

Reaffirmed in McConnell v. Avey, et al, 117 Iowa 286, 90 N. W. 605, holding that on a motion to modify, or correct a decree, the court may act upon knowledge acquired during the trial, or upon facts shown by the pleadings and other records in the case.

Distinguished and narrowed in Giddings v. Giddings, 70 Iowa 488, 30 N. W. 875, holding that where on the trial of an equity cause on its merits, a judgment is entered for a blank sum, it gives the successful party no lien thereunder on lands involved in the action: And that the successor of the judge entering such judgment cannot, on a motion to correct and supply the omission therein, go outside the record to ascertain the intention of his predecessor, or to cure the defect.

(Note.—See further sustaining, explaining and analogous to, but not citing, the text, Risser & Reitz v. Martin & Phillips, 86 Iowa 392, 53 N. W. 270; Elsner v. Shrigley, 80 Iowa 30, 45 N. W. 393; Deere, Wells & Co. v. Nelson, 73 Iowa 186, 34 N. W. 809; Ch. I. & Dak. Ry. Co. v. Estes, 71 Iowa 603, 33 N. W. 124; Hawkeye Ins. Co. v. Duffie, 67 Iowa 175, 25 N. W. 117; Bosch v. Kassing, 64 Iowa 312,

20 N. W. 454; Wolmerstadt v. Jacobs, 61 Iowa 372, 16 N. W. 217; Carpenter v. Zuver, 56 Iowa 390, 9 N. W. 304; Porter v. McBride, 44 Iowa 479; Brace v. Grady, 36 Iowa 352.—Ed.)

Cross references. See further in this connection, annotations and cross references under State v. Elgin (11 Iowa 216), Vol. I, p. 805; Rogers and Tallman v. Cummings (11 Iowa 459), Vol. I, p. 844; Julien Gas Light Co. v. Hurley (11 Iowa 520), Vol. I, p. 853; Lind v. Adams (10 Iowa 398), Vol. I, p. 714.

"Record entry—Conclusiveness of recitals in"—See annotations under Holmes & Avery v. Budd (11 Iowa 187) Vol. I, p. 800.

WALLACE v. BERGER, 14 IOWA 183

1. Evidence—Admissions — Conversations — Weight of.—Admissions by a party made in loose and random conversations, are very weak and unsatisfactory and should be received with great caution: But admissions in conversations shown to have been made deliberately are strong evidence.

Admissions by conversations are to be weighed according to the circumstances of the case and under which they were made, pp. 184, 185.

Reaffirmed in Krause v. Redman, 134 Iowa 132, 133, 112 N. W. 92.

(Note.—See further sustaining and explaining, but not citing, the text, Martin v. Algona, 40 Iowa 390; Wilmer v. Farris, 40 Iowa 309; Cooper v. Skeel, 14 Iowa 578.—Ed.)

Cross reference. See further, annotations under Rule 4 of Fifield v. Gaston (12 Iowa 218) ante. p. 35.

BARNEY v. BARNEY, 14 IOWA 189

1. Divorce — Action for—Death of Party — Abatement — To What Extent May be Revived.—An action for divorce abates upon the death of either party; but where such an action involves property rights, it may be revived either in the district or the appellate court for the purpose of determining such questions, pp. 193, 195.

Reaffirmed in Wood, Adm'r et al v. Wood, Ex'x, et al, 136 Iowa 131, 113 N. W. 493, 12 L. R. A. (New Series) 891.

Reaffirmed and extended in Lawrence v. Nelson, 113 Iowa 278, 85 N. W. 84, 57 L. R. A. 583, holding further that where a husband obtains a decree of divorce which is valid on its face, and thereafter marries again and dies, that the first wife may sue the second wife and ask an annulment of the decree on the ground that the court rendering it had no jurisdiction, or other ground rendering it invalid, for the purpose of determining which is the wife and entitled to a pension of the deceased husband.

Cited with approval in McEwen v. McEwen, 26 Iowa 376, on the question of the power of the court to enforce, by proper orders, a judgment allowing alimony.

BURTON v. KNAPP, 14 IOWA 196, 81 Am. Dec. 465

1. Attachment—Wrongful Issuance—Action for—Evidence in—Malice—Exemplary Damages.—In an action for damages for the wrongful issuance of an attachment, declarations made by the defendant (plaintiff in attachment action) long after the issuance of the attachment, which do not directly relate to the suing out thereof, are inadmissible to prove malice of the defendant, and justify exemplary damages, p. 197.

Cited with approval in Nordhaus v. Peterson Bros., 54 Iowa 70, 71, 6 N. W. 79, holding that in order for the plaintiff to recover in an action for damages for the wrongful suing out of an attachment, he must prove it was procured by the defendant (plaintiff in the attachment action) without any reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design, or set purpose of injuring the plaintiff (defendant, debtor in the attachment action).

Cross reference. See further Rule 2 hereof.

2. Attachment—Wrongful Suing Out—Action for Damages for—Proof Necessary to Sustain.—In an action for damages for the wrongful suing out of an attachment, the plaintiff must allege and prove that the defendant (plaintiff in the attachment action) exercising that degree of caution that a reasonable, prudent man should, had not good cause to believe that which he stated in the attachment action to be true, p. 198.

Reaffirmed and explained in Vorse v. Phillips, 37 Iowa 430; Bordhaus v. Peterson Bros., 54 Iowa 69, 6 N. W. 78, holding that although the facts upon which an attachment is sued out may not be true in fact, still if the plaintiff in making the affidavit therefor exercising that degree of caution that a reasonably prudent man should, had good cause to believe the facts to be true, the writ is not wrongfully sued out, and no action thereby lies for damages.

(Note.—See further sustaining and explaining, but not citing, the text, Drummond v. Stewart, 8 Iowa 341; Raver v. Webster, 3 Iowa 503; Mahnke v. Damon & Co., 3 Iowa 107; Winchester v. Cox, 4 G. Greene 121.—Ed.)

Cross reference. See further in this connection, annotations under Rule 2 of Campbell v. Chamberlain (10 Iowa 337), Vol. I, p. 698.

WILSON v. HILLHOUSE, 14 IOWA 199

1. Appeal—Assignment of Errors—Failure to Argue—Waiver.—Where on appeal the party complaining assigns several errors, some

of which he fails to argue or insist upon, the appellate court will not consider these latter ones, p. 202.

Special cross reference. For cases citing the text, and others on the subject, see annotations under *Shaw v. Brown* (13 Iowa 508) ante, p. 180.

CHASE *v.* PARKER, 14 IOWA 207

1. **Trust Deed of Land—Sale Under—Right of Redemption by Subsequent Judgment Creditor, etc.**—A sale of land under a trust deed divests a creditor who recovers judgment after the execution of the instrument, of all lien on the land and of all right to redeem, p. 210.

Reaffirmed and extended in *Lowe v. Grinnan*, 19 Iowa 197, holding that a valid sale of land under a trust deed cuts off the rights of a mortgagee under a mortgage executed prior to the trust deed: This, says the court, is the established rule, in the absence of a statute allowing the right of redemption, by such mortgagee, after sale, or of some extrinsic equity.

Cross reference. See Rule 2 hereof and cross reference there found.

2. **Trust Deeds of Lands—Sales Under—Surplus of Proceeds—Subjection by Subsequent Judgment Creditor.**—The surplus arising from a sale of land under a trust deed may be subjected in equity in the hands of the trustee by a judgment creditor of the grantor who obtains his judgment after the execution of the trust deed, p. 210.

Reaffirmed and extended in *Polk County v. Sypher*, 17 Iowa 363, 85 Am. Dec. 568, holding further that when lands are sold under an execution to satisfy a prior judgment and there are other liens upon it, the liens follow the surplus in equity, and the surplus will be distributed in the order and according to priorities of the liens, whether they be by judgment or by mortgage; that in such case it is not in the power of the debtor to assign the surplus and defeat the lienholders, and the sale of such surplus under execution in favor of a junior lienholder is, in operation of law, such an assignment.

Cross reference. See further on this question, annotations under Rules 2-5 of *Cook & Sargent v. Dillon* (9 Iowa 407), Vol. I, p. 598.

EDGAR *v.* GREER, 14 IOWA 211

1. **Certiorari—When Granted.**—When in the judgment of the court applied to there is no other plain, speedy, and adequate remedy, a writ of *Certiorari* will be granted, where an inferior court, board, or officer has exceeded its or his proper jurisdiction, or is otherwise acting illegally, p. 212.

Reaffirmed in *O'Hare, Adm'r v. Hempstead*, county judge, 21 Iowa 36, holding that *Certiorari* does not lie where the party aggrieved has a plain, speedy, and adequate remedy by appeal.

Reaffirmed and explained in Berkey v. Thompson, judge, and Lefebure & Sons, 126 Iowa 398, 102 N. W. 136, holding that the question of whether or not a court acted illegally and without jurisdiction in a matter involved in an action of which it otherwise has jurisdiction may be reviewed by *Certiorari*.

Reaffirmed and extended in Keck v. Board of Supervisors of Keokuk County, 37 Iowa 549, 550, holding that a writ of *Certiorari* lies where a town assessor refuses to correct assessment books as ordered by the board of trustees, and delivers such books, uncorrected, to the county auditor.

Reaffirmed, extended and qualified in Jordan v. Hayne, 36 Iowa 15, holding further that the question of whether or not the action of township trustees, on a matter of a judicial or *quasi-judicial* character, was illegal and they were without jurisdiction, may be tested by *Certiorari*: But that *Certiorari* must be tried upon the *record* and not upon *facts*.

Reaffirmed and qualified in Smith v. Board of Supervisors, 30 Iowa 533, 535, holding that where a court, or board has jurisdiction of the subject-matter involved, errors of fact in a proceeding before it, will not be reviewed by *Certiorari*.

Cross references. See further, sustaining, explaining and qualifying, but not citing, the text, annotations under *Spray & Barnes v. Thompson* (9 Iowa 40), Vol. I, p. 541; *Rule 1 of Craine v. Fulton* (10 Iowa 457), Vol. I, p. 728; *Fagg v. Parker, justice*, (11 Iowa 18), Vol. I, p. 762.

BAKER & GRIFFIN v. STEAMBOAT MILWAUKEE, 14 IOWA 214

1. Constitutional Law—Special Legislation.—Laws Concerning Cities and Towns.—Under the Constitution (1857), the General Assembly has no power to amend, or repeal an act incorporating a city or town in this state. All laws on this subject must be of a general nature. This constitutional prohibition applies and extends to such special laws amending, or repealing, special acts of incorporation adopted and in force prior to the taking effect of the Constitution. The intention of the Constitution on this subject, is to leave cities and towns to the control of their own municipal affairs, subject to the Constitution and general laws of the state. The General Assembly can pass a general law under which all cities and towns may proceed to repeal their previous charters and substitute others of their own formation or creation, or may by a general law give cities and towns general power to amend, change, or modify their charters, pp. 216, 217.

Reaffirmed in Town of McGregor v. Baylies, 19 Iowa 49.

Reaffirmed and extended in Stange v. City of Dubuque, 62 Iowa 305, 17 N. W. 519, holding further that the Legislature cannot by a special law legalize a city ordinance passed without authority: For the

reason that the legislature cannot do indirectly that which it is not empowered to do directly.

Reaffirmed and narrowed in State v. Squires, 26 Iowa 343, holding that a special law can be passed by the Legislature, where a general law cannot be made applicable.

Cross references. See further on this question, annotations under Ex parte Pritz (9 Iowa 30), Vol. I, p. 540; Davis & Bro. v. Woolnough (9 Iowa 104), Vol. I, p. 549.

2. Statutes—Repeals by Implication Are Not Favored.—The repeal of a statute by implication is not favored; and courts will give effect to several statutes on the same subject if possible, p. 218.

Reaffirmed and explained in State v. Shaw, 28 Iowa 79, 4 Am. Rep. 159, holding that in order for a new statute to work a repeal of an old one by implication, there must be an absolute repugnancy between them.

Reaffirmed and explained in City of Dubuque v. Harrison, 34 Iowa 167, 168, holding that where an old and a new statute are not necessarily in conflict, both will be upheld.

Reaffirmed and extended in State v. Brandt, 41 Iowa 614; State v. Higgins, 121 Iowa 25, 95 N. W. 246, holding further that any reasonable or allowable construction of two statutes will be adopted, in order to prevent a repeal of an old one by implication.

Reaffirmed and extended in State v. Van Vliet, 92 Iowa 482, 61 N. W. 243, holding further that the court will not adjudge an old statute to be repealed by implication by a new one, except where such construction is inevitable, and is plainly the legislative intention.

Cross reference. See further, sustaining text, annotations, note and cross references, under Thatcher v. Haun (12 Iowa 303), ante. p. 51.

3. City Court of Dubuque—Selection of Jury for Term—Venire for More Than Statutory Number—Challenge to Panel—Mandatory and Directory Statutes.—Where the clerk of the city court of Dubuque issued a *venire* for twenty jurors for a term of that court instead of fifteen as required by statute, a challenge to the panel so summoned, by a litigant in an action triable at such term should have been sustained: The statute mentioned requiring fifteen jurors is mandatory, not directory, pp. 221, 222.

Cited in State v. Brandt, 41 Iowa 632 (Opinion on Re-hearing), the court holding that an indictment will not be set aside because of irregularities in the selection of the grand jury, where they do not affect or prejudice the substantial rights of the accused.

4. Trial—Instructions—Instruction Erroneous Standing Alone But Corrected by Others.—Although an instruction if considered alone, may be erroneous, still if as qualified and explained by others,

it is correct and not misleading, the giving thereof is not reversible error, pp. 225, 226.

Reaffirmed in Hunt v. Ch. & N. W. R. R. Co., 26 Iowa 365, 366.

(Note.—See further sustaining, but not citing, the text, Shafer, Adm'r, v. Grimes, 23 Iowa 550; Hamilton v. State Bank, 22 Iowa 306; Bondurant v. Crawford, 22 Iowa 40; DeMoss v. Haycock, 15 Iowa 149, and there are many others.—Ed.)

ESPY v. TOWN OF FORT MADISON, 14 IOWA 226

1. Mistake of Law—Money Paid Under Cannot be Recovered—Taxes Paid Under Invalid or Unconstitutional Law.—Money paid under a mistake of law cannot be recovered. Hence, where a person voluntarily pays taxes under a law previously declared unconstitutional, it cannot be recovered, p. 228.

Reaffirmed and explained in Dubuque & Sioux City R. R. Co. v. Board of Supervisors of Webster County, 40 Iowa 17; Bailey v. Town of Paullina, 69 Iowa 464, 29 N. W. 419, holding that where one voluntarily pays money with full knowledge of all the facts, under a mistake as to the law, he cannot recover it.

Reaffirmed and extended in Lindsey v. Boone County, 92 Iowa 90, 60 N. W. 175, holding further that a purchaser at a tax sale cannot recover from the county, taxes voluntarily paid by him thereunder, where the land sold thereat is so indefinitely described on the assessment rolls that such sale is void.

Reaffirmed and extended in Odendahl v. Board of Supervisors and Treasurer of Carroll County, 122 Iowa 183, 83 N. W. 886, holding further that *excessive* taxes voluntarily paid cannot be recovered from the county.

Cross reference. See further on this question, annotations under Kraft v. City of Keokuk (14 Iowa 86), ante. p. 209.

DALBY v. WOLF & PALMER, 14 IOWA 228

1. Constitutional Law—Delegation of Legislative Powers—Stock Running at Large—Election for, etc.—Constitutionality of Law.—A law is not unconstitutional as delegating legislative powers to the people when it requires a vote of the people of a certain territory as to whether or not it shall become operative therein. Hence, Chapter 193, laws of 1857, and Sec. 114 of the Code of 1851, authorizing a vote of the people of a county to determine whether or not stock shall be permitted to run at large, and for a sale of stock, upon advertisement, found running at large where prohibited by vote, is constitutional, pp. 230, 231.

Reaffirmed and extended in State v. Forkner, 94 Iowa 10, 12, 31, 62 N. W. 775, 781, 28 L. R. A. 206, holding that where a law is a complete and perfect enactment after the approval of the Governor and publication, it is constitutional, although it may depend upon a

vote or consent of the people for its operation in a particular territory: Hence, upholding the constitutionality of the "Mulct" intoxicating liquor law, Chap. 62, Acts of Twenty-fifth General Assembly requiring the consent of the people of a city for its operation, etc., and allowing them to revoke the consent under certain conditions.

Reaffirmed and extended in Page v. Millerton, 114 Iowa 380, 86 N. W. 440, upholding the constitutionality of Chapter 143, Laws of Sixteenth General Assembly, Chapter 6, Title 3 of the Code of 1897, allowing the people of a city to choose, in the manner therein provided, whether or not they will have a Superior or a Police Court.

Reaffirmed and extended in Eckerson v. City of Des Moines, 137 Iowa 478, 115 N. W. 187, holding that the Legislature may require a city to accept provisions of an act, either by its council or by vote of the people, before the law becomes operative.

Cited with approval in McCormick v. Rusch, 15 Iowa 130, 83 Am. Dec. 401, upholding constitutionality of law of 1862, Chap. 109, granting a continuance of an action to a party in the actual military service of the United States during the continuance of such service.

Cited with approval in Shaw v. Marshalltown, 131 Iowa 138, 104 N. W. 1125, 10 L. R. A. (New Series) 825, upholding the constitutionality of Chap. 9, Laws of the Thirtieth General Assembly, granting preference in appointment to minor municipal offices, to soldiers, sailors and marines from the army and navy of the United States in the late Civil War, who are citizens and residents of this state.

(Note.—See further as to when law valid because legislative authority is not delegated, City of Des Moines v. Hillis, 55 Iowa 643, 8 N. W. 638; Lytle v. May, 49 Iowa 224; State v. King, 37 Iowa 462; Morford v. Unger, 8 Iowa 82.—Ed.)

VAN VARK v. VAN DAM, 14 IOWA 232

1. Actions — Original Notice — Requisites — Name of Term Appeal—Motion in Trial Court.—An original notice must name the term at which the defendant is to appear and answer, or it is defective: But the Supreme Court will not reverse a cause for defective notice when the attention of the trial court was not called to it, p. 233.

Reaffirmed in Pratt v. Western Stage Co., 27 Iowa 364, 365, holding that a motion to correct a defect in service of notice, or other irregularity, must be made in the trial court, before it can be ground for reversal upon appeal.

Reaffirmed in De Tar v. Boone County, 34 Iowa 490, holding that where a judgment by default is entered on an original notice which is defective in warning the defendant to appear and answer at "the next term" of court, that before such judgment will be reversed therefor, a motion to set it aside on account thereof must first be made in the trial court.

Reaffirmed and qualified in Boals v. Schules, 29 Iowa 509, holding that a notice warning the defendant to appear "on or before Noon of the second day of the April term of the district court, to begin on the 12th day of April, 1870" (the day named being before the commencement of the term), is insufficient.

Cross references. See further, sustaining and qualifying the text, annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66; Branch of State Bank v. Van (12 Iowa 523), ante. p. 88.

LYON v. O'KELL, 14 IOWA 233

1. **Contracts and Notes—Failure of Consideration.**—Where after the execution of a contract or a note, the consideration therefor fails, or the party to whom the money is payable is unable to perform the contract in relation to the subject-matter according to its terms, the contract, or note is unenforceable, p. 235.

Reaffirmed in Lyon v. Day, 15 Iowa 470.

CORSE BROS. v. SANFORD, 14 IOWA 235

1. **Trial—Instructions—Province of Court and Jury.**—Instructions must be confined to matters of law applicable to the facts proven. The court has no right to comment on the facts, or tell the jury what facts are proven, p. 238.

Reaffirmed and explained in West v. Moody, 33 Iowa 139, 140, holding that the determination of the facts is for the jury, and that what constitutes the issue as made by the pleadings is a question for the court.

(Note.—See further, Rohrabacher v. Ware, 37 Iowa 85; Pharo v. Johnson, Ex'r, 15 Iowa 560; Reid v. Mason, sheriff, 14 Iowa 541; Potter et al v. Wooster et al, 10 Iowa 334; McKinley v. Hartman, 4 Iowa 154.—Ed.)

Cross references. See further on this question, annotations under Russ v. Steamboat War Eagle (9 Iowa 374), Vol. I, p. 592; Rule 2 of Fannon v. Robinson (10 Iowa 272), Vol. I, p. 682.

DENEGRE v. HAUN, 14 IOWA 240, 81 Am. Dec. 480

(Case on same facts, 13 Iowa 240.)

1. **Homestead—Debt Created Before Enactment of Law—Sale of to Satisfy.**—Homestead is subject to the satisfaction of a debt created before the enactment of the homestead law, although a creditor may delay the enforcement of his judgment thereon until the debtor has incumbered, sold, or has had sold under other judgments, all of his other property, pp. 243, 245, 246.

Reaffirmed and extended in Burmeister v. Dewey, 27 Iowa 472, holding further that although homestead which is subject to the satisfaction of a judgment is sold before other property of the debtor, subject thereto, is exhausted, still it will not be a ground for setting aside

the sale and deed made thereunder in 1859, in an action therefor commenced in 1868; a case, however, in which the court decides that the other property was properly exhausted before the homestead was sold.

Reaffirmed and extended in *Foley v. Cooper*, 43 Iowa 379, holding further that where homestead is subject to the satisfaction of a judgment after certain other property is exhausted, and the debtor allows his homestead to be sold therefor and without objection, before the sale of the other property, he is thereafter estopped to attack such proceedings for that reason.

(Note.—See further on this question, *Hale v. Heaslip*, 16 Iowa 451; *Stevens v. Myers*, 11 Iowa 183.—Ed.)

MUSSER & CO. *v.* HOBART, 14 IOWA 248

1. Husband and Wife—Separate Property and Contracts of Wife—Actions Against Both on—Allegations of Petition.—In an action against husband and wife for the value of property, where the petition alleges that the wife owned and controlled her real estate and personalty, and that the personal property the value of which is claimed, was purchased at her special instance and request, for her use and benefit, and was used in and about her premises, it sufficiently charges that the contract was made by the wife in relation to her separate property, p. 250.

Reaffirmed and extended in *Jones v. Crosthwaite*, 17 Iowa 402, holding further that a wife owns and controls and may sell, dispose of, and make contracts concerning her real estate as if she were unmarried.

Reaffirmed and extended in *Richmond v. Tibbles*, 26 Iowa 477, 478, holding further that a wife (under the Code of 1860), is liable for breach of covenants contained in a deed to her own land.

Cross reference. See further in this connection, annotations, note and cross references under Rule 4 of *Suiter v. Turner* (10 Iowa 517), Vol. I, p. 739.

STERNBURG *v.* CALLANAN & INGHAM, 14 IOWA 251

1. Usury—Who Can Interpose Plea.—A plea of usury cannot be interposed except by a party to the usurious contract, p. 255.

Reaffirmed in *Allison & Crane v. King*, 25 Iowa 58; *Carmichael v. Bodfish*, 32 Iowa 419.

Cross reference. See further, annotations and cross references under *Powell v. Hunt* (11 Iowa 430), Vol. I, p. 838.

2. Partnership—Liability of Incoming Partner for Antecedent Debt of Firm—Novation.—Where the membership of a partnership changes and a new partner comes in, to bind the new firm on an antecedent debt, it must appear that there was a novation of the old debt, p. 271.

Reaffirmed in Cadwallader & Co. v. Blair & Van Nostrand, 18 Iowa 423.

Cited in Hawkeye Woolen Mills v. Conklin, 26 Iowa 425, 426, holding that a partnership may in good faith and for a valuable consideration sell or dispose of the firm property, and a creditor thereof has no lien on the property sold, but may in equity enforce his rights against the proceeds.

3. Partnership—Contract by Member for—Extent of Authority—Ratification.—A partner cannot contract in relation to any matter outside of the firm business: And a contract by a partner to pay the debt of an old firm of which the partnership is the successor, is invalid unless ratified by the other partners, pp. 259, 260.

Reaffirmed and extended in Brewster v. Reel, 74 Iowa 508, 38 N. W. 382, holding that a partner cannot pledge the firm credit, or use the firm property to secure or pay his own debts.

(Note.—See further sustaining and explaining, but not citing, the text, Thomas v. Stetson, 62 Iowa 537, 17 N. W. 751, 49 Am. Rep. 148; Waller v. Davis, 59 Iowa 103, 12 N. W. 798; First Nat'l Bank v. Carpenter, Stibbs & Co., 34 Iowa 433; Rutledge v. Squires, 23 Iowa 53; Boardman & Gray v. Adams & Hackley, 5 Iowa 224, and there are others.—Ed.)

4. Statute of Frauds—Agreement to Answer for Debt of Another.—A parol promise to pay the debt of another where he remains liable thereon is within the Statute of Frauds, p. 259.

Reaffirmed in Walker & Davis v. Irwin, 94 Iowa 453, 62 N. W. 787; Griffin v. Hoag, 105 Iowa 500, 75 N. W. 373.

(Note.—See further sustaining, but not citing, the text, Benbow v. Soothsmith & Co., 76 Iowa 151, 40 N. W. 693; Beerkle & Bitner v. Edwards, 55 Iowa 750 (abstract), 8 N. W. 341; Kauffman v. Harstock, 31 Iowa 472, and there are others.—Ed.)

VANNICE v. GREEN, TRAER & Co., 14 IOWA 262

1. Pleadings—Petition—Exhibits—What to be Filed With Petition.—Only written instruments which are the basis of an action are required to be filed as exhibits as part of the petition: The rule does not apply to instruments of evidence. So, in an action to set aside a judgment rendered by confession, because the statement therefor was insufficient, a copy of the statement need not be filed with the petition as an exhibit, p. 264.

Special cross reference. For cases citing the text, and others on the subject, see annotations, notes and cross reference under Walkup v. Zehring (13 Iowa 306), ante. p. 155.

O'HAGEN v. O'HAGEN, 14 IOWA 264

1. District Courts—Jurisdiction by Consent of Parties—Judgment in Vacation By Agreement of Parties.—Jurisdiction of the

parties to an action may be obtained by consent. Judgment may be rendered by the district court in vacation by consent of the parties, p. 267.

Reaffirmed in Gillespie v. See, 72 Iowa 347, 33 N. W. 677, holding that a hearing of a cause may be had in chambers by agreement of the parties, by order entered in the district court of the county wherein the action is pending.

Reaffirmed in Schrader v. Hoover, 87 Iowa 655, 54 N. W. 464, holding that jurisdiction of the parties may be acquired by consent.

Reaffirmed in Funk v. Carroll County, 96 Iowa 159, 64 N. W. 768, holding that where a county has a suitable court house, the court cannot, without consent of parties to actions therein pending, adjourn to a private house.

Cross reference. See further, sustaining, but not citing, the text, annotations under Hattenback v. Hoskins, (12 Iowa 109), ante. p. 21.

2. Divorce and Alimony—Amount of Alimony.—In an action for divorce, the district court will award reasonable alimony to the wife, where the husband is in fault. But a judgment awarding all the real estate of the husband in such case, to the wife as alimony, where the husband owns more than forty acres, is unreasonable, and will be modified so as to give the wife the forty acres upon which improvements are located, p. 269.

Cited in Zuver v. Zuver, 36 Iowa 197, the court fully discussing and reviewing all previous cases on alimony, and holding that in an action for divorce, the court may award such alimony as is proper and right, and also, the custody of the children, although there is no prayer therefor.

BREED v. CONLEY, 14 IOWA 269, 81 Am. Dec. 485

1. Conveyances—Sufficiency of Index Entry—Constructive Notice.—Where the description in an index entry of land conveyed, is so defective as not to put a reasonably cautious man upon inquiry, it does not impart constructive notice. So, where the index entry misdescribes the land conveyed, a further reference to the record or deed, is insufficient to impart constructive notice, pp. 271, 272.

Reaffirmed in Stewart v. Huff, 19 Iowa 560, 561, 87 Am. Dec. 454; Peters v. Ham & Co., 62 Iowa 658, 18 N. W. 297.

Cross references. See further on this question, annotations under Calvin v. Bowman and Neal (10 Iowa 529), Vol. I, p. 741; Scoles v. Wilsey (11 Iowa 261), Vol. I, p. 812.

GOLDSMITH v. CLAUSSEN, 14 IOWA 278

1. Judgments—Clerical Mistake or Omission in—Correction of.—A motion to correct a clerical mistake or omission in a judgment, may be made within one year, and upon notice to the adverse party or

his attorney, as provided by Secs. 3499 and 3500 of the Code of 1860, although the party moving therefor may have paid or satisfied the erroneous judgment, p. 280.

Reaffirmed in Greazel v. Price, 135 Iowa 366, 367, 112 N. W. 827, holding that the trial court may at a subsequent term of court, within one year after the rendition of judgment, and on motion, correct an error as to the *date* of or other mistake or omission of the clerk in a judgment entry, notice of such motion to be served on the adverse party (the court construing Secs. 244, 4091 and 4093 of the Code of 1897).

Distinguished in Indep. Dist. of Altoona v. Dist. Township of Delaware, 44 Iowa 202, holding that the acceptance of the amount of a judgment estops the party accepting from appealing therefrom.

(Note.—See further, Borgalthous v. Farmers' and Merchants' Ins. Co., 36 Iowa 250; M. & M. R. R. Co. v. Byington, 14 Iowa 572.—Ed.)

Cross reference. See further in this connection, annotations, note and cross references under Holmes & Avery v. Budd (11 Iowa 187), Vol. I, p. 800.

AMES v. MACLAY, 14 IOWA 281

1. Principal and Surety—Discharge of Principal in Any Way Releases Surety.—The discharge of the principal either by act of parties or by operation of law, from his liability to pay a debt or claim secured, releases the surety thereon although judgment therefor may have been rendered against the latter before such release: In such a case a court of equity will enjoin the collection of the judgment against the surety, p. 284.

Reaffirmed in Malanaphy v. Fuller & Johnson Mfg. Co., 125 Iowa 724, 101 N. W. 641, 106 Am. St. Rep. 332.

Reaffirmed and explained in Chambers v. Cochran and Brock, 18 Iowa 165, holding that whatever discharges the principal discharges the surety; and that reducing a note to judgment does not change the relation of the parties, take away any of the rights of the surety, or release the creditor from any duties imposed on him in consequence of the suretyship.

Reaffirmed and qualified in Jones v. Crosthwaite, 17 Iowa 396, holding that where a person *sui juris* guarantees the obligation of, or becomes surety for, a person under disability, such as a married woman, minor or other such person, he is liable thereon, although the principal be released by operation of law, upon plea.

(Note.—See further sustaining, but not citing, the text, Roberts v. Richardson, 39 Iowa 290; Taylor v. Short's Adm'r, 27 Iowa 361 —Ed.)

Cross references. See further, annotations under Kelly v. Gillespie (12 Iowa 55), ante, p. 9. See also, in this connection, annotations under Corbett v. Waterman (11 Iowa 86), Vol. I, p. 778.

POTTER v. PARSONS, 14 IOWA 286

1. Actions—Appearance by Attorney—Presumption as to Authority of—Proof to Rebut.—Where the record on appeal shows that a party to an action entered his appearance by an attorney, the presumption arises that the attorney had authority: And in an action by such party to set aside such a judgment therein rendered, he must rebut such presumption by sufficient proof, p. 288.

Partially overruled in Kilmer v. Gallamer, 112 Iowa 584, 585, 84 N. W. 697, 84 Am. St. Rep. 358, holding that an attorney, under a general employment, has no authority to consent to a judgment by compromise against his client.

(Note—See also, in this connection, Rhutasel v. Rule, 97 Iowa 20, 65 N. W. 1013; Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Ohlquest v. Farwell & Co., 71 Iowa 231, 32 N. W. 277; Bigler v. Toy, 68 Iowa 687, 28 N. W. 17.—Ed.)

2. Attorney and Client—Agreement by Attorney in an Action—Validity.—An attorney in an action on a promissory note may agree for a judgment against his client for a definite amount, and for a stay of execution thereon, p. 288.

Reaffirmed and extended in Crawford and Kimball, Ex'rs v. White, 17 Iowa 561, holding further that an attorney employed to appear and defend an action may, in good faith, compromise the suit and consent to judgment for a specific amount.

Partially overruled in Martin v. Capital Ins. Co., 85 Iowa 649, 52 N. W. 536; Kilmer v. Gallamer, 112 Iowa 584, 585, 84 N. W. 697, 84 Am. St. Rep. 358, holding that an attorney under a general employment, has no authority to consent to judgment against his client, or waive any cause of action or defense in his case. Holding further that an attorney to whom a claim is sent for collection, cannot without special authority, accept less than its full amount in satisfaction thereof.

FARLEY, NORRIS & Co. v. BUDD, 14 IOWA 289

1. Record of District Court—Recitals in—Impeachment of by Extrinsic Evidence Not Allowed.—The recitals in a record entry of the district court cannot be contradicted by extrinsic evidence, p. 290.

Reaffirmed and extended in Mornyer v. Cooper, 35 Iowa 260, 261, holding further that affidavits cannot be received (on a motion to set aside or vacate) to show that a judgment reciting and showing that it was entered in term-time was, in fact, entered in vacation and is therefore void; that on an appeal a judgment must be taken as absolute verity.

Reaffirmed and extended in Maynes v. Brockway, 55 Iowa 460, 8 N. W. 318, holding further that the recital in the record of the district court as to the date of the approval of a bond, cannot be contradicted by parol.

Reaffirmed and extended in Sloss v. Bailey, 104 Iowa 698, 74 N. W. 17, holding further that a record of a court imports a verity, and evidence *aliunde* cannot be received to impeach or contradict it.

Cross reference. See further, annotations, note and cross reference under Holmes & Avery v. Budd (11 Iowa 187), Vol. I, p. 800.

2. Trial—Instructions—Verdict Contrary to—Review on Appeal.—Where the trial court grants a new trial because the verdict was contrary to the instructions, his ruling thereon will not be reviewed on appeal, p. 291.

Special cross reference. For cases citing the text, and others sustaining it, see annotations and cross references under Savery v. Busick (11 Iowa 487), Vol. I, p. 848.

SHERRILL v. FAY, 14 IOWA 292

1. Attachment—Grounds for—Disposing of or Removing Property From State—Pleadings—Intention to Defraud Creditors.—Where under Sec. 3174 of the Revision of 1860, the plaintiff asks an attachment upon the ground that the defendant is "about to dispose of or remove his property out of the state, without leaving sufficient remaining for the payment of his debts," it is not necessary to aver an intention to *defraud creditors*, in the affidavit or petition for the writ, p. 294.

Impliedly Overruled in Mingus v. McLeod, 25 Iowa 45, holding that a petition for an attachment on the ground "that the defendant is in some manner about to dispose of his property without leaving sufficient remaining for the payment of his debts," must further allege an intention to defraud on the part of the defendant (debtor): "The writ," says the court, "has never been allowed unless the defendant (debtor) was either beyond the reach of process or about to abscond, or had disposed of, or was about to dispose of his property under such circumstances as to amount to actual or constructive fraud."

2. Attachment—Action Not Founded on Contract—Allowance by Judge of Amount to be Attached.—In an action not founded on contract an allowance by the county judge, to whom the petition is presented, of the amount to be attached, is sufficient although not certified under the seal of the court, p. 294.

Reaffirmed and extended in Magoon v. Gillett, 54 Iowa 56, 6 N. W. 132, holding further that under Sec. 3021 of the Code of 1873, it is proper for the court in an action not based on a written contract and pending a motion to quash an attachment and discharge the property attached, to enter an order that the plaintiff be allowed to hold the property attached and be allowed to attach property in all not exceeding a certain amount fixed in the order: And such order cures a failure to make an allowance of the amount in value of the property that may be attached, as required by Sec. 2955 of the Code of 1873.

3. Attachment—Action for Unliquidated Damages—Allegations for Attachment.—In an action for unliquidated damages, the petition or affidavit for attachment need not allege the amount due, p. 295.

Cited in Shaffer v. Sunwall, 33 Iowa 583, holding that in an action on a contract where the attachment is sued out at the commencement thereof, it is sufficient if the amount due be stated in the part of the petition alleging the cause of action.

4. Attachment—Affidavit Making Allegations of Petition Part of it—Effect.—Where an affidavit appended to a petition avers that "the facts set forth therein asking a writ of attachment are true, etc.," it is sufficient to authorize the writ, pp. 295, 296.

Cited with approval in Wheelock v. Winslow, 15 Iowa 465, a case wherein the sufficiency of an affidavit as in the text, was not properly raised in the court below, and was therefore not determined on appeal.

COLE v. CITY OF MUSCATINE, 14 IOWA 296

1. Municipal Corporations—Streets and Alleys—Establishment or Change of Grade—Damages for and Assessment of Provided by Statute—Statute to be Pursued.—Where a statute allows damages against a city for injuries resulting to realty by reason of the establishment of, or the changing of grades of a street, and also prescribes the manner of assessment thereof, it must be pursued, and an action will not lie for such injury, p. 298.

Reaffirmed in City of Burlington v. Gilbert, 31 Iowa 369, 370, 7 Am. Rep. 143.

Cross references. See Rule 2 hereof. See further, annotations under Rules 1 and 2 of Cotes & Patchin v. City of Davenport (9 Iowa 227), Vol. I, p. 568.

2. Rights and Remedies Created by Statute—Statute Exclusive and to be Pursued.—Where a statute gives a right and creates a liability which did not exist at common law, and also provides the manner in which the right is to be asserted and the liability ascertained, it is *exclusive* and must be pursued, pp. 298, 299.

Reaffirmed and extended in Lease v. Vance, 28 Iowa 511, holding further that where without any agreement, or facts by which an agreement might be implied, one land owner voluntarily builds the entire division fence between his land and another's, he cannot recover of such other person the value of one-half the cost of building: That in such case the statute, Chap. 61 of the Revision of 1860, in the absence of prescription or agreement, creates the obligation and prescribes the method of settling all controversies as to division fences, which is by applying to the fence viewers, and that such method must be pursued.

Reaffirmed and extended in Conrad & Ewinger v. Starr, 50 Iowa 479, 480, holding further that a mechanic's or materialman's lien is purely statutory and that its creation and enforcement must be as provided by the statute.

Reaffirmed and extended in Hodges v. Tama County, 91 Iowa 581, 60 N. W. 186, holding further that Chap. 70, Acts of Twentieth General Assembly, as amended by Chap. 42, Acts of Twenty-second General Assembly, in reference to the payment of owners of sheep injured or killed by dogs, and the manner of ascertainment and collection of claims therefor, is *exclusive* and must be pursued.

Reaffirmed and extended in Crawford County v. Laub, 110 Iowa 357, 358, 81 N. W. 591, holding further that Chap. 62, Acts of Twenty-fifth General Assembly, in reference to taxes, lien therefor and enforcement thereof, under the "Mulct" law, is *exclusive*, and the manner of the enforcement of such lien for taxes thereunder must be pursued.

Reaffirmed and qualified in Meeker v. McGlothlin, 61 Iowa 314, 16 N. W. 138, holding that where the statutory remedy on a bond is not *exclusive*, action may be maintained thereon as at Common Law: That a delivery bond remains in force until its conditions are performed, and is not affected by the execution of a supersedeas bond.

Cross reference. See Rule 1 hereof, and cross reference there found.

MERRITT v. WOODBURY & DAWLEY, 14 IOWA 299

1. Negotiable Notes—Indorser of—Notice of Protest or Non-Payment—When May be Verbal.—Where notice of the protest, or non-payment of a negotiable promissory note is given directly to the indorser thereof, it need not be in writing, p. 300.

Reaffirmed and qualified in McKewer v. Kirtland, 33 Iowa 352, holding that verbal notice of protest, or non-payment of a negotiable note, if given directly to an indorser, is sufficient, if given in time. That the burden of proving due notice, where denied, is on the plaintiff in an action against the indorser on such a note.

Cross references. See further in this connection, annotations and note under Sabin & Moon v. Harris (12 Iowa 87), ante. p. 17; Rule 2 of Peck v. Frink (10 Iowa 193), Vol. I, p. 666.

"Non-negotiable instrument—Indorsement of—Effect"—See annotations under Rule 1 of Peck v. Frink (10 Iowa 193), Vol. I, p. 666; Billingham v. Bryan (10 Iowa 317), Vol. I, p. 693.

BOWERS v. KEESECKER, 14 IOWA 301

1. Lands—"Claims"—Right to Pre-empt—Rights of Administrator and Heirs.—A right to pre-empt land where no money is paid, or receipt or other evidence of title is obtained, is regarded as personalty and descends to the personal representative, upon the death of the

owner of the right; and such representative may sell and convey it, pp. 306, 307.

Reaffirmed and extended in Corbett v. Berryhill, 29 Iowa 165, holding further that a "claim" upon public lands is personalty, and may be sold and conveyed by the administrator, and that in an action arising out of the sale of such "claim" by the administrator or for conveyance thereunder, the heirs of the decedent are not necessary parties.

2. Lands—Pre-emption Right to—Widow Not Entitled to Dower in.—A widow is not entitled to dower in lands in which her deceased husband had a pre-emption right only. The case of Davis v. O'Ferrall, 4 G. Greene, p. 168, so far as it conflicts herewith, is overruled, p. 308.

Reaffirmed in Langworthy v. Heeb, 46 Iowa 65.

BONSALL v. ISETT, 14 IOWA 309

1. Actions—Original Notice—Substituted Service—What Return to Show.—The return of an original notice on which substituted service is had, must show that the defendant was "not found," or it is defective, p. 312.

Unreported citation, 94 N. W. 572.

Cross references. See Rule 2 hereof. See further, sustaining, explaining and qualifying, but not citing, the text, annotations and cross references under Boker v. Chapline (12 Iowa 204), ante. p. 33.

2. Actions—Original Notice—Insufficiency of Service—When Judgment is Void.—In order for a judgment to be void by reason of the manner of service of notice, the service must amount to *no notice*; *defective service* must be corrected by motion and appeal, pp. 312, 313.

Reaffirmed and explained in De Tar v. Boone Connty, 34 Iowa 491; Griffith v. Milwaukee Harvester Co., 92 Iowa 641, 61 N. W. 246, 54 Am. St. Rep. 573, holding that *defective* notice is not sufficient to allow the enjoining or setting aside, a judgment, but that in order to justify such proceedings the original notice must amount to *no notice*.

Reaffirmed and explained in Myers v. Davis, 47 Iowa 329, 330, holding that where the service of original notice is insufficient only in the manner of making it, it must be corrected by motion, and if the trial court rules incorrectly thereon, a judgment thereafter rendered will be reversed on appeal.

Reaffirmed and extended in Perry & Townsend v. Miller, 54 Iowa 284, 5 N. W. 733, and 6 N. W. 302, holding further that where the court rendering a judgment has jurisdiction of the subject-matter and of the parties to the action, that it is not subject to collateral attack.

Reaffirmed, varied and qualified in Farmers' and Mechanics' Bank v. Mather, 30 Iowa 284, 285, holding that a judgment by confession entered by the clerk, without the knowledge or assent of one of the parties, is voidable and will be vacated on motion of the non-assent-

ing party: That in order for a judgment to be valid, the court rendering it must have jurisdiction of the subject-matter and of the parties.

Reaffirmed and qualified in Newcomb v. Dewey, 27 Iowa 388, holding that where a service of notice amounts to *no notice* a judgment thereon rendered is void, although the court rendering it may have decided that it was sufficient—But see Applegate v. Applegate et al, 107 Iowa 323, 78 N. W. 38, (citing text), the court holding that a court may conclusively decide *as against collateral attack*, whether or not jurisdictional facts exist.

Cited with approval in Moon v. Moon, 19 Iowa 131, where the question was not determined because the record on appeal was not sufficient to allow review.

Cited in Hawkeye Ins. Co. v. Huston, 115 Iowa 624, 89 N. W. 29, holding that under Sec. 4364 of the Code of 1897, an action to set aside a void judgment and to enjoin proceedings on an execution thereunder, must be brought in the county and court rendering it.

Special Cross reference. For other cases citing the text, and many more on the question, see annotations under Boker v. Chapline (12 Iowa 204), ante. p. 33: And see also, cross references there found.

HOSKINS v. HATTENBACK AND CHARLES, 14 IOWA 314

(Same Case, 14 Iowa 472, 83 Am. Dec. 378.)

1. **New Trial at Law Decreed in Equity—When.**—A court of equity may decree a new trial in an action at law on the ground of newly discovered evidence, or other cause, where the court of law has ceased to have power so to do, and under such circumstances (as to materiality and newness of testimony, diligence to discover, etc.) as would have authorized the latter to grant it, p. 319.

Reaffirmed in Young v. Tucker, 39 Iowa 600, holding that equity will set aside a judgment at law which was procured by fraud, where the relief cannot be granted by appeal and the defrauded party is otherwise without redress.

Reaffirmed and qualified in Bowen v. Troy Portable Mill Co., 31 Iowa 463; Dist. Township of Newton v. White, 42 Iowa 613; Bond v. Epley, 48 Iowa 605; Larson v. Williams & Betenbender, 100 Iowa 117, 69 N. W. 442, and 63 N. W. 464, 62 Am. St. Rep. 544, holding that equity will grant a new trial in an action at law where the power of the court of law to so do has ceased, the judgment cannot be corrected on appeal, and the applicant therefor states sufficient reasons why the motion was not made in the court of law in the proper time, and sets out equitable circumstances entitling him to relief.

Cited, doubted and criticised in Dixon v. Graham, 16 Iowa 311, the court saying that "the instances in which equity interferes are rare and exceptional."

Cited in Benby v. Fie and Cain, 106 Iowa 302, 76 N. W. 703, holding that equity will not entertain a bill to modify a decree because of a change of law after its entry.

(Note.—See further, McConkey v. Lamb, 71 Iowa 636, 33 N. W. 146; Lumpkin v. Snook, 63 Iowa 515, 19 N. W. 333; Partridge & Co. v. Harrow, 27 Iowa 96.—Ed.)

HAYNES, HUTT & CO. v. MEEK, 14 IOWA 320

1. Mortgages on Homestead—Foreclosure—When Homestead to be Pleaded.—Homestead can only be pleaded by the parties thereto in an action to foreclose a mortgage thereon; it is ineffective as a defense in an action to recover possession by a purchaser at a sale under an execution under a decree in the foreclosure action, p. 321.

Reaffirmed in Oleson v. Bullard, 40 Iowa 14.

(Note.—See further, Larson v. Reynolds & Packard, 13 Iowa 579, 81 Am. Dec. 444.—Ed.)

Cross reference. See further in this connection, annotations and cross references under Larson v. Reynolds & Packard (13 Iowa 579), ante. p. 190.

HURST v. SHEETS AND TRUSSELL, 14 IOWA 322

(Case arising out of facts, 21 Iowa 501.)

1. Mutual Judgments—Set-Off—Fraudulent Assignment of to Prevent—Effect—Equitable Relief.—Mutual judgments will be set-off the one against the other by a court of equity, although one of them may have been fraudulently assigned to prevent this effect. A person who accepts an assignment of such a judgment with full knowledge of the other judgment and from an insolvent assignor (judgment holder) takes it subject to such set-off, pp. 324, 325.

Reaffirmed and extended in Burtis v. Cook & Sargent, 16 Iowa 203; Ballinger v. Tarbell, 16 Iowa 494, 495, 85 Am. Dec. 527; Benson v. Haywood, 86 Iowa 112, 53 N. W. 87, 23 L. R. A. 335, holding further that the assignee of a judgment takes it subject to all set-offs and equities which the judgment debtor had against the assignor, before notice of the assignment.

Reaffirmed and extended in Ballinger v. Tarbell, 16 Iowa 494, 85 Am. Dec. 527, holding further that the defendant may set-off against the plaintiff's claim, a prior judgment obtained by him against the plaintiff and another.

Reaffirmed and extended in Hurst v. Trussell, 21 Iowa 504, holding further that the right to set-off mutual judgments exists against the lien of an attorney for an attorney's fee, where the judgment sought to be set-off existed before the attorney gave notice of his lien, under Sec. 2708 of the Code of 1860.—But see Benson v. Haywood, 86 Iowa 112, 53 N. W. 87, 23 L. R. A. 335 (reaffirming text) holding

further that the right to set-off mutual judgments is unaffected by the right of an attorney (under Sec. 215 of the Code of 1873) to a lien for an attorney's fee.

Distinguished in Gray v. McCallister, 50 Iowa 503, a case wherein an assignment of a judgment was held to defeat the right of a judgment debtor to set-off his mutual judgment against it, the facts not showing fraud and knowledge on the part of the assignee, or insolvency of the assignor; and there were other peculiar facts on which it seemed to turn.

MACGREGOR v. GARDNER, 14 IOWA 326

(Former Appeal, 9 Iowa 65; Later Appeals, 16 Iowa 539; 21 Iowa 441.)

1. Principal and Agent—Agent Taking Title in Himself to Property of Principal—Effect.—An agent acting under a power of attorney cannot convey real estate of his principal without consideration, for the purpose of acquiring title in himself; and such a conveyance will be declared by a court of equity to be fraudulent and void. A trustee cannot become a purchaser of the trust estate, pp. 335-337.

Reaffirmed in Clark v. Lee, 14 Iowa 426.

Reaffirmed and explained in Sypher v. McHenry, 18 Iowa 235, holding that when a trustee, or any one acting for another, becomes interested in the trust property by purchase at his own sale, the *cestui que trust* may, in a court of equity, set aside the purchase, and have the property re-exposed to sale, without inquiry as to whether or not the purchase was to the advantage of the trustee or other fiduciary or agent.

Reaffirmed and narrowed in Buell v. Buckingham & Co., 16 Iowa 293, 85 Am. Dec. 516, holding that a purchase by a trustee at his own sale is *voidable only*; but such sale may, within a reasonable time thereafter, be set aside by the *cestui que trust* without proof of fraud or injury.

(Note.—See further specially on this question, Pearson v. Taylor, 37 Iowa 331; Clark v. Lee, 14 Iowa 425; Bank of Old Dominion v. D. & P. Ry. Co., 8 Iowa 277, 74 Am. Dec. 302.—Ed.)

Cross reference. See further, annotations under Rule 3 of MacGregor v. MacGregor (9 Iowa 65), Vol. I, p. 546.

2. Real Estate—Purchase Money Paid by One, Title Taken by Another—Resulting Trust in—Proof Required.—Where one person pays or furnishes the purchase money for the purchase of land, and the title thereto is taken by another, a trust results in favor of the former: But in order to establish such a resulting trust in land as against the holder of the legal title, the proof must be clear and unequivocal, pp. 342, 343.

Reaffirmed in Childs v. Griswold, 19 Iowa 364; Sunderland v. Sunderland, 19 Iowa 328; Nelson v. Worrall, 20 Iowa 471.

(Note.—See further, sustaining and explaining, but not citing, the text, Baldwin v. Thompson, 15 Iowa 504; Cooper v. Skeel, 14 Iowa 578; Rudolph v. Covell, Adm'r, 5 Iowa 525; Fairbrother v. Shaw, 4 Iowa 570; Williamson v. Williamson, 4 Iowa 279; Sullivan v. McLennans, 2 Iowa 437; Ratliff v. Ellis, 2 Iowa 59; Noel v. Noel, 1 Iowa 423; Claussen, Gd'n, v. La Franz, 1 Iowa 226; Brace v. Reid, 3 G. Greene 422; Olive v. Dougherty, 3 G. Greene 371.—Ed.)

Cross reference. See further, annotations and cross references under Cooper v. Skeel (14 Iowa 578), *Infra*. p. 288.

McKELLAR v. STOUT, 14 IOWA 359

1. Private Corporations—Failure to Post By-Laws, Statement of Capital Stock, etc., Under Code of 1851—Individual Liability of Stockholders.—The failure of a private corporation to post a copy of the by-laws and a statement of its capital stock, etc., as provided by Secs. 1161, 1162 of the Code of 1860, does not make the stockholders therein individually liable for the debts thereof, under Sec. 1166 of that Code, p. 362.

Reaffirmed and extended in White v. Hosford, 37 Iowa 570, holding further that in order to render stockholders, or officers of a private corporation liable in damages for "intentional fraud in failing to comply substantially with the articles of incorporation," or "in deceiving the public or individuals in relation to its means or liabilities," as provided by Sec. 1163 of the Code of 1860, there must be some act done with the fraudulent intention to deceive the public or individuals in relation thereto, which must have so deceived the public or some individual, the person deceived must have sustained injury therefrom, and the facts must be stated in the petition for damages therefor.

Reaffirmed and extended in Langan & Noble v. I. & M. Cons. Co., 49 Iowa 323, on Secs. 1076 and 1077 of the Code of 1873, which corresponds with sections mentioned in the text: Holding further that failure to comply with Sec. 1078 of the Code of 1873, in relation to the manner of keeping books, does not render the stockholders in a private corporation individually liable for its debts: That if the books thereof are fraudulently kept, those guilty of or participating in the fraud may be held personally liable therefor under Sec. 1071 of that Code.

Cited with approval in First Nat'l Bank of Davenport v. Davies, 43 Iowa 431; Langan & Noble v. I. & M. Cons. Co., 49 Iowa 323, 324, the court holding that the provisions of the statute requiring the articles of incorporation of a private corporation to be filed in the office of the Secretary of State within three months after such articles are filed in the office of the recorder of deeds, is mandatory, for the reason that it contains negative language showing a manifest intention of the Legisla-

ture that this be done within such time, or the acts of the company are not to be valid; and in such case the stockholders are individually liable for the debts thereof; except stockholders in railway companies are only liable to the amount of their stock.

RUSS v. STEAMBOAT WAR EAGLE, 14 IOWA 363

1. Common Carriers—Liability for Injury to Passengers—Skill and Prudence Required of to Prevent.—Common carriers are bound to use the utmost skill and prudence in conveying passengers and are responsible for the slightest negligence or want of skill either in themselves or their servants which results in injury to a passenger. Common carriers of passengers must use such care and diligence as the most careful and diligent man would observe in the exercise of the utmost prudence and foresight, p. 370.

Reaffirmed in *Bonce v. Dubuque Street Railway Co.*, 53 IOWA 280, 5 N. W. 178, 36 Am. Rep. 221, holding the rule applicable to common carriers of passengers by hacks and stage coaches, as well as all other common carriers of passengers.

Cited in *Trevor v. Steamboat Ad. Hine*, 17 IOWA 351, holding that state courts have concurrent jurisdiction with admiralty courts of the United States in all cases of maritime torts.

2. Negligence of Common Carrier—Injury to Passengers—Measure of Damages.—In an action against a common carrier for personal injury to a passenger, the jury may consider the loss the plaintiff may have sustained up to the time of the trial in consequence of the injury by reason of physical disability and pain suffered; and if the injury be shown to be permanent may, also, consider plaintiff's future damages occasioned by the injury, p. 371.

Distinguished in *Sanders v. O'Callaghan*, 111 IOWA 582, 82 N. W. 971, holding that in an action for personal injury the jury cannot consider as an element of damages, future suffering which the plaintiff may experience by reason thereof.

3. Negligence—Personal Injury—Excessive Damages.—In an action for damages for personal injury occasioned by the negligence of a common carrier, a verdict in favor of plaintiff, will not be disturbed on appeal as excessive, unless it is clearly and flagrantly so excessive as to show bias or prejudice on the part of the jury, p. 372.

Reaffirmed in *Allender v. C. R. I. & P. R. R. Co.*, 43 IOWA 281, 282; *Belair v. C. & N. W. R. R. Co.*, 43 IOWA 676, 677.

Reaffirmed in *Redfield v. Redfield*, 75 IOWA 441, 39 N. W. 691, in an action for damages by a female for assault and battery.

Reaffirmed and varied in *Donaldson et al, Adm'rs v. M. & M. R. R. Co.*, 18 IOWA 289, 87 Am. Dec. 391, holding that in an action for damages for the death of a party occasioned by the negligence of a common carrier, where the evidence on the trial thereof as to the

negligence of the carrier, is conflicting, a judgment in favor of the plaintiff will not be reversed because the verdict was against the weight of the evidence.

4. Trial — Evidence Conflicting — Province of Jury — Verdict Contrary to Evidence—Reversal — When. — Where the evidence is conflicting it is the province of the jury to pass upon its sufficiency and arrive at their verdict; and a judgment will not be reversed because the verdict was contrary to the evidence unless clearly against the weight thereof, p. 368.

Reaffirmed in Clear v. Reasor, 29 Iowa 329; Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404.

Cross references. See other rules hereof. See further, annotations and cross references under Napper v. Young (12 Iowa 450), ante. p. 72.

5. Trial—Instructions—Assumption of Facts as True in.—Instructions which assume facts as true must be refused, p. 370.

Reaffirmed and explained in Muldowney v. Ill. Cent. R. R. Co., 32 Iowa 178, holding that where there is no evidence, or where essential or integral elements of a cause of action or defense, are entirely without proof, the trial court may properly give a peremptory instruction, or direct the jury as to the kind of verdict to be rendered; but that where there is evidence tending in any degree to establish the cause of action or defense, the trial court must not take the case from the jury, or pronounce an opinion as to the sufficiency or weight of the evidence, except in cases where the proof is documentary: That it is the peculiar province of the jury to decide questions of fact, the weight and sufficiency of evidence and the credibility of witnesses, and instructions must be confined to rules of law only.

Reaffirmed and qualified in Crane v. Malony, 39 Iowa 41, holding that the court may in its charge to the jury, assume a fact as true, which under the pleadings neither party could or did deny.

Reaffirmed and qualified in Hall v. Town of Manson, 90 Iowa 589, 58 N. W. 882, holding that it is not error for the court, in an instruction, to assume a fact as true, about which there is no conflict and which is fully established by the evidence.

(Note.—See further specially, State v. Meshek, 61 Iowa 316, 16 N. W. 143; Wood v. Porter, 56 Iowa 161, 9 N. W. 113; Hughes v. Monty, 24 Iowa 499.—Ed.)

Cross references. See other rules hereof. See further, Rules 3 and 4 of Potter et al v. Wooster et al (10 Iowa 334), Vol. I, p. 697.

6. Trial—Instructions—Refusal of Instruction Already Covered by Others.—The court may properly refuse an instruction already covered by one given, p. 370.

Reaffirmed in Todd v. Branner, 30 Iowa 442.

Cross references. See further, sustaining text, annotations, note and cross references under Rule 4 of Trustees of Iowa College v. Hill (12 Iowa 462), ante. p. 75; Rule 3 of State v. Hockenberry and Brandt (11 Iowa 269), Vol. I, p. 814.

7. Evidence—Husband and Wife—Competency to Testify in Action by Consort.—In an action between a husband and another, the wife is competent for or against the husband if he waives the statutory prohibition; and the adverse party thereto cannot object to the wife's competency by reason of the marital relation: And the same rule applies as to the competency of the husband in an action wherein the wife is a party, pp 375, 376.

Reaffirmed in Blake v. Graves, 18 Iowa 315, 316, 319; Jordan v. Henderson, 19 Iowa 566 (abstract; Sylvester v. Fleming, 19 Iowa 567 (abstract); Wendeling v. Besser, 31 Iowa 249.

Reaffirmed and qualified in Shafer v. Dean, Adm'r, 29 Iowa 145, 146, holding that in an action against a personal representative no one who is a party, or in whose behalf the action is brought, may testify to facts which transpired before the death of decedent, (under Secs. 3980, 3982 of Code of 1860); but such provisions only apply as to the competency of such persons.

Cited with approval in Stanley v. Morse, 26 Iowa 456, an action wherein the trial court sustained an objection of a wife (defendant to an action) to the competency of her husband to testify against her, to which ruling there was no exception, and its correctness was not determined on appeal.

(Note.—See further sustaining, but not citing text, Morris v. Sargent, 18 Iowa 90.—Ed.)

LAY v. GIBBONS, 14 IOWA 377, 81 Am. Dec. 487

1. Foreclosure of Mortgage—Separate Parcels or Tracts of Land—Failure to Sell Separately Vitiates Sale.—Where under an execution in an action to foreclose a mortgage on several parcels or tracts of land, the sheriff sells the tracts or parcels *as a whole* to satisfy the debt, the sale will be set aside, and a re-sale be ordered, p. 378.

Reaffirmed in White v. Watts, 18 Iowa 76; Penn v. Clemans, 19 Iowa 379; Williams v. Allison, 33 Iowa 389, applying the rule to sales of lands under execution, decree, and for taxes.

Unreported citation, 128 N. W. 375.

Cross reference. See further, sustaining the text, annotations, note and cross reference under Rule 6 of Boyd v. Ellis (11 Iowa 97), Vol. I, p. 781.

ROBB v. DOUGHERTY, 14 IOWA 379

1. Actions in Equity—Appeal—Trial De Novo—When.—On an appeal to the Supreme Court in an equitable action, it will be tried

de novo, on the pleadings and evidence adduced below, when all such evidence is brought before the appellate court, pp. 380, 381.

Reaffirmed in State v. Orwig, 27 Iowa 530, 532.

Reaffirmed and extended in Hackworth, Gd'n v. Zollars, 30 Iowa 436, holding further that on appeal a chancery cause is tried *de novo* upon the facts and the law apparent of record; and that in such case no assignment of errors is necessary.

Cross references. See further, sustaining and explaining the text, annotations under Garner v. Pomroy (11 Iowa 149), Vol. I, p. 791; Rule 2 of Cook v. Woodbury County (13 Iowa 21), ante. p. 111; Rule 2 of Blake v. Blake (13 Iowa 40), ante. p. 115.

WOODWARD, ADM'R v. LAVERTY, 14 IOWA 381

1. Decedent's Estate—Claims Against of Fourth Class—When Barred.—A claim of the fourth class against the estate of a decedent, as described and denominated by Sec. 2404 of the Code of 1860, is barred under Sec. 2405 of that Code, unless filed and proved within one year and a half after the giving of notice of the death of decedent and the appointment and qualification of the personal representative, unless the claim is pending in the District or Supreme Court, or unless there are peculiar circumstances entitling the claimant to equitable relief, pp. 382, 383.

Reaffirmed and narrowed in Cooley v. Smith, Ex'r, 17 Iowa 103, holding that where a claim of the fourth class against the estate of a decedent is sued on in the district court before the statutory period expires, the limitation of the text, does not apply.

Cross reference. See further in this connection, annotations, note and cross reference under Ferrall v. Irvine, Adm'r (12 Iowa 52), ante. p. 8.

2. Trial—Opening and Closing Argument—Discretion of Trial Court—Review on Appeal.—The granting of the opening and closing argument on the trial of a cause, is a matter exclusively within the discretion of the trial court, and his ruling thereon will not be reviewed on appeal, p. 383.

Reaffirmed and qualified in Fountain v. West, 23 Iowa 14, 92 Am. Dec. 405; Viele v. Germania Ins. Co., 26 Iowa 45, 96 Am. Dec. 83; Preston v. Walker, 26 Iowa 208, 96 Am. Dec. 140; Ashworth v. Grubbs, 47 Iowa 354; Van Horn v. Smith, 59 Iowa 147, 12 N. W. 792; Miller Brew. Co. v. De France, 90 Iowa 400, 57 N. W. 961; Names v. Dwelling House Ins. Co., 95 Iowa 645, 64 N. W. 629; Shaffer v. Des Moines Coal & Hay Co., 122 Iowa 236, 98 N. W. 112, holding that in order to justify the reversal of a judgment because the trial court refused to grant appellant the opening and closing arguments, there must be a clear case of prejudice resulting to appellant from such ruling.

Cross reference. See further on this question, annotations and note under Rule 2 of *Smith et al v. Coopers et al* (9 Iowa 376), Vol. I, p. 592.

3. Decedent's Estate—Action by Administrator—Set-Off by Debtor.—In an action for the debt of a decedent by his administrator, the estate being insolvent, the defendant (debtor) cannot set-off against his debt, claims bought by him against the estate, pp. 383, 384.

Special cross reference. For cases citing the text and others on the question, see annotations and note under *Cook, Adm'r v. Lovell* (11 Iowa 81), Vol. I, p. 776.

SWEET v. BILLINGS, 14 IOWA 384

1. Municipal Corporations—Taxation and Revenue of—Sale for Taxes.—A purchaser at a tax sale of land for city taxes, has the same rights and remedies as purchasers under other tax sales, pp. 385, 386.

Reaffirmed in *McNamara v. Estes*, 22 Iowa 258.

Reaffirmed and qualified in *Ham v. Miller*, 20 Iowa 452, 453, holding that the text only applies to cities whose charters give them the power to sell and convey real estate for taxes: And that the charter of the city of Dubuque (Charter of January 28, 1857) confers no such power.

(Note.—See further, *Street v. Hughes*, 20 Iowa 131.—Ed.)

Cross reference. See further in this connection, annotations and cross references under *Byington v. Walsh* (11 Iowa 27), Vol. I, p. 764.

SHARP v. BAILEY, 14 IOWA 387, 81 Am. Dec. 489

1. Homestead—Deed, Mortgage, or Deed of Trust on or to—Failure of Wife to Join in—What Insufficient as—Effect.—Where in a deed, mortgage, or deed of trust by the husband on or to the homestead, the wife does not appear as a party to the granting clause, her relinquishment of dower in a clause at the end thereof, and her signing and acknowledging it, does not pass the homestead, p. 390.

Reaffirmed in *Edwards v. Sullivan*, 20 Iowa 504, holding that where a wife joins in the granting and covenanting parts of a deed of her husband to real estate, and signs and acknowledges the instrument in due form, she thereby conveys all her interest therein.

Reaffirmed in *Wilson v. Christopherson*, 53 Iowa 483, 5 N. W. 688; *Eisenstadt & Co. v. Cramer*, 55 Iowa 754, 8 N. W. 427 (abstract); *Alvis, Adm'r v. Alvis*, 123 Iowa 553, 99 N. W. 168, holding that the instrument alone is to be looked to as to its effect.

Reaffirmed and extended in *Morris v. Sargent*, 18 Iowa 100, holding further that a deed or other conveyance by the husband must be signed and acknowledged by the wife; and that such an instrument

executed for her by the husband, is of no effect to convey homestead, in the absence of facts constituting estoppel.

Reaffirmed and extended in Heaton v. Fryberger, 38 Iowa 193, 201, holding further that where a mode is prescribed by statute by which a wife may convey her land, if the statutory directions are not complied with it is void as to her: In such case a deed will not be treated as an imperfect conveyance, or as an agreement to convey; nor will a mistake in a deed of a married woman be corrected as against her.

Reaffirmed and extended in Seiffert & Wiese Lum. Co. v. Hartwell, 94 Iowa 580, 583, 63 N. W. 334, 335, 58 Am. St. Rep. 413, holding further that a mortgage on a homestead not signed and concurred in by the husband is void; and that a statement in a subsequent mortgage that it is *subject to* the first, does not validate it.

Reaffirmed and varied in Edgell v. Hagens, 53 Iowa 226, 5 N. W. 138, holding false representations made to the wife by the husband, or undue influence exerted by him to induce her to execute a mortgage, where she afterwards duly acknowledges it, does not affect or prejudice the mortgagee, if the conduct of the husband was without the instigation, procurement, knowledge or consent of the mortgagee; and that in such case fraud must be brought home to the latter party.

Reaffirmed and qualified in Fuller & Co. v. Hunt, 48 Iowa 167, holding that a purchaser of homestead who buys subject to the mortgage, although without an express assumption of personal liability, cannot take advantage of the fact of the failure of the wife of the grantor (mortgagor) to join in the mortgage: But it is otherwise where the purchaser does not buy it subject to the mortgage.

Cross references. See further, annotations, note and cross references under *Larson v. Reynolds & Packard* (13 Iowa 579) ante. p. 190. See also, in this connection, annotations, notes and cross references under *McHenry v. Day* (13 Iowa 445), ante. p. 171; *Rule 1 of Haynes v. Seacrest* (13 Iowa 455), ante. p. 173.

WILKINS v. TREYNOR, 14 IOWA 391

1. **Replevin Action — Dismissal — Reinstatement to Assess Damages to Defendant—Plaintiff Not Entitled to Jury.**—Where a replevin action is dismissed by the plaintiff, and thereafter the defendant has it reinstated for the purpose of assessing damages to him, the plaintiff is not entitled to demand a jury therefor; in such case the plaintiff is in default, pp. 392, 393.

Reaffirmed in Armstrong v. Catlin, 17 Iowa 581 (abstract); *Preston v. Wright*, 60 Iowa 353, 14 N. W. 353, holding further that a defendant in default cannot claim the right to a jury to assess damages to plaintiff.

Cited in Rhutasel v. Rule, sheriff, 97 Iowa 24, 65 N. W. 1014, holding that an attorney under a general employment has no power to dismiss an action.

Distinguished and narrowed in Crist v. Francis, 50 Iowa 260, 261, holding that although a plaintiff in a replevin who dismisses his action is considered in default as set out in the text, still such default does not have the effect of admitting matters afterward pleaded by the defendant; and in such case the plaintiff should be allowed to make an issue on such subsequent pleading.

Cross reference. See Rule 2 hereof in this connection.

2. Right of Jury Trial In Civil Action—Waiver.—The right of trial by jury in a civil action may be lost or waived by the act or consent of a party entitled to have his cause so tried, p. 393.

Reaffirmed and extended in Rogers v. Western Mut. L. Ass'n, 123 Iowa 723, 99 N. W. 589, holding further that a surety on a bond for costs is not entitled to a trial by a jury to ascertain his liability thereon: That as the statute on the question provides for a summary hearing in such a case, the surety waives a jury trial by signing the bond.

Cited with approval in State v. Belvel, 89 Iowa 411, 56 N. W. 547, 27 L. R. A. 846, not in point.

(Note.—See further specially, on this question, *In re Estate of Hooker & Son*, 75 Iowa 377, 39 N. W. 652; *Henny Buggy Co. v. Patt*, 73 Iowa 485, 35 N. W. 587; *Kelsh v. Town of Dyersville*, 68 Iowa 137, 26 N. W. 38; *Eshelman v. Ch. R. I. & P. Ry. Co.*, 67 Iowa 206, 25 N. W. 251; *Clute Bros. & Co. v. Hazelton*, 51 Iowa 355, 1 N. W. 672; *Davidson v. Wright*, 46 Iowa 383; *Hawkins v. Rice*, 40 Iowa 435; *Cowles v. Buckman & Son*, 6 Iowa 160.—Ed.)

Cross reference. See Rule 1 hereof in connection herewith.

HURD v. GALLAHER, 14 IOWA 394

1. Mortgages—Parol Evidence to Contradict, Inadmissible.—Parol evidence to contradict or explain a mortgage is inadmissible, p. 395.

Reaffirmed and extended in Pilmer v. Branch of State Bank of Des Moines, 16 Iowa 331, holding further that parol evidence of the intention of the parties to a written instrument, is inadmissible; that the written instrument is evidence of the intention as therein expressed.

Reaffirmed and extended in Allen v. Bryson, 67 Iowa 595, 25 N. W. 822, 56 Am. Rep. 358, holding further that a bill of sale cannot be varied or limited by proof of a contemporaneous parol agreement by which it was in fact a bailment.

(Note.—In the text and the above cases, neither fraud, accident or mistake, or custom varying the language of the instrument, was in issue.—Ed.)

Cross references.

"Custom as varying or controlling written instruments"—See annotations under Rule 2 of *Rinsko v. Barrett* (14 Iowa 101), ante. p. 211; *Hopkins v. Grimes* (14 Iowa 73), ante. p. 207.

"Deed absolute on face but in fact a mortgage"—See Rule 2 of *Farley et al v. Goocher* (11 Iowa 570), Vol. I, p. 862.

"Written instruments—Parol evidence of contents—When admissible"—See annotations under *Horseman v. Todhunter* (12 Iowa 230), ante. p. 39.

"Written instrument—Fraud, mistake or want of consideration—Parol evidence"—See annotations under Rule 3 of *Williams v. Donaldson* (8 Iowa 108), Vol. I, p. 498.

BEASON v. JONASON, 14 IOWA 399

1. Appeal — Review — Exceptions to Ruling of Trial Court Necessary to.—Rulings of the trial court will not be reviewed on appeal to the Supreme Court, where the record does not affirmatively show that exceptions were taken thereto, at the time they were made, p. 400.

Reaffirmed and extended in *Snyder v. Eldridge*, 31 Iowa 131, holding further that only errors assigned and insisted on and contended for in argument will be considered on appeal.

Unreported citation, 126 N. W. 175.

(Note.—See further sustaining, but not citing, the text, *Norton v. Swearingen*, 19 Iowa 566 (abstract); *Darrance v. Preston*, 18 Iowa 396; *Perkins v. Whittam*, 14 Iowa 596 (abstract), and there are many others.—Ed.)

Cross reference. See further, annotations under *Perkins v. Whittam* (14 Iowa 596), *Infra*. p. 292.

BLANEY v. HANKS, 14 IOWA 400

1. Judgments of Justice of the Peace—Lien on Lands in County Other Than That Where Rendered—How Acquired.—Before the lien of a justice's judgment attaches upon land in another county than that wherein it is rendered, it must first be entered upon the records of the district court therein, and be certified as a judgment of that court for entry in the other county, p. 402.

Reaffirmed in *State Ins. Co. v. Prestage and Philbrick*, 116 Iowa 470, 471, 90 N. W. 64; *Drahos v. Kopesky and Amen*, 132 Iowa 500-502, 109 N. W. 1023.

Cross reference. See further on this subject, annotations under *Seaton & Son v. Hamilton & Co.* (10 Iowa 394), Vol. I, p. 711.

2. Cancellation of Deed—Effect in Equity as Against Judgment Creditor of Grantee.—Where the grantor and grantee to an unrecorded deed to land in good faith agree to a cancellation thereof, and thereupon the grantor re-delivers the part of the purchase price

paid, to the grantee, the deed is destroyed, and the grantee surrenders all claim and interest in and to the land, a creditor of the grantee cannot in equity claim any rights to the property under a levy of an execution made and a lien thereafter acquired, p. 403.

Reaffirmed and extended in Lathrop v. Brown, 23 Iowa 49, 51, holding further that a judgment creditor has a lien only on the interest of his judgment debtor in lands; that a judgment creditor whose judgment is first rendered has a superior lien on the interest of the judgment debtor to land, to that of a subsequent judgment creditor.

Cited with approval in Mitchell v. Moore, 24 Iowa 396, holding that a tender of the return of a deed procured by false and fraudulent representations will not divest the party of title; but where, before commencing action, plaintiff tenders to the defendant all the consideration he received in the fraudulent transaction, it will be sufficient to entitle him to a rescission thereof.

Cited with approval in Grapes v. Grapes, 106 Iowa 319, 76 N. W. 797, not in point.

Distinguished in Matheson v. Matheson and Buena Vista County, 139 Iowa 514, 117 N. W. 757, a case wherein the proof failed to show that the grantee in the unrecorded deed consented to the cancellation thereof, and the court thereupon holding that the title remained in such grantee although such deed was destroyed.

3. Judgment Liens on Land of Judgment Debtor—Extent of.—The lien of a judgment attaches to the estate or interest of the judgment debtor in lands at the time of the rendition thereof, and not to the mere naked legal title of the judgment debtor thereto, pp. 403, 404.

Reaffirmed in Churchill v. Morse, 23 Iowa 231, 92 Am. Dec. 422; *Atkinson v. Hancock & Co.*, 67 Iowa 455, 25 N. W. 702.

Reaffirmed and extended in Welton v. Tizzard, 15 Iowa 497, holding further that an unrecorded mortgage which was intended to convey a lien on certain land, but which by accident or mistake misdescribed it, gives the mortgagee a right in equity to the land intended to be conveyed, which is superior to a subsequent attachment or judgment creditor: That an attachment, or judgment creditor is entitled to the rights of the judgment debtor, and to no more.

Reaffirmed and extended in Lathrop v. Brown, 23 Iowa 49, 51, holding further that a judgment creditor has a lien only on the interest of his judgment debtor in lands; that a judgment creditor whose judgment is first rendered has a superior lien, on the interest of the judgment debtor to land, to that of a subsequent judgment creditor.

Reaffirmed and extended in Thomas v. Kennedy, 24 Iowa 405, 406, 95 Am. Dec. 740, holding further that the lien of a judgment attaches to the interest of a judgment debtor in land, and not to the naked legal title; and that a purchaser from a judgment debtor, who, at the time of the rendition of the judgment, holds under an imperfect, or equitable title which is afterwards perfected by conveyance placed of re-

cord, may set up such defense against the judgment creditor, or against a purchaser at a sale under such judgment made after the recording of such perfected conveyance

Reaffirmed and extended in Swan v. Yapple, 35 Iowa 249, holding further that the right of a mortgagee, or his assignee, under a mortgage of land is a mere chattel interest inseparable from the debt it is given to secure, ceasing when it is discharged, and is no interest or estate in the mortgaged land, and a judgment creditor has no lien on such an interest, nor will a sale thereof under an execution in favor of a judgment creditor, pass any title thereto.

Reaffirmed and extended in Rider v. Kelso, 53 Iowa 370, 5 N. W. 512, holding further that the lien of a judgment attaches to the lands actually owned by the judgment debtor at the time of its rendition; and that an assignee of a judgment has no better right than his assignor (judgment creditor).

Cited in Taylor v. Branscombe, 74 Iowa 536, 38 N. W. 401, holding that a creditor has a right to proceed in equity to set aside a deed to lands made by his debtor, as fraudulent, and to attach such property therein: That in such case the grantee in the fraudulent deed is regarded as holding the land conveyed, in trust for the grantor, to be applied to the latter's debts, and that as to the creditor, the grantor (debtor) is regarded as the *cestui que trust*, having an interest in the fraudulently conveyed property which may be subjected in a civil action.

Cross references. See further on this question, annotations under Cook & Sargent v. Dillon (9 Iowa 407), Vol. I, p. 598; Norton, Jewett & Busby v. Williams (9 Iowa 528), Vol. I, p. 620.

STATE v. KLINGMAN, 14 IOWA 404

1. **Demurrer—Answering Over—Waiver of Error.**—Where a demurrer to the petition is overruled, and the defendant thereupon files an answer, he thereby waives error, if any, of the ruling of the court on the demurrer, p. 407.

Reaffirmed in Melhop & Kingman v. Daone & Co., 31 Iowa 399, 7 Am. Rep. 147; Phillips v. Hosford, 35 Iowa 594 (abstract).

Reaffirmed and extended in Coakley v. McCarty, 34 Iowa 107, holding further that by the defendant answering after a motion to make the petition more specific has been overruled, he thereby waives the error, if any, as to such ruling.

Cross reference. See further, sustaining text, annotations, note and cross references under Eubank v. Whittaker (11 Iowa 197), Vol. I, p. 802.

2. **Criminal Law—Bail Bond—Forfeiture of—When Not Allowed.**—A bail bond in a criminal case cannot be forfeited unless it is on file in the district court, or is made part of the record therein at the time the forfeiture is sought, pp. 408, 409.

Reaffirmed and extended in State v. Brown, 16 Iowa 318, 319, holding further that a bail bond, or recognizance in a criminal case may, without notice to accused or his sureties, be forfeited at any time during the pendency of the cause wherein it is executed, upon breach thereof, unless the accused has been surrendered or discharged.

Reaffirmed and extended in Ringgold County v. Ross, 40 Iowa 177, holding further that a bail bond can only be forfeited when the accused fails to appear when his presence is lawfully required in the case wherein it is executed.

Reaffirmed and qualified in State v. Farrell, 83 Iowa 664, 665, 49 N. W. 1039, holding that where the sheriff accepts a sum of money in lieu of the bail of an accused person, and agrees to deposit it with the clerk, it is of no effect and does not authorize a forfeiture thereof, or an action for its recovery by the state or by the county.

BIDDLE v. ALLENDER, 14 IOWA 410

1. Justice's Court—Attachment and Replevin—Jurisdiction.— Under Sec. 3853 of the Code of 1860, the jurisdiction of a justice's court in an action of attachment or replevin, is co-extensive with the county, p. 411.

Special cross reference. For cases citing the text, and others on the question, see annotations under Rule 1 of *Leversee v. Reynolds* (13 Iowa 310), ante. p. 155.

ODELL & UPDEGRAFF v. LEE & KINNARD, 14 IOWA 411

1. Husband and Wife—Personal Property in Joint Possession of and Common Use By—Presumption as to Title—Liability for Debts of Husband—When.— Personal property in the common use and joint possession of husband and wife is *prima facie* controlled and owned by the husband and is subject to his debts to third persons who have no notice that it is in fact owned by the wife. If such property is in fact owned by the wife she must, in order to be protected as against the creditors of her husband who have no actual notice of her ownership, avail herself of the provisions of Secs. 2499-2503 of the Code of 1860 (as to the filing for record of notice of her ownership), failing which the property is subject to such debts of the husband, pp. 413, 414.

Reaffirmed and extended in Presnall v. Herbert, 34 Iowa 543, holding further that personal property of a wife under the control of her husband at the time he contracts a debt, is subject to be taken under execution, or attachment, therefor, although the notice mentioned in the text may be given by the wife before the issuance of the writ.

Special cross reference. For other cases citing the text, see annotations under *Smith v. Hewett* (13 Iowa 94), ante. p. 123.

PATTERSON v. LINDER, 14 IOWA 414

1. Vendor's Lien—Sale Under Execution for—Rights of Purchaser Under.—A purchaser of land at an execution sale under a judgment at law for purchase money notes, may sue in equity to quiet his title as against the purchaser of the land under an execution under a subsequent and inferior judgment. The purchaser at the last sale only obtained the right of redemption from the first sale, the interest of the judgment debtor at the time of the last sale, p. 416.

Distinguished and narrowed in State v. Lake, 17 Iowa 220, 221, holding that where a mortgagee obtains a judgment at law for his mortgage debt, and purchases at a sale thereunder, giving for his title at such sale the full amount of his mortgage debt, such debt and mortgage is thereby satisfied, and neither the mortgagee nor his assignee can thereafter claim any rights under the mortgage.

Unreported citation, 125 N. W. 338.

Cross references. See Rule 2 hereof. See further, annotations under Wahl v. Phillips (12 Iowa 81), ante. p. 16; Rule 2 of *Wilhelmi v. Leonard* (13 Iowa 330), ante. p. 157.

2. Judgment Lien on Land of Judgment Debtor—Extent of.—A judgment is a lien only upon the interest of the judgment debtor in land at the time of its rendition, p. 416.

Reaffirmed and extended in Welton v. Tizzard, 15 Iowa 497, holding further that an unrecorded mortgage which was intended to convey a lien on certain land, but which by accident or mistake misdescribed it, gives the mortgagee a right in equity, to the land intended to be conveyed which is superior to a subsequent attachment, or judgment creditor: That an attachment, or judgment creditor is entitled to the rights of the judgment debtor, and to no more.

Reaffirmed and extended in Delavan v. Pratt, 19 Iowa 432, holding further that as between a judgment creditor and the judgment debtor and his heirs, the former may show that his judgment is a lien on land and that it is subject thereto, by other proof than the record.

Reaffirmed and extended in Markham v. Buckingham, 21 Iowa 496, 89 Am. Dec. 590, holding further that in a contest between the judgment debtor and a purchaser at an execution sale thereunder, the latter may show by the pleadings and the record in the action that the judgment attached as a lien upon the land purchased by him, although the judgment itself does not show such fact.

Cross references. See further in connection herewith, annotations under Rule 3 of *Blaney v. Hanks* (14 Iowa 400), ante. p. 254; Rule 3 of *Christy v. Dyer* (14 Iowa 438), *Infra.* p. 263; *Redfield v. Hart* (12 Iowa 355), ante. p. 59.

MALONY v. FORTUNE, 14 IOWA 417**1. Mortgage on Land—Foreclosure—Decree in—Requisites.—**

A decree of foreclosure of a mortgage on land must order that so much thereof be sold as is necessary to satisfy the debt, interest and costs. In such case the decree must not direct that all the property be sold and the residue of the proceeds thereof after the payment of the debt, interest, and costs, be paid into court, pp. 418, 419.

Reaffirmed and qualified in Treiber v. Shafer, 18 Iowa 35, holding that a decree in a foreclosure action which orders the mortgaged land to be sold under special execution "according to law," is sufficient; as in such case it is the sheriff's duty to sell only so much as is necessary to satisfy the debt, interest, and costs.

Cited in Taylor v. Trulock, 59 Iowa 559, 560, 13 N. W. 661, holding that Sec. 3088 of the Code of 1873, relative to land being sold by the sheriff according to a plan of division furnished by the judgment debtor before Nine O'clock A. M. of the day of sale, applies to sales of land both under general and under special executions.

Cross reference. See further in this connection, annotations and cross references under Lay v. Gibbons (14 Iowa 377), ante. p. 249.

2. Constitutional Law—Retrospective Statutes—When Unconstitutional—Redemption of Land Sold Under Foreclosure.—A retrospective statute which impairs the obligations arising under pre-existing contracts, is unconstitutional in so far as it applies to them: Hence, Sec. 3664 of the Code of 1860 (Chap. 103, Laws of that year) relating to the redemption of land sold under foreclosure of a mortgage, does not affect contracts and mortgages made and executed before it took effect, p. 420.

Reaffirmed in Gargan v. Grimes, 47 Iowa 182.

Reaffirmed and varied in Jordan v. Wimer, 45 Iowa 68, holding that the law (Sec. 1940 of the Code of 1873) forbidding a vendor's lien under an unrecorded deed from being enforced after a conveyance by vendee, does not apply to obligations under or contracts made before its enactment.

Cross reference. See further in this connection, annotations under Rosier v. Hale (10 Iowa 470), Vol. I, p. 732.

ROBINSON v. LAKE, 14 IOWA 421

1. Lands—Adverse Possession—Statute of Limitation—When Begins to Run.—The statute of limitation commences to run as against the owner of real estate from the time another person enters thereon and takes possession thereof under color of title; and actual, continuous, visible, notorious, distinct and hostile adverse possession by the latter for the period of ten years thereafter bars an action by the owner for its recovery, p. 424.

Reaffirmed in Sorenson v. Davis, 83 Iowa 411, 49 N. W. 1006; Hempstead v. Huffman, 84 Iowa 401, 51 N. W. 17.

Reaffirmed and extended in City of Pella v. Scholte, 24 Iowa 293, 85 Am. Dec. 729, holding further that a right to land by adverse possession for the statutory period may be acquired, or lost by the public in and to public realty.

Reaffirmed and extended in Amer. Em. Co. v. Fuller, 83 Iowa 609, 50 N. W. 50, holding further (as does the present case in argument) that the transfer of title to land carries with it the legal possession thereof, which remains until it is disturbed by a hostile possession under color of title or claim of right by another.

(Note.—See further specially, Grube v. Wells, 34 Iowa 148; Booth & Graham v. Small, 25 Iowa 177; Onstott v. Murray, 22 Iowa 457; Newman v. DeLorimer, 19 Iowa 244; Keys & Crawford v. Tait, 19 Iowa 123; Johnson v. Hopkins, 19 Iowa 49.—Ed.)

Cross reference. See further on this question, annotations and note under Jones v. Hockman (12 Iowa 101), ante. p. 19.

CLARK v. LEE, 14 IOWA 425

(Later Appeal, 21 Iowa 276, 89 Am. Dec. 574.)

1. Trusts—Trustee Cannot Purchase or Acquire Interest in Trust Property.—A trustee cannot purchase or acquire an interest or become interested in the trust property; and such a transaction will, in equity, at the instance of the *cestui que trust*, be declared fraudulent and void, p. 426.

Special cross reference. For cases citing the text and others on the question, see annotations under MacGregor v. Gardner (14 Iowa 326), ante. p. 245.

WOODS v. IRISH, 14 IOWA 427

1. Action Commenced Before Revision of 1860 Took Effect—Code of 1851 Governs.—Under Sec. 4172 of the Revision of 1860, all actions commenced before that Code took effect are to be governed to final determination by the provisions of the Code of 1851, p. 428.

Distinguished and narrowed in Gray v. Iliff, 30 Iowa 196, holding that where an action was commenced and judgment rendered therein before the taking effect of the Code of 1860, that the provisions of the Code of 1860 govern the time and manner of issuing execution thereon.

Cross references. See further, annotations under State v. Innskeep (12 Iowa 266), ante. p. 44; Rules 3 and 4 of Thatcher v. Haun (12 Iowa 303), ante. p. 51.

2. Appeal—Evidence Not Made Part of Record on—Presumption as to Finding Below.—Where on appeal the evidence on the trial below is not certified as part of the record, the Supreme Court

will presume that there was sufficient evidence to justify the finding of the trial court, p. 429.

Reaffirmed in Darrance v. Preston, 18 Iowa 404.

(Note.—See further sustaining text, Thompson v. Lord, 14 Iowa 591 (abstract), and there are many others to the same effect.—Ed.)

SMITH v. GRABLE, 14 IOWA 429

1. Contracts for Intoxicating Liquors in Violation of Law are Void.—All contracts for the sale of intoxicating liquors in violation of law are void as against all persons. So, where a party exchanges property for intoxicating liquors, exchanged in violation of law, he may treat the transaction as void and sue for the value of his property; and if the defendant therein insists upon the validity of the transaction, he (plaintiff) may set up the statutory inhibition to defeat the defense, p. 430.

Reaffirmed in Davis v. Slater, 17 Iowa 252, 253, holding that a contract having as a consideration the illegal sale of intoxicating liquors is void as against all persons.

Cited in Monty v. Arneson, 25 Iowa 392 (dissenting opinion), the majority court holding that the owner of intoxicating liquors in his possession for unlawful sale may recover possession thereof of a sheriff, or other person, wrongfully obtaining their possession.

Cited in Barnett v. Mendenhall, 42 Iowa 302, on the question of a void conveyance of homestead, for failure of wife to join.

Cross references.

"Contracts contrary to Common Law or a statute are void"—See annotations under Reynolds v. Nichols & Co. (12 Iowa 398), ante, p. 67.

"Gaming contracts—Recovery by loser—When"—See annotations under Shannon v. Baumer (10 Iowa 210), Vol. I, p. 669.

2. Trial—Instructions Covered by Others May be Refused.—It is not error for the court to refuse to give an instruction covered by others already given, p. 430.

Reaffirmed in Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404.

Cross reference. See further, sustaining the text, annotations and cross references under Rule 6 of Russ v. Steamboat War Eagle (14 Iowa 363), ante, p. 247.

JOHNSON v. LYON, 14 IOWA 431

1. Judgment at Law—Fraud or Wrong in Obtaining—Equitable Relief.—Where the evidence clearly and unequivocally shows that a judgment at law was wrongfully and fraudulently obtained, without fault or negligence of the defendant, it will be set aside in equity, p. 434.

Reaffirmed in Humphrey v. Darlington, 15 Iowa 213; Dixon v. Graham, 16 Iowa 313.

Reaffirmed and extended in Barthell v. Roderick, 34 Iowa 519, holding further that a mistake in a judgment in an action at law, not the result of the negligence of the party complaining or his attorney, may be corrected by an action in equity; And that a mistake in a calculation of an attorney, whereby a judgment in an action on a promissory note is for too small a sum, may be so corrected.

Cross reference. See further on this question, annotations under Hoskins v. Hattenback and Charles (14 Iowa 314), ante. p. 243.

ALLEN v. SAYLOR, 14 IOWA 435

1. **Actions—Original Notice—Service on Minors Under Fourteen Years Under Code of 1851.**—Service of an original notice on a minor under fourteen years of age under the Code of 1851, must be made upon the father, mother, or guardian, and if none be in the state, then upon the person having the legal care and control of the minor; and a return on an original notice in such case on the latter person, must state that he has the care and control of the minor, and that such minor has no father, mother, or guardian within the state, or it will be defective and a judgment rendered thereon will be reversed on appeal, p. 436, 437.

Reaffirmed in Cummings v. Landes, 140 Iowa 84, 117 N. W. 24.

Reaffirmed and extended in Good v. Norley, 28 Iowa 195-200, holding further that probate proceedings to sell real estate of a decedent where the heirs and persons having an interest therein are not served with notice, are *void ab initio*; and that the appointment of a guardian *ad litem* for a minor heir in such case, and his defense for such minor is of no effect.

Reaffirmed and qualified in Moomey v. Maas, 22 Iowa 384, 385, 92 Am. Dec. 395, holding that where minors are personally served with original notice, then although a return thereon may be so defective as to authorize a reversal of a judgment rendered thereon upon an appeal, still it will not be *void* upon collateral attack, a guardian *ad litem* having been appointed in the first action for the infants and having answered for them.

Unreported citations, 124 N. W. 354, 355, 357, 358.

Cross references. See Rule 2 hereof. See further, Rule 1 of Thornton v. Mulquinne (12 Iowa 549), ante. p. 95.

2. **Guardian Ad Litem—Appointment of—When Not Allowed.**—Unless there is a complete service of original notice on a minor defendant, the court has no jurisdiction to appoint a guardian *ad litem*, p. 437.

Reaffirmed in Good v. Norley, 28 Iowa 195-200, holding that probate proceedings to sell real estate of a decedent where the heirs and persons having an interest therein are not served with notice, are *void ab initio*; and the appointment of a guardian *ad litem* for a minor heir in such case and his defense for such minor is of no effect.

Reaffirmed and explained in Cummings v. Landes, 140 Iowa 84, 87, 117 N. W. 24, holding that when an original notice is so wanting in the requirements of the statute as to constitute *no notice* when served, the court is without jurisdiction even to appoint a guardian *ad litem*; and that service of an original notice after the date fixed for the defendant to appear and answer, is *no notice*, and all proceedings thereunder are *void*.

Reaffirmed and varied in In re Estate of Hunter, 84 Iowa 393, 394, 51 N. W. 21, holding that in an action involving the title to land of a person of unsound mind, the court has no power to appoint a guardian *ad litem* to defend for him, until service of notice on such person of unsound mind; and that in such case when the statutory guardian is acting contrary to the interest of such person, his defense must be made by the guardian *ad litem* appointed as provided above, or the decree therein will be *void*.

Reaffirmed and qualified in Rice v. Bolton, 126 Iowa 657, 658, 100 N. W. 635, holding that in an action wherein a minor is properly served with notice, that a premature appointment of and defense by a guardian *ad litem* and entry of decree, will not render the proceedings void or subject to collateral attack.

Cross reference. See further, annotations under Coon v. Jones (10 Iowa 131), Vol. I, p. 657.

CHRISTY v. DYER, 14 IOWA 438, 81 Am. Dec. 493

1. Homestead — Requisites — Occupancy.—The actual use and occupancy of land by the head of the family fixes the homestead in it, p. 440.

Reaffirmed in Hale v. Heaslip, 16 Iowa 452; Elston & Green v. Robinson, 23 Iowa 211; Neal v. Coe, 35 Iowa 409; Givans v. Dewey, 47 Iowa 417; Maguire v. Hanson, sheriff, 105 Iowa 218, 74 N. W. 776.

Reaffirmed and extended in Elston and Green v. Robinson, 21 Iowa 534, holding further that a judgment debtor cannot, after the rendition of a judgment against him, occupy land as a homestead, and thus defeat the lien of the judgment creditor thereon.

Distinguished and narrowed in Mann v. Corrington, 93 Iowa 111-113, 61 N. W. 409, 57 Am. St. Rep. 256, holding that homestead may exist in vacant land purchased with money derived from a sale of a previous homestead, or received in exchange therefor, where such vacant land is held in good faith for use as a home.

Cross references. See further, annotations under Rule 1 of Williams v. Swetland (10 Iowa 51), Vol. I, p. 642.

"Head of family—Who is"—See annotations and cross references under Parsons v. Livingston & Kinkead (11 Iowa 104), Vol. I, p. 783.

2. Homestead—Vendor's Lien for Purchase Money of—Mortgage to Secure by Husband—Failure of Wife to Join in—Effect.—

A vendor of land, afterwards claimed by the purchaser as homestead, has a lien thereon for the unpaid purchase money: And a mortgage on such land executed at the time of the delivery of the deed thereto, to secure purchase money notes, is valid without the joinder or concurrence of the purchaser's wife, pp. 441-443.

Reaffirmed in Burnap v. Cook, 16 Iowa 153, 85 Am. Dec. 507; Hyatt v. Spearman, 20 Iowa 513.

Reaffirmed and extended in Bills v. Mason, 42 Iowa 332, 333, holding further that where a homestead which is subject to the satisfaction of unpaid purchase money is exchanged by the debtor (purchaser) with a third person without notice, for another homestead, the latter is subject to the satisfaction thereof; and that the assignee of purchase money notes for homestead, or of a judgment thereon, has the same rights as his assignor (vendor).

Reaffirmed and extended in Campbell v. Maginnis, Ex'x, 70 Iowa 589, 590, 31 N. W. 946, holding further that when homestead is sold, under a decree of foreclosure of a mortgage to secure the purchase money, for an amount insufficient to satisfy all of the debt, that upon the debtor (vendee) redeeming from such sale, it may again be sold under execution to satisfy the residue of the purchase (mortgage) debt.

Cited with approval in Cole v. Gill, 14 Iowa 530.

Cited in Johnson County Sav. Bank v. Carroll, 109 Iowa 574, (dissenting opinion, 578), 80 N. W. 684, 685, the majority court holding that the vendee of lands under a contract of purchase, is entitled to homestead therein from the time he takes possession and commences to occupy the premises as a homestead for his family: And that this rule applies where the vendee so takes possession and occupies with the consent of his vendor, or his agent, under a contract of purchase providing that he is not entitled to possession until the payment of the purchase price: Holding further that homestead is not subject to the satisfaction of a debt created after the homestead right attaches, although it be for money to pay therefor.

3. Mortgage on Land—Judgment at Law on Note Secured by—Lien.—Where a note is secured by a mortgage on land, the mortgagee (or his assignee) may sue at law on the note, instead of proceeding to foreclose the mortgage; and the mortgaged property may, in such law action, be sold to satisfy the judgment thereon. In such case the lien of the judgment as between the parties, attaches from the date of recording the mortgage, p. 443.

Reaffirmed in Bills v. Mason, 42 Iowa 334.

Reaffirmed and explained in State v. Lake, 17 Iowa 218, 219; Morrison v. Morrison and Berry, 38 Iowa 78, holding that as between the parties to a mortgage the lien thereof is not extinguished by a general judgment on the note secured; that as between the parties, nothing ex-

tinguishes the lien of the mortgage, other than the satisfaction of the debt.

Reaffirmed and extended in Delaven v. Pratt, 19 Iowa 432, 433, holding further that as between a judgment creditor and the judgment debtor and his heirs, the former may show that his judgment is a lien on land and that it is subject thereto, by other proof than the record.

Reaffirmed and extended in Markham v. Buckingham, 21 Iowa 496, 89 Am. Dec. 590, holding further that in a contest between the judgment debtor and a purchaser at an execution sale thereunder, the latter may show by the pleadings and the record in the action that the judgment attached as a lien upon the land purchased by him, although the judgment itself does not show such fact.

Cited in Patterson v. Linder, 14 Iowa 416, holding that a purchaser at an execution sale under a judgment at law for the balance of purchase money of land, may sue in equity to quiet his title as against the vendee of a purchaser (with notice) of the interest of the latter.

Cross references. See further on this question, annotations under Redfield v. Hart (12 Iowa 355), ante p. 59; Wahl v. Phillips (12 Iowa 81), ante. p. 16.

See also other rules hereof, and cross references there found; annotations under Patterson v. Linder (14 Iowa 414), ante. p. 258; Rule 2 of Rakestraw v. Hamilton (14 Iowa 147), ante. p. 219.

STATE v. GURLOCK, 14 IOWA 444

1. Indictment—Defects in, Not Prejudicial to Rights of Accused.—Defects in an indictment which are not prejudicial to the substantial rights of accused are not grounds for demurrer: So, an error in the spelling in the name of the state or of the county therein, is not ground therefor, p. 445.

Reaffirmed and extended in State v. Brooks, 85 Iowa 368, 369, 52 N. W. 241, holding further that a clerical error which may be seen by a casual reading of the indictment, is not fatal; and that such an error may be corrected by leave of court: That a mistake in the Year Date of the commission of the offense charged, where such date is later than the finding of the indictment, is such an error.

(Note.—See further sustaining, but not citing, the text, State v. Goode, 68 Iowa 593, 27 N. W. 772; State v. Crawford, 66 Iowa 318, 23 N. W. 684; State v. Ormiston, 66 Iowa 143, 23 N. W. 370; State v. White, 32 Iowa 17; State v. Emeigh, 18 Iowa 122; State v. Ansaleme, 15 Iowa 44; State v. Freeman, 8 Iowa 428; Wrockledge v. State, 1 Iowa 167; Hintermeister v. State, 1 Iowa 101, and there are others.—Ed.)

Cross references.

"Indictment—Surplusage in"—See annotations under State v. Freeman (8 Iowa 428), Vol. I, p. 525; State v. Finan (10 Iowa 19), Vol. 1, p. 635.

"Indictment—Duplicity in"—See annotations and cross references under *State v. Myers* (10 Iowa 448), Vol. I, p. 726.

STATE *v.* POSTLEWAIT, 14 IOWA 446

1. Indictment—Minutes of Evidence Before Grand Jury—Competency of Witnesses—Procedure.—The minutes of the evidence before the grand jury need not be attached to the indictment in order to render a witness for the State competent on the trial thereof; it is sufficient if such minutes be left with the clerk to be filed, although not so done by him. On the trial of an indictment the attorney for the State may read to the court that which purports to be minutes of the grand jury of the evidence of a witness offered to be introduced, and if the court thereupon allows such witness to testify, the Supreme Court will presume upon appeal, in the absence of facts in the record to the contrary, that such minutes were of record in the court below, pp. 447, 448.

Reaffirmed and extended in *State v. Guisenhouse*, 20 Iowa 229, 230, holding further that it not error for the trial court to enter a *nunc pro tunc* order filing minutes of the evidence before the grand jury in a criminal prosecution: That the fact of minutes of evidence before the grand jury on which several indictments for nuisance against different defendants were found, are not returned to the clerk and filed separately, is not error, where the record does not disclose that the accused complaining was not thereby misled or prejudiced in his substantial rights.

Reaffirmed and extended in *State v. Cross*, 95 Iowa 632, 64 N. W. 615; *State v. Doss*, 110 Iowa 716, 717, 80 N. W. 1070, holding further that it is sufficient if the minutes of the evidence before the grand jury on which an indictment is found, be delivered to the clerk to be kept as part of the record, although not actually filed by him.

Cited with approval in *State v. Patterson*, 23 Iowa 579, holding that in an action on a forfeited bail bond it is proper for the court to enter a *nunc pro tunc* order filing it as of the date it should have been filed, and to thereupon admit it in evidence.

(Note.—See further on this question, *State v. Craig*, 78 Iowa 637, 43 N. W. 462; *State v. Briggs*, 68 Iowa 416, 27 N. W. 358; *State v. Rivers*, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112; *State v. Hamilton*, 42 Iowa 655.—Ed.)

2. Trial — Evidence — Exclusion of Prejudicial, Inadmissible Evidence Before Retirement of Jury—Effect.—Where the court allows the introduction of prejudicial, inadmissible evidence, but thereafter and before the retirement of the jury to consider their verdict, excludes it and directs the jury not to consider it, the error is cured, p. 449.

Reaffirmed in *State v. Booth*, 121 Iowa 711, 94 N. W. 75; *State v. Moran*, 131 Iowa 648, 109 N. W. 188, holding that error in the ad-

mission of improper testimony may be cured by exclusion or by withdrawal.

Reaffirmed and extended in Shepard v. Ch. R. I. & P. Ry. Co., 77 Iowa 57, 41 N. W. 565; Keyes v. City of Cedar Rapids, 107 Iowa 520, 78 N. W. 230, holding further that error in the admission of improper evidence may be cured by the instructions to the jury.

Reaffirmed and varied in State v. Guisenhause, 20 Iowa 230, holding that it is not error for the trial court to enter a *nunc pro tunc* order filing minutes of the evidence before the grand jury in a criminal prosecution: That the fact that minutes of evidence before the grand jury on which several indictments for nuisance against different defendants were found, are not returned to the clerk and filed separately, is not error, where the record does not disclose that the accused complaining was not thereby prejudiced in his substantial rights and thereby misled.

Unreported citation, 88 N. W. 345.

(Note.—See further sustaining, explaining and qualifying, but not citing, the text, State v. Helm, 97 Iowa 378, 66 N. W. 751; Jones v. U. S. Mut. Accid. Ass'n, 92 Iowa 652, 61 N. W. 485; Gall v. Dickey, 91 Iowa 126, 58 N. W. 1075; Egan v. Murray, 80 Iowa 180, 45 N. W. 563; Redfield v. Redfield, 75 Iowa 435, 39 N. W. 688; State v. Schaffer, 74 Iowa 704, 39 N. W. 89; Sullens v. Ch. R. I. & P. Ry. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501; Whitsett v. Ch. R. I. & P. R. R. Co., 67 Iowa 150, 25 N. W. 104; Davis, Gould & Co. v. Danforth & Co., 65 Iowa 601, 22 N. W. 889; State v. Spurbeck, 44 Iowa 667; Cook & Mitchell v. Robinson, 42 Iowa 474.—Ed.)

STATE v. SCHILLING, 14 IOWA 455

1. Intoxicating Liquors — Nuisance — Indictment — Keeping, etc., Building for Sale of—Sufficiency of Description.—It is a sufficiently definite description for an indictment for a nuisance in keeping and selling intoxicating liquors in a particular place, for the indictment to allege such acts as done by the defendant in "a certain building under his control," pp. 456, 458.

Reaffirmed in State v. Shaw, 35 Iowa 578; State v. Waltz, 74 Iowa 611, 38 N. W. 495.

Cited in State v. Reid, 20 Iowa 418, not in point.

Cross reference. See further on this question, annotations and cross references under State v. Kreig (13 Iowa 462), ante. p. 174.

2. Indictment — Surplusage — What so Regarded.—An averment in an indictment which is not necessary, and is no part of the offense, will be treated as surplusage and be disregarded, p. 458.

Reaffirmed in State v. Ean, 90 Iowa 536, 58 N. W. 899; State v. Wrand, 108 Iowa 74, 78 N. W. 789.

Cross references. See further, annotations under *State v. Freeman* (8 Iowa 428), Vol. I, p. 525; *State v. Finan* (10 Iowa 19), Vol. I, p. 635.

3. **Records—Judicial Notice.**—The district court will take judicial notice of the genuineness of the records in a case on trial, p. 459.

Reaffirmed in *State v. Postlewait*, 14 Iowa 449.

Reaffirmed and extended in *State v. Guisenhouse*, 20 Iowa 229, holding further that it is not error for the trial court to enter a *nunc pro tunc* order filing minutes of the evidence before the grand jury in a criminal prosecution: That the fact that minutes of evidence before the grand jury on which several indictments for nuisance against different defendants were found, are not returned to the clerk and filed separately, is not error, where the record does not disclose that the accused complaining was not thereby misled or prejudiced in his substantial rights.

Reaffirmed and extended in *State v. Loffer*, 38 Iowa 426, holding further that the district court will take judicial notice of the fact that a certain town is the county seat of a certain county, and may instruct the jury as to such fact, without proof thereof.

Reaffirmed and extended in *Kenosha Stove Co. v. Shedd*, 82 Iowa 544, 48 N. W. 934, holding further that in an action to enforce a judgment, the court will take judicial notice of the judgment sought to be enforced, and all proceedings of the action wherein it was rendered, both being in the same court.

Cross reference. See further, explaining and narrowing the text, annotations under Rule I of *Baker v. Mygatt*, (14 Iowa 131), ante, p. 217.

CARSON v. CROSS, 14 IOWA 463

1. **New Trial—Newly Discovered Evidence—Diligence to Discover to be Shown.**—An application for a new trial on the ground of newly discovered evidence must set out facts constituting due diligence to discover it before the trial, so that the trial court may judge of the sufficiency thereof, p. 464.

Reaffirmed in *Scott v. Hawk and Scott*, 105 Iowa 469, 75 N. W. 368.

Reaffirmed and extended in *Sully v. Kuehl*, 30 Iowa 279, holding further that the application for new trial should also be accompanied by the affidavit of the newly discovered witness, where it can be obtained.

Reaffirmed and qualified in *Darrance v. Preston*, 18 Iowa 404, holding that the failure by the applicant for a new trial to state facts constituting due diligence to discover the newly discovered evidence before the trial, cannot be made available on appeal by the adverse party, where the question was not raised in the trial court.

Reaffirmed and qualified in Bingham v. Foster, 37 Iowa 341; Cohol v. Allen, 37 Iowa 451, holding also, that a new trial will not be granted for newly discovered evidence, which is merely cumulative.

Unreported citation, 128 N. W. 943.

(Note.—See further sustaining and explaining, but not citing, the text, Woodman v. Dutton, 49 Iowa 398; Stuckslager v. McKee, 40 Iowa 212; Stineman, Ex'r, v. Beath, 36 Iowa 73; Miller v. Allbaugh, 24 Iowa 128, and there are others.—Ed.)

Cross reference. See further, annotations and cross references under Sturgeon v. Ferron (14 Iowa 160), ante. p. 222.

KEENEY v. LEAS AND LYON, 14 IOWA 464

1. De Facto Officer—What Constitutes—Acts of are Valid.—

Where an officer is in his place by appointment or election, although he has not complied with all the provisions of the statute as to his qualification, his acts are entitled to credit, and cannot be assailed in a collateral proceeding, p. 469.

Reaffirmed and extended in State v. Bates, 23 Iowa 99, holding further that a constable who holds over after his term of office has expired, his successor not having been elected and qualified, is a *de facto* officer, and his acts cannot be collaterally assailed.

CHARLES v. HASKINS, 14 IOWA 471, 83 Am. Dec. 378

1. Principal and Surety — Liability of Surety — Judgment Against Principal *Prima Facie* Evidence of Surety's Liability.—The liability of the surety is dependent upon the liability of his principal: And a judgment against the principal is *prima facie* evidence of the responsibility of the surety; but in an action thereafter against the surety he may rebut the presumption of the judgment by showing that it was obtained by fraud or collusion, show a mistake in its amount, or that it has been paid, p. 473.

Reaffirmed in Chase v. Wright et al, 116 Iowa 558, 90 N. W. 358, holding that a judgment against a guardian on a settlement as to an amount due his ward, is conclusive against the sureties on his bond, in the absence of fraud, collusion, or mistake.

Reaffirmed and extended in Skiff v. Cross, 21 Iowa 462, holding further that a surety who pays the debt for which he is liable for his principal, is subrogated to the rights of the creditor, and may maintain action therefor: That where the sheriff pays or turns over money or property in his hands, as such officer, either wrongfully or by mistake to a person not entitled thereto, the sureties on his official bond may sue the person receiving it, therefor.

Reaffirmed and extended in Boone County v. Jones, 54 Iowa 709, 2 N. W. 987, and 7 N. W. 155, 37 Am. Rep. 229; Wadsworth & Co. v. Gerhard, 55 Iowa 369, 7 N. W. 638, holding that sureties can make

no defense that could not be made by the principal, the measure of his liability being also theirs; and any act of the principal which estops him from setting up a claim personal to himself, estops his sureties equally: Holding further that a county treasurer and the sureties on his official bond, are concluded as to the amount due the county by such officer, by his settlements as provided by law in the absence of proof of mistake therein.

Reaffirmed and extended in Wadsworth & Co. v. Gerhard, 55 Iowa 369, 7 N. W. 638, holding further that where a judgment is recovered against a public officer, and thereafter the sureties on his official bond are sued on the same cause of action, that the latter may, in the latter action, plead the statute of limitation as to the cause of action sued on.

Reaffirmed and extended in Bradford v. McCormick, 71 Iowa 131, 32 N. W. 94, holding further that the liability of sureties are determined by that of their principal, and they are bound by his fraudulent conduct: If the principal is bound, so are his sureties.

Reaffirmed and varied in Lyon v. Northrup, 17 Iowa 315, 316, holding that a judgment against a surety on a replevin bond, is *prima facie* evidence of the measure of the surety's liability, in an action by the surety on an indemnity bond given to him to secure him from liability on the replevin bond; and when, in the last action, the surety proves that he has paid the judgment, it is sufficient to entitle him to recover the amount thereof, unless the defendant (maker of the indemnity bond) proves that such judgment is not the true measure of damages.

Partially overruled in McConnell v. Poor, 113 Iowa 136, 137, 84 N. W. 968, 52 L. R. A. 312, holding that a judgment against the principal is entitled to no consideration as against his surety, unless by the terms of the contract the surety is to be thereby bound.

THOMPSON v. BERTRAM, 14 IOWA 476

1. Vendor and Purchaser — Purchaser of Mortgaged Realty Assuming or Covenanting to Pay Debt—Rights of Mortgagee.—Where a purchaser of mortgaged real estate assumes the debt, or covenants to pay it, he becomes a joint principal with the mortgagor, and the mortgagee may sue both the vendor and purchaser, jointly, and obtain a foreclosure of the mortgage, and a general execution against both for any residue after the sale of the mortgaged premises, p. 478.

Reaffirmed and extended in Foster v. Marsh, 25 Iowa 304, holding further that a purchaser of mortgaged realty who assumes the debt, or covenants to pay it, is, as between him and his vendor (mortgagor) a principal, and upon such vendor paying the debt he is entitled to be subrogated to all the rights of the mortgagee.

Cited in McHose v. Dutton, 55 Iowa 730, 8 N. W. 668, not in point, but on a parity.

Special cross reference. For other cases citing text and others, see annotations under *Corbett v. Waterman* (11 Iowa 86), Vol. I, p. 778.

Cross reference. See further on this question, annotations under *Moses v. Clerk of Dallas District Court* (12 Iowa 139), ante. p. 27.

NESBITT *v.* BARTLETT, 14 IOWA 485

1. **Landlord and Tenant—Lien of Landlord—To What Property it Attaches.**—Where a cow is in good faith and for a valuable consideration purchased from a tenant, without knowledge of a lease, and it does not appear that it was upon the leased premises, the purchaser takes it free of any attempted lien of the landlord, pp. 486, 487.

Special cross reference. For cases citing the text and others on this question, see annotations under *Grant v. Whitwell et al* (9 Iowa 152) Vol. I, p. 555.

HALL *v.* CROUSE, 14 IOWA 487

1. **Action at Law—Injunction in Under Code of 1860.**—Under Sec. 3798 of the Code of 1860, the plaintiff in an action at law for breach of contract or other injury may have an injunction against a repetition or continuance of the breach, or other injury of like character arising out of the same contract, or relating to the same property or right, without alleging great or irreparable injury, insolvency of the defendant, or other equitable grounds therefor; and he may, also, claim damages or other redress therein, p. 489.

Reaffirmed in *Buchanan v. Marsh*, 17 Iowa 497.

OLIVER, ADM'R *v.* DEPEW, GD'N, 14 IOWA 490

1. **Appeal—Review—Evidence Not Objected to Below—Sufficiency of Record on Appeal.**—Where on appeal the record does not set out the evidence on the trial below and does not show that the evidence admitted was improper, prejudicial to the substantial rights of the party complaining and was objected to by him at the time it was admitted, and the ground of the objection, it will not be ground for reversal, p. 493.

Reaffirmed and extended in *Crawford v. Wolf, Carpenter & Angle*, 29 Iowa 574, holding further that only the grounds of objection given below to the admission of evidence will be considered on appeal.

(Note.—See further, *Boardman v. Beckwith*, 18 Iowa 292; *Campbell v. Chamberlain*, 10 Iowa 337, and there are many others.—Ed.)

Cross references. See Rule 2 hereof. See further in this connection, annotations and cross references under *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764.

2. **Appeal—Sufficiency of Record on—Record Admitted Below Not Made Part of—Review.**—A record admitted in evidence below

and claimed by appellant to have been improperly so done, will not be considered on appeal, where it is not set out and made part of the record thereon, p. 493.

Reaffirmed and extended in Helphrey v. Ch. R. I. & P. R. R. Co., 29 Iowa 481; Crawford v. Wolf, Carpenter & Angle, 29 Iowa 575, holding further that evidence claimed to have been improperly admitted below will not be considered on appeal, where it is not set out and made part of the record thereon.

(Note.—See further sustaining, but not citing, the text, Speers v. Fortner, 6 Iowa 552; Mays v. Deaver, 1 Iowa 216, and there are many others.—Ed.)

Cross references. See Rule 1 hereof and cross reference there found.

"Imperfect record on appeal"—See annotations under Briggs & Sawyer v. Hartman (10 Iowa 63), Vol. I, p. 644; Rule 2 of Mumma v. McKee (10 Iowa 107), Vol. I, p. 652; Rules 1 and 2 of Potter et al v. Wooster et al (10 Iowa 334), Vol. I, p. 334; State v. Lyon (10 Iowa 340), Vol. I, p. 700; and Fletcher v. Burroughs (10 Iowa 557), Vol. I, p. 748.

3. Husband and Wife—Note for Wife's Property Made Payable to Husband "or Bearer"—Delivery to Wife Thereafter—Effect.—Where a note given for the purchase of a wife's property is made payable to her husband "or bearer," and is thereafter delivered to her, it becomes her property, and upon her death descends to her heirs and cannot be sued on by the husband, pp. 492, 494.

Cited in King v. Gottschalk, 21 Iowa 514, holding that a wife may give and deliver to her husband notes or other choses in action; and that in such case the husband may sue thereon in his own name.

Cross reference. See further, Rule 3 of Peck v. Hendershott (14 Iowa 40), ante. p. 201.

CLARK, DODGE & CO. v. CITY OF DAVENPORT, 14 IOWA 494

1. Municipal Taxation—Power to be Expressly Conferred.—

No property can be taxed until the legislature authorizes and requires it to be done; and when such an act requires it to be done in a particular manner, it must be strictly pursued, p. 498.

Reaffirmed in Iowa R. R. Land Co. v. Sac County, 39 Iowa 133, (Opinion on Re-hearing).

Reaffirmed and explained in McNamara v. Estes, 22 Iowa 254, holding that the power of a municipal corporation to levy and collect taxes, particularly special assessments, must be clearly conferred; and such an act will receive a strict construction.

Reaffirmed and explained in Merriam v. Moody's Ex'rs, 25 Iowa 170; Burdick v. Babcock, 31 Iowa 572; City of Ottumwa v. Chinn, 75 Iowa 407, 39 N. W. 671; Alrich v. Paine, et al, Board of Supervisors of Wright County, et al, 106 Iowa 467, 76 N. W. 815, holding

that a municipal corporation has only the powers expressly granted, those necessarily implied or incident to powers expressly granted, and those absolutely essential and indispensable to the declared objects and purposes of the corporation; and that any fair doubt as to the existence of such a corporate power is to be resolved against it, and against the corporation.

Reaffirmed and extended in State v. Smith, 31 Iowa 495, holding further that a municipal corporation can exercise no power of taxation unless it is expressly conferred by the Legislature, or is absolutely necessary to carry out some other power expressly conferred.

Reaffirmed and extended in City of Ottumwa v. Zekind, 95 Iowa 626, 64 N. W. 647, 58 Am. St. Rep. 447, 29 L. R. A. 734, holding further that a power to a city to "regulate and license auctioneers and transient merchants," does not authorize it to require a license so large as to amount to a tax; and that an ordinance passed by a city under such a power, requiring such a merchant to pay a license fee of \$250 per month, or \$25 per day for a short period of time, is unreasonable and void.

Reaffirmed and extended in Field v. City of Des Moines, 39 Iowa 579, 585, 18 Am. Rep. 46, holding further that where a city passes an ordinance in excess of authority conferred, authorizing an officer to do an act or acts, the ordinance is void, and the city is not liable for the act or acts of the officer done thereunder.

Reaffirmed and extended in McPherson v. Foster Bros., 43 Iowa 58, 22 Am. Rep. 215, holding further that an act of a municipal corporation in excess of power conferred is void: Hence, holding that negotiable bonds issued by a city, county, or other municipal corporation without authority are void, even in the hands of *bona fide* holders.

Reaffirmed and qualified in Taylor v. McFadden, treasurer, 84 Iowa 271, 50 N. W. 1072, holding that no taxes can be levied by a municipal corporation unless authority therefor is conferred by statute, either expressly or by unmistakable implication: But that a power to a city to erect water-works, carries with it the right to levy a tax therefor, if it is not in excess of its limitation therefor.

Reaffirmed and qualified in Oswald v. Thedinger, 17 Iowa 14, 15, holding that after an execution has been issued and returned "no property found" on a judgment against a city, that upon the failure of the officers thereof, upon demand, to levy a tax, as soon as practicable thereafter, to pay the judgment, interest and costs, they are individually liable therefor to the judgment creditor.

Distinguished in Boynton v. Dist. Township of Newton, 34 Iowa 515 (Opinion on Re-hearing), the court holding in original opinion that a school district may be sued like any other corporation for debt, or on an order drawn by its president, and property liable to execution be levied on and sold under a judgment in such an action: That although mandamus lies in favor of a creditor, either before or after judgment,

to compel the levying and collection of a tax to pay his debt, such remedy is not exclusive, and is no defense to such an action by the creditor: And that the drawing of an order by the president of a school district for a debt, does not discharge it.

(Note.—See further specially on this question, *Brockman v. City of Creston*, 79 Iowa 587, 44 N. W. 822; *Becker v. Keokuk Water Works*, 79 Iowa 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Jeffries v. Lawrence*, 42 Iowa 498; *City of Keokuk v. Scroggs*, 39 Iowa 447; *Coffin v. City Council of Davenport*, 26 Iowa 515; *McInerny v. Reed*, 23 Iowa 410; *Porter v. Thomson*, 22 Iowa 391; *Clark v. City of Des Moines*, 19 Iowa 199; *Coy v. City Council of Lyons*, 17 Iowa 1.—Ed.)

Cross references. See Rule 2 hereof. See further in this connection, annotations and cross references under *City of Davenport v. M. & M. R. R. Co.* (12 Iowa 539), ante. p. 94; *Hull & Argalls v. Marshall County* (12 Iowa 142), ante. p. 29; *State ex rel. Clark, Dodge & Co. v. City of Davenport* (12 Iowa 335), ante. p. 56.

2. City of Davenport—Power to Levy Tax to Pay Indebtedness.—The power of the city of Davenport to levy a tax to pay its indebtedness is governed alone by Sec 1, Article V of its charter, as amended by Act of January 22, 1855: Sec. 3275 of the Code of 1860, is inapplicable thereto, pp. 498-500.

Cited in *Grant v. City of Davenport*, 36 Iowa 404, the court holding that the provision of Chap. 78, Laws of 1872, in reference to the power of cities to levy a special tax for the constructing and maintaining water-works, that it shall not "be levied upon the taxable property of said city which lies wholly without the limits of the benefit or protection of such works," is constitutional.

3. Municipal Powers—Statutes Conferring—Construction.—Any doubt or ambiguity arising out of terms used in a statute granting municipal powers must be resolved in favor of the public, p. 500.

Reaffirmed in *State v. Smith*, 31 Iowa 496.

Cross reference. See further Rule 1 hereof and cross references there found.

TAYLOR v. COOK, 14 IOWA 501

1. Trial—Instructions—Verdict Contrary to—Review on Appeal.—It is the duty of the jury to be governed by the instructions given by the trial court, and where the verdict is contrary thereto and a new trial is granted, upon appeal from the court's ruling thereon, the correctness of his ruling in giving or refusing instructions, will not be reviewed, p. 504.

Reaffirmed in *Porter v. Thomson*, 22 Iowa 392.

Reaffirmed and qualified in *Musser & Porter v. Maynard*, 59 Iowa 13, 12 N. W. 751, holding that where a verdict is contrary to the in-

structions and the trial court refuses to sustain a motion for a new trial, the judgment will be reversed on appeal.

Cross reference. See further, annotations under *Savery v. Bussick* (11 Iowa 487), Vol. I, p. 848.

2. Banks — Liability of Members. — Where several banking houses which are partnerships, issue and publish a circular holding themselves individually responsible for the issues and to redeem the notes of a named bank of issue, they are all liable therefor, pp. 503, 505.

Reaffirmed and extended in *Allen v. Pegram*, 16 Iowa 170, holding further that where the president of a bank which has no legal existence, signs, issues and puts in circulation notes of such bank, he is personally liable for their redemption: That a person who acts as an agent when in fact there is no principal is personally liable.

STREET v. RIDER, 14 IOWA 506

1. Fraud—Injunction for—Allegation of Petition.—Where a grantor in a deed of trust seeks to enjoin a sale thereunder on the ground of fraud, the petition must allege such facts as constitute fraud, false representations, or a warranty by the grantee. Facts equally within the knowledge of both parties to the instrument, or which the grantor had an equal opportunity with the grantee of ascertaining, does not constitute fraud or false representations and is insufficient, p. 507.

Reaffirmed and explained in *Burnett v. Hensley*, 118 Iowa 578, 579, 92 N. W. 679, holding that it is fraud for a vendor to fail to disclose to a purchaser a *latent* defect, not ascertainable upon inspection, in personal property sold: And if a vendor makes statements regarding the condition of the thing sold, with the intent to divert the eye or obscure the observation of the purchaser, it is fraud.

Cited with approval in *Scofield v. Moore*, 31 Iowa 244, holding that where one transfers "all right, title and interest in" a judgment "whatever that may be," he does not thereby become a guarantor of the amount due thereon.

Cross reference. See further as to fraud and false representations, annotations under Rules 1 and 2 of *Holmes v. Clarke* (10 Iowa 423), Vol. I, p. 719.

ADAMS v. PECK, 14 IOWA 508

1. Pleadings—Reply—When Not Necessary—Default.—Where under the Code of 1860, a reply to an answer is unnecessary, the plaintiff will not be deemed in default by failing to file such pleading. Such is the rule where the defendant denies the allegations of the petition, and pleads that the claim of the plaintiff has been satisfied, p. 509.

Reaffirmed and exchanged in Barger v. Farris & Wilmer, 34 Iowa 230, 231; Gwyer v. Figgins, 37 Iowa 520, holding that unless an answer contains a set-off, counterclaim, cross petition or cross demand, no reply thereto is necessary; that all other affirmative allegations in an answer, are denied by operation of law: And when a reply is filed when not required, it does not change the issue or shift the burden of proof, and the case stands as if it had not been filed.

(Note.—See further, sustaining, but not citing, the text, Clark v. Cress, 20 Iowa 50; Savery v. Browning, 18 Iowa 246; Smith v. Milburn, 17 Iowa 30; Davenport Sav. Fund & L. Ass'n v. N. A. Fire Ins. Co., 16 Iowa 74.—Ed.)

HOWE v. MASON, 14 IOWA 510

1. Officers—Ministerial and Judicial Acts—Liability of Officer and His Surety.—A judicial officer and the sureties on his official bond are not liable for his judicial acts, unless it is proven that he acted corruptly: But a ministerial officer and his sureties are liable for his negligent, or wrongful acts. In accepting a replevin bond and determining the capacity of persons to become sureties thereon, a justice of the peace acts judicially and not ministerially, and is not liable for errors of judgment, pp. 511, 514.

Reaffirmed and extended in Wasson v. Mitchell, 18 Iowa 155-157, holding further that the exemption from liability extends to all officers charged with the determination of matters of a *quasi judicial* character; and applies to a board of supervisors of a county; that such board is exempt from liability for honest mistakes and errors of judgment whether of law or fact, in the approving of bonds, but the members are personally liable for negligence, or official misconduct in such a matter.

Cited in Maynes v. Brockway, 55 Iowa 459, 8 N. W. 318, not in point.

Distinguished and narrowed in Hubbard v. Switzer, 47 Iowa 683, holding that the question of the financial sufficiency of a surety on a bond to stay a judgment is not a judicial question to be determined by the clerk, and such officer and sureties on his official bond are liable in damages for an insufficient bond negligently taken by him.

Impliedly overruled as to judicial officer's liability in Henke v. McCord, 55 Iowa 384, 7 N. W. 625, holding that a justice of the peace is not liable in damages for issuing a warrant for breach of a city ordinance which is void for want of authority of the city to enact it; and that a ministerial officer who executes such warrant, it being regular and sufficient on its face, is not liable in damages therefor.

Cross reference. See further, annotations under Gowing v. Gowing, (12 Iowa 495), ante. p. 82.

TUPPLE v. VIERS AND NICHOLS, 14 IOWA 515

1. Vendor's Lien on Land—Foreclosure for Part of Purchase Money Due—Mistake in Title Bond and Notes—Equitable Relief.—The vendor of real estate may sue in equity for the foreclosure of his lien for some of the purchase money notes after their maturity without waiting for all to become due; and may in such action ask for a correction of mistakes in the title bond and notes, pp. 515, 516.

Unreported citation, 126 N. W. 372.

HAYWARD v. MUNGER, 14 IOWA 516

1. Promissory Notes—Assignment of—Presumption as to Date of Assignment When it is Not Shown.—Where the date of an assignment of a promissory note is not shown either by the assignment or otherwise, it is presumed to have been assigned on the day it was executed, p. 518.

Reaffirmed in Leonard et al Adm'rs v. Olson, 99 Iowa 168, 68 N. W. 677, 61 Am. St. Rep. 230, 35 L. R. A. 381.

2. Contracts and Notes—Usurious Interest Provided for—Allowance of Interest in Action Concerning—Injunction—Tender.—In an action to enjoin a sale under a deed of trust for a loan tainted with usurious interest, the plaintiff is not compelled to tender six per cent. interest per annum on the original loan as a condition precedent to his suit.

So, in an action to enjoin the sale under a deed of trust on the ground that the debt (borrowed money) had been satisfied, where it appeared that the debt bore usurious interest the referee allowed six per cent. per annum on the original loan, which ruling was not objected to below, the Supreme Court said: "The referee allowed interest at the rate of six per centum per annum on the amount of the original loan. * * * Neither seems to controvert this rule, and we therefore let it pass, without by any means conceding its correctness, remarking that we are aware of no case decided by this court which recognizes the right to such interest," pp. 521, 523.

Reaffirmed in Morrison v. Miller, 46 Iowa 86, 87, holding that a party to a usurious contract may ask for relief in equity without tendering six per cent. per annum in addition to the amount due thereon.

Cross references. See Rule 3 hereof. See further in this connection, annotations under Rutherford v. Haven & Co. (11 Iowa 587), Vol. I, p. 864.

"Usury—Proceedings in actions involving"—See generally, annotations under Campbell v. McHarg (9 Iowa 354), Vol. I, p. 588.

3. Tender for Less Than Amount Due—Failure of Creditor to Object—Effect—Tender to be Kept Good.—Where before the commencement of an action the debtor tenders an amount less than is due,

which is not objected to by the creditor, and thereafter in an action on the debt pleads, tenders and pays such sum into court, the failure to object by the creditor and the keeping good by paying into court, stops interest and costs; but the creditor may therein recover more than the amount so tendered, pp. 521, 522.

Reaffirmed in Guengerich v. Smith, 36 Iowa 588, 589; Sheriff v. Hull, 37 Iowa 177.

Impliedly overruled in McWhirter v. Crawford, 104 Iowa 553, 554, 72 N. W. 506, and 73 N. W. 1021, holding that under the Code of 1873 a tender by a debtor of an amount insufficient to cover the debt due, is not good although the creditor may fail to object thereto for that reason: Hence, holding that a tender of a less sum than is due to the vendor of land by the vendee of a contract for a sale or conveyance thereof, is insufficient to entitle the latter to demand specific performance, and a deed—Unless the vendor is unable to perform his contract or is insisting upon a cancellation or a forfeiture, in which latter case a tender by the vendee is not required.

Impliedly overruled in Wood v. Howland, 127 Iowa 398, 101 N. W. 758, holding that a tender may be in writing, and while an offer of full performance in general terms may be sufficient in equity, still, if the party making it specifies the exact amount which he offers, he must make it large enough to pay the obligation, or it will be insufficient.

Cross references. See Rule 4 hereof.

"Tender to be kept good"—See annotations and cross references under Mohn v. Stoner (11 Iowa 30), Vol. I, p. 765.

4. Tender—Equitable Action—Rule in—Costs.—A tender before the commencement of an equitable action is not necessary, where the plaintiff shows himself otherwise entitled to relief and stands ready to obey the orders of the court and do equity. In such action the question of interest and costs and all other matters are controlled by the court by proper orders and according to equitable principles, p. 523.

Reaffirmed in Jones v. Hartsock, 42 Iowa 153.

Reaffirmed and qualified in Lavery v. Hall's Adm'x, 19 Iowa 529, 530, holding that where a purchaser sues for specific performance of a sale of land, he must tender the purchase price into court; but where the vendor is dead or unable to convey a good title, he may allege in such action that he is ready to pay the purchase price upon a good deed being made.

(Note.—See further specially, Taylor v. Ormsby Bros., 66 Iowa 109, 23 N. W. 288; Binford v. Boardman, 44 Iowa 53.—Ed.)

Cross references. See Rule 3 hereof. See further, sustaining, but not citing, the text, annotations under Rutherford v. Haven & Co. (11 Iowa 587), Vol. I, p. 864.

DAVIS, MOODY & CO. v. KELLEY, 14 IOWA 523

1. Homestead—Abandonment—What Constitutes—Proof.—

Where one occupying land as a homestead leaves it temporarily with the intention to return, it still retains its homestead character; but where such homestead is clearly, actually and permanently abandoned, it stands like any other property and may be similarly incumbered by judgment, or attachment lien, or otherwise subjected to the satisfaction of debts against the owner.

The question of whether or not a homestead has been so abandoned is one of intention of the debtor, to be determined from the facts and circumstances of each case: But where land not actually occupied by a debtor is claimed as homestead as against his creditors, a stronger case of temporary absence or intention to return must be made out by him, than when the creditors are asserting rights claimed to be acquired while he was so occupying it, p. 525.

Reaffirmed in Morris v. Sargent, 18 Iowa 102.

Reaffirmed and extended in Booth v. Brewster, 75 Iowa 633, 36 N. W. 650, 9 Am. St. Rep. 515; Maguire v. Hanson, 105 Iowa 217, 74 N. W. 776, holding further that homestead once acquired, is presumed to continue, and the burden of proving an abandonment thereof, is on the creditor seeking to subject it to the satisfaction of his debt.

Reaffirmed and extended in Booth v. Brewster, 75 Iowa 633, 36 N. W. 650, 9 Am. St. Rep. 515; Jones v. Blumenstein, 77 Iowa 365, 366, 42 N. W. 323; Robinson v. Carleton, 104 Iowa 298, 73 N. W. 617, holding further that the length of time a debtor is absent from his homestead is entitled to consideration, but is not conclusive, on the question of abandonment thereof by him.

Reaffirmed and extended in Robinson v. Carleton, 104 Iowa 298, 73 N. W. 617, holding further that in an action to set aside a sale and deed to homestead under an execution, where the homestead is once shown to have existed, the burden is on the defendant (purchaser) to prove an abandonment thereof by the debtor.

Reaffirmed and qualified in Fyffe v. Beers, 18 Iowa 10, 11, 85 Am. Dec. 577, holding that where temporary absence from land claimed as homestead is prolonged, the intention by the owner to return thereto and again occupy it as a home, must be clearly and unmistakably shown.

Reaffirmed and qualified in Dunton v. Woodbury, 24 Iowa 76, holding also, that while the length of absence from a homestead is not conclusive on the question of its abandonment, still, where there are no circumstances or acts of the party claiming it, which manifest a purpose to return and occupy it as such, that fact becomes important in determining the intention.

Reaffirmed and qualified in Wapello County v. Brady, 118 Iowa 486, 92 N. W. 719, holding that a vague intention to return to a

homestead at some future time, or to return upon the happening of contingencies, is not sufficient to retain homestead in land abandoned.

Cited in Campbell v. Ayres, 18 Iowa 256, a case wherein realty claimed as homestead was never occupied by the debtor.

Cross references.

"Requisites of homestead—Occupancy"—See annotations and cross references under Rule 1 of Christy v. Dyer (14 Iowa 438), ante. p. 263; Rule 2 of Cole v. Gill, next succeeding this present case.

COLE v. GILL, 14 IOWA 527

1. Homestead—Purchase Money for—Liability for.—Homestead is subject to the payment of its purchase price, and to the vendor's lien therefor, p. 530.

Special cross reference. For cases citing the text and others on the question, see annotations under Rule 2 of Christy v. Dyer (14 Iowa 438), ante. p. 263.

2. Homestead—Requisites—Occupancy, etc.—Occupancy and use as a home by the family of the party claiming it, are the essentials to a homestead. To merely mark out, plat and record a tract of ground as a homestead does not establish it, p. 530.

Reaffirmed in Hale v. Heaslip, 16 Iowa 452; Elston & Green v. Robinson, 23 Iowa 211; Neal v. Coe, 35 Iowa 409.

Reaffirmed and extended in Elston and Green v. Robinson, 21 Iowa 534, holding further that a homestead acquired after the levying of an execution under a judgment, is subject to the judgment or execution lien: Holding, also, that a defendant cannot after the levy of an execution on a lot, change his homestead from a farm to the lot, and defeat the execution lien.

Cross references. See further on this question, annotations under Rule 1 of Christy v. Dyer (14 Iowa 438), ante. p. 263; Rule 1 of Williams v. Swetland (10 Iowa 51), Vol. I, p. 642; Rule 2 of Yost v. Devault (9 Iowa 60), Vol. I, p. 544.

HAMBEL v. TOWER, 14 IOWA 530

1. Contracts and Notes Payable in Specific Property—When Converted Into Money Demand.—Where a contract or note is payable in specific property, and no time is fixed therein for the delivery or performance, it cannot be converted into a money demand until a demand of performance has been made and the maker (debtor) refuses, or a reasonable time is allowed for performance. Where, however, the time and place of performance are fixed in such a contract, or note, then if the maker (debtor) tenders the specific articles, and properly designates and sets them apart at such time and place, and the promisee (creditor) is not there to accept, or refuses to accept

them, the debt is discharged, and the property passes to the latter, p. 532.

Reaffirmed in Council Bluffs Iron Works v. Cuppey, 41 Iowa 107, 108.

Distinguished in Padden v. Marsh, 34 Iowa 523, 524, holding that where defendant executed a written warranty of a harvester machine, by the terms whereof if the machine did not comply therewith, the plaintiff was to deliver it to defendant at a certain place, and upon its failing to so comply the plaintiff offered to so deliver, and defendant told him that he would not receive it, that such delivery was waived, and plaintiff could recover for the breach of warranty without so doing.

2. Contract or Note Payable in Specific Property—Tender of Property to be Kept Good.—Where a contract or note is payable in specific property a tender thereof by the maker is lost, by a subsequent demand of the creditor and refusal to so pay by the maker, unless the latter sufficiently explains his refusal, p. 533.

Special cross reference. For cases citing the text and others on analogy, see annotations under Mohn v. Stoner (11 Iowa 30), Vol. I, p. 765.

HARPER v. DRAKE, 14 IOWA 533

1. Judgment by Default—When May be Set Aside—Naked Default—When May be Set Aside.—Under Sec. 3150 of the Revision of 1860, a judgment by default may be only set aside on motion at the term at which it was rendered, a sufficient excuse therefor and a defense to the action being shown: But a naked default may be set aside at any time before judgment is entered thereon, p. 535.

Reaffirmed in McDonald v. Donaghue, 30 Iowa 569; Simmons v. Church, 31 Iowa 286; Ordway v. Suchard & Gebhard, 31 Iowa 487.

2. Judgment by Default—Motion to Set Aside—Judicial Discretion of Trial Court.—In determining the meritorious defense and excuse of the party moving to set aside a judgment by default, the trial court has a large judicial discretion which will not be disturbed upon appeal except for abuse thereof, p. 535.

Reaffirmed and qualified in Ordway v. Suchard & Gebhard, 31 Iowa 487, holding that the judicial discretion of the trial court in acting upon a motion to set aside a judgment by default should never be exercised in favor of a party who is in default through the negligence of himself or his attorney.

Reaffirmed and qualified in Gilbert, Hedge & Co. v. Wilcox, 33 Iowa 594 (abstract), holding that in acting upon an application to set aside a default during the term at which the judgment is rendered thereon, the trial court has a large judicial discretion, which will not be interfered with upon appeal, unless for a clear abuse thereof, or for disregard of some legal requirement.

Cross reference. See further on this subject, annotations and cross references under *Bolander v. Atwell* (14 Iowa 35), ante. p. 200.

WILHELMI v. THORINGTON, 14 IOWA 537

1. Trial—Instructions—Exceptions to Those Given and Refused—Certainty Required—Review on Appeal.—Where on appeal it appears from the bill of exceptions that the party complaining excepting generally to the charge or instructions to the jury, such general exception will not (under Code of 1860) authorize a review of errors in any portion thereof, where any part or anyone is correct, p. 537.

Special cross reference. For cases citing the text and many more on the subject, see annotations under Rule 5 of *Davenport Gas Light & Coke Co. v. City of Davenport* (13 Iowa 229), ante. p. 140.

2. New Trial—Newly Discovered Cumulative Evidence.—A new trial will not be granted for newly discovered evidence, which is merely cumulative, p. 538.

Reaffirmed in *Bingham v. Foster*, 37 Iowa 341.

Reaffirmed and explained in *Stineman v. Beath*, 36 Iowa 78, holding that evidence is not merely cumulative, where it has, in any degree, an independent and distinct bearing on the issue tried in the action wherein the new trial is sought.

Cited in *Barnes v. McDaniels*, 35 Iowa 382, on the general proposition of the judicial discretion of the trial court in granting or refusing new trials.

Cross reference. See further, sustaining the text, annotations and cross references under *Sturgeon v. Ferron* (14 Iowa 160), ante. p. 222.

ALLMAN v. GILBERT, 14 IOWA 538

1. Action at Law—Trial by Court—Finding of Facts—Motion For New Trial, Etc.—Review on Appeal.—When in an action at law, a jury is waived and a trial had by the court and no finding of the facts is made by the court and no motion for new trial presents the ground that the judgment is contrary to the evidence, it will not be reviewed upon appeal, unless the finding of the trial court on the evidence be presented as a matter of law, p. 539.

Special cross reference. For cases citing the text, and many others on the question, see annotations under *Warner, Adm'r v. Pace* (10 Iowa 391), Vol. I, p. 710.

ROBISON v. SAUNDERS, KIBBEN & Co., 14 IOWA 539

1. Appeal—Review of Errors—Necessity for Exception, or Motion to Correct, Etc., Below.—Unless exception is taken to a ruling or an order of the trial court at the time it is made, or a motion is

made to set it aside, or modify it, as the case may be, below, it will not be considered upon appeal by the Supreme Court, p. 541.

Reaffirmed in Hunt v. Stevens and Alverson, 25 Iowa 262; Sanders v. Lowe, 25 Iowa 599 (abstract); Borgalthous v. Farmers' & Merchants' Ins. Co., 36 Iowa 251, 252.

Reaffirmed and explained in Carleton v. Byington, 17 Iowa 580; Eason v. Gester, 31 Iowa 476, holding that in an action at law where the action is tried by the district court, a motion for a new trial must be made setting out the errors, or a motion be made to set aside or modify an erroneous order or judgment, or the errors therein will not be reviewed upon appeal: That specific objection and exception must, in actions at law, be made and taken in the district court, in order that that court may correct errors without an appeal.

Reaffirmed and extended in Webster v. Cedar Rapids & St. P. R. Co., 27 Iowa 318, holding further that objection to a pleading so defective that it does not state a cause of action, or defense, cannot be taken for the first time upon appeal to the Supreme Court.

Reaffirmed and extended in Borgalthous v. Farmers' & Merchants' Ins. Co., 36 Iowa 251, holding further that a person who is not a party to the record in an action, cannot appeal from a judgment therein.

Cited in Brainard v. Van Kuran, 22 Iowa 266, not in point.

Cross reference. See further in this connection, annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66.

REID v. MASON, SHERIFF, 14 IOWA 541

1. Instructions—Pertinency to Issue—Court to State Issue In.—In the instructions to the jury, the court should state the issue as joined by the pleadings, p. 542.

Reaffirmed in West v. Moody, 33 Iowa 139, 140.

Reaffirmed and qualified in Fitzgerald v. McCarty, 55 Iowa 704, 8 N. W. 647; Keatley v. I. C. Ry. Co., 94 Iowa 690, 63 N. W. 562, holding that it is reversible error for the court to make the pleadings in an action a part of the instructions by reference, and then refer the jury to them for the issues being tried.

Cross reference. See further on this question, annotations and note under Rule 2 of Fannon v. Robinson (10 Iowa 272), Vol. I, p. 682.

2. Instructions Based Upon Evidence—Review on Appeal—Imperfect Record.—Instructions based upon evidence will not be reviewed upon appeal, unless all the evidence adduced on the trial is before the Supreme Court, p. 543.

Reaffirmed in Tootle, Livingston & Co. v. Phoenix Ins. Co., 62 Iowa 363, 17 N. W. 584.

(Note.—See further sustaining, but not citing, the text, Potter et al v. Wooster et al, 10 Iowa 334.—Ed.)

BANK OF INDIANA *v.* ANDERSON, 14 IOWA 544, 83 Am. Dec. 390

1. Mortgage—Transfer of Notes Secured by—Rights of Assignee—Rights of Innocent Third Persons.—The transfer of a note secured by mortgage carries with it the mortgage lien, and is effective as against the parties thereto and the mortgagor, but not against an innocent third person who acts in relation to the mortgaged property without either actual or constructive notice thereof. Such an assignee must record his assignment in order for it to impart constructive notice to such third persons, pp. 550-552.

Reaffirmed in McClure *v.* Burris, 16 Iowa 592 (abstract); Walker *v.* Schreiber, 47 Iowa 532, 533; Daws *v.* Craig, 62 Iowa 517, 17 N. W. 779; Reel *v.* Wilson, 64 Iowa 15, 16, 19 N. W. 815; Livermore *v.* Maxwell, 87 Iowa 714, 55 N. W. 40; Jenks *v.* Shaw, Hartley and Woodruff, 99 Iowa 613, 68 N. W. 903, 61 Am. St. Rep. 256; Day *v.* Brenton, 102 Iowa 489, 71 N. W. 540, 63 Am. St. Rep. 460.

Reaffirmed in part in Gower *v.* Winchester, 33 Iowa 308; Bremer County Bank *v.* Eastman, 34 Iowa 394; Swan *v.* Yapple, 35 Iowa 249, holding that a mortgage is a chattel interest and is an incident to, and follows the debt it is given to secure.

Reaffirmed and explained in Bowling *v.* Cook, 39 Iowa 202, holding that a mortgage on land executed by a mortgagee in a prior mortgage, is superior to the right of the assignee of the first mortgage debt, where the assignment of the first is not of record and the second mortgagee had no actual notice thereof at the time he took his mortgage.

Reaffirmed and explained in Central Trust Co. *v.* Stepanek, 138 Iowa 134, 115 N. W. 892, 15 L. R. A. (New Series) 1025, holding that an unrecorded assignment of a mortgage on either real or personal property will be avoided in favor of subsequent purchasers and existing creditors without actual notice.

Reaffirmed and qualified in Walker *v.* Schreiber, 47 Iowa 532, 533, holding however, that notice to a person's attorney of the assignment of mortgage notes is notice thereof to him.

Reaffirmed and qualified in Brayley *v.* Ellis, 71 Iowa 156, 32 N. W. 255, holding that one who purchases real estate with a mortgage thereon which is not released of record, takes it subject thereto.

Reaffirmed and narrowed in Nashua Trust Co. *v.* Edwards Mfg. Co., 99 Iowa 112, 113, 68 N. W. 588, 61 Am. St. Rep. 226, holding that the written assignment of mortgage notes, although not recorded, is good as against a mechanic's or materialman's lien decreed in an action to which the assignee thereof is not made a party: That a mechanic or materialman is not a "purchaser," and has only such rights as are given by statute.

Cited with approval in Kenosha Stove Co. *v.* Shedd, 82 Iowa 545, 48 N. W. 934, holding that an assignment of a mortgage is required by law to be recorded; and that a certified copy of such a recorded assignment is admissible in evidence without preliminary proof.

Cited in *Swan v. Yapple*, 35 Iowa 249, holding that a conveyance by the assignee of mortgage notes made after he has re-assigned the notes, of all his "estate, title and interest" in the land mortgaged, does not operate as an assignment of the mortgage to the grantee in such last conveyance.

Cited in *Rand, Ex'r, v. Barrett*, 66 Iowa 738, 24 N. W. 533, not in point.

Distinguished in *Churchill v. Morse*, 23 Iowa 233, 92 Am. Dec. 422, holding that the assignee of an unrecorded assignment of a contract for school lands, has a superior lien to a purchaser of such land at an execution sale under a judgment against the assignor of the contract, when it is assigned more than one year and twenty days after the sale and before the execution of the sheriff's deed thereunder, and the assignee has no actual notice of such sale and purchase at the time of the assignment.

Unreported citation, 126 N. W. 782.

(Note.—See further specially on this question, *Farmer, Thompson and Helsell v. Bank of Graettinger*, 130 Iowa 469, 107 N. W. 170; *Quincy v. Ginsbach*, 92 Iowa 144, 60 N. W. 511; *Parmenter v. Oakley*, 69 Iowa 388, 28 N. W. 653.—Ed.)

FAHNESTOCK v. SMITH, 14 IOWA 561

1. Negotiable Instruments—Protest — Notice — Sufficiency of Notice by Mail.—In order to charge an indorser or other person bound on a negotiable instrument (under Sec. 213 of the Code of 1860) if notice of protest and refusal to pay by the maker be made by mail, it must be deposited in the post office nearest to the party to be charged, on the day the demand, refusal and protest is made, properly stamped and addressed to such person to be charged, pp. 563, 564.

Cited in *Hamilton v. Veach*, 19 Iowa 420, not in point.

2. Negotiable Instruments—Liabilities and Rights of Indorsers —Notice.—Where several persons are indorsers of a negotiable instrument the holder thereof may hold any or all of them by giving due notice of non-payment and protest to those sought to be held; and each indorser so notified may in turn notify his next preceding indorser, who may in turn notify his next, and thus all parties may be protected by binding those liable to them, p. 566.

Reaffirmed in *Hamilton v. Veach*, 19 Iowa 420, 421.

LAMB v. SHAYS, 14 IOWA 567

1. Judgments—Liens of on Lands—How and When Effective.—A lien of a judgment upon the lands of defendant is, in this state, purely statutory, and is governed as to the time and manner that it attaches by the conditions and limitations of the statute itself, p. 569.

Reaffirmed in *Lathrop v. Brown*, 23 Iowa 47.

Cross references. See Rule 2 hereof. See further on this question, annotations under Rule 3 of *Blaney v. Hanks* (14 Iowa 400), ante. p. 254; Rule 1 of *Cook & Sargent v. Dillon* (9 Iowa 407), Vol. I, p. 598.

2. Homestead Exempt From Judgment—Debtor May Convey.—Homestead is exempt from the lien of or sale under a judgment, and the owner thereof may at any time incumber, or convey it, free from all claims of his creditors, pp. 569, 571.

Reaffirmed in *Cummings v. Long*, 16 Iowa 42, 85 Am. Dec. 502; *Thomas v. McDonald*, 102 Iowa 568, 71 N. W. 572, and 93 N. W. 381.

Cited with approval in *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 281, holding that a judgment is not a lien upon realty exempted by statute from judicial sale.

Cited with approval in *Stadler Bro. & Co. v. Allen*, 44 Iowa 200, holding that a judgment is not a lien on land when it is not subject thereto; and that a judgment against a partnership is not a lien upon realty of the individual members, until after *scire facias* subjecting it.

Distinguished and narrowed in *Hale v. Heaslip*, 16 Iowa 453, 454, (cited in dissenting opinion, 457), holding that a judgment for a debt created prior to the acquisition of a homestead by the judgment debtor, where the records of the action wherein the judgment was rendered discloses such fact, is superior to the lien of a mortgagee of the homestead, where the mortgage is executed subsequent to the rendition of the judgment: That a judgment for a debt created prior to the acquisition of homestead by the debtor, is a lien thereon.

Unreported citation, 129 N. W. 946.

(Note.—See further sustaining, but not citing, the text, *Beyer v. Thoeming*, 81 Iowa 517, 46 N. W. 1074; *Payne v. Wilson*, 76 Iowa 377, 40 N. W. 75.—Ed.)

Cross references. See Rule 1 hereof. See further in this connection, annotations under Rule 2 of *Stephens v. Myers* (11 Iowa 183), Vol. I, p. 799.

MISSISSIPPI & MISSOURI R. R. Co. v. BYINGTON, 14 IOWA 572

1. Appeal—Acceptance of Benefits of Adjudication by Party—Estoppel.—A party cannot accept the benefits of an adjudication, and thereafter appeal from it claiming it to be erroneous; the acceptance of the amount of a judgment estops the accepting party from appealing therefrom, p. 575.

Reaffirmed and extended in *Borgalthous v. Farmers' & Merchants' Ins. Co. and Leedham*, 36 Iowa 252, holding further that where one voluntarily pays a judgment against him, he thereby waives all errors in the proceedings and cannot thereafter appeal.

Reaffirmed and extended in *Indep. Dist. of Altoona v. Dist. Township of Delaware*, 44 Iowa 202; *Reichert v. Seal*, 76 Iowa 277, 41 N. W. 17, holding further that a party who voluntarily accepts the amount of a judgment in his favor, cannot thereafter appeal therefrom: That a voluntary payment of a judgment by a party against whom it is rendered, and an acceptance of the amount thereof by the adverse party, operates as a reciprocal waiver of errors in the proceedings, and neither can thereafter appeal.

Reaffirmed and extended in *Root v. Heil*, 78 Iowa 437, 43 N. W. 278, holding further that the acceptance of costs and an attorney's fee adjudged a party to an action, by his attorney, estops such party from thereafter appealing from such judgment.

Reaffirmed and extended in *Doyle v. Burns*, 123 Iowa 493, 99 N. W. 197, holding further that where a party complies with all the conditions of the trial court on which a judgment by default against him is set aside, he cannot thereafter complain of them upon appeal.

Reaffirmed and qualified in *Ballinger v. Conn. Mut. L. Ins. Co. and Haight*, 118 Iowa 25, 91 N. W. 768, holding that the acceptance of the amount of a judgment waives all errors necessarily involved in rendering it for that amount; but that when the sum so received is not in dispute, there is no such waiver.

Distinguished and narrowed in *Burns v. C. Ft. Mad. & D. M. Ry. Co.*, 102 Iowa 12, 13, 70 N. W. 730, holding that where both the land owner and the railroad company appeals to the district court from an assessment of damages to the land owner by a sheriff's jury in a proceeding to condemn land for a railroad right of way, that the acceptance, thereafter and before trial of the appeal, by the land owner of the amount allowed him by such jury, does not preclude him from recovering a larger amount of damages on the trial of the cause *de novo* in the district court, to be credited by the amount of the first assessment.

Unreported citation, 93 N. W. 86.

(Note.—See further specially on this question, *Mountain v. Low*, 107 Iowa 403, 78 N. W. 45; *Weaver v. Stacy*, 93 Iowa 683, 62 N. W. 22; *Upton Mfg. Co. v. Huiske*, 69 Iowa 557, 29 N. W. 621; *Buena Vista County v. Iowa Falls & S. C. R. R. Co.*, 55 Iowa 157, 7 N. W. 474; *Dudman v. Earl*, 49 Iowa 37.—Ed.)

RHOADS v. BOOTH, 14 IOWA 575

1. Actions—Parties Plaintiff—Joinder of—When Allowed.—

As a rule it is only persons jointly entitled to, or having a joint interest in the property affected by, or the damages to be recovered in an action, who may sue as joint plaintiffs. Several parties cannot sue jointly for separate injuries to the person or character, p. 577.

Cited in *Hinkle v. Davenport*, 38 Iowa 357, 360, holding that where two persons sue jointly for slander, the action may, after the trial has commenced, by leave of court and without re-swearing the

jury, upon the discovery of the error, be dismissed as to one of the parties plaintiff, and the trial proceed as to the cause of action of the other.

Distinguished in Brandirff et al v. Harrison County, 50 Iowa 166, 167, holding that several land owners may unite as parties plaintiff in an action to restrain the collection of an illegal special ditch tax affecting their lands, and to obtain a cancellation of such illegal tax.

Distinguished in Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa 640, 641, 49 N. W. 66, 31 Am. St. Rep. 507, holding that a husband and wife may sue jointly for total loss by fire under a policy of insurance issued to them jointly, on the wife's store house and the husband's goods therein, where the policy of insurance does not specify the amount for which each is insured.

2. Actions—Misjoinder of Parties Plaintiff—When May be Taken Advantage of.—A misjoinder of parties plaintiff, may be objected to and be taken advantage of at any stage of the case at which the misjoinder appears, and even in arrest of judgment, p. 577.

Cited in Hinkle v. Davenport, 38 Iowa 357, holding that where two persons sue jointly for slander, the action may, after the trial has commenced, by leave of court and without re-swearing the jury, upon the discovery of the error, be dismissed as to one of the parties plaintiff, and the trial proceed as to the cause of action of the other.

Cited erroneously in Clark v. Lee, 21 Iowa 276, 89 Am. Dec. 574, on the question of the right of a party to amend his pleadings.

Distinguished in Grant v. McCarty, 38 Iowa 471, holding the rule inapplicable to misjoinder of *causes of action*, and that error as to misjoinder of causes of action is waived, unless objected to by motion to strike from the petition before answer.

COOPER v. SKEEL, 14 IOWA 578

1. Equitable Actions—Appeal—Trial De Novo.—An appeal in an equitable action tried in the lower court according to the first method prescribed by Sec. 2999 of the Code of 1860 (all the evidence in writing) will be tried *de novo* by the Supreme Court upon the law and the facts as apparent of record, p. 579.

Reaffirmed and extended in Hackworth, Gd'n v. Zollars, 30 Iowa 436, holding further that upon an appeal in such case, no assignment of errors is necessary.

Cross references. See further on this question, annotations and cross references under Robb v. Dougherty (14 Iowa 379) ante. p. 249; Rule 2 of Blake v. Blake (13 Iowa 40), ante. p. 115; Garner v. Pomroy (11 Iowa 149), Vol I, p. 791.

2. Trust Contrary to Absolute Deed—Parol Evidence—Sufficiency of—Admissions by Loose and Random Conversations.—Where it is sought to establish a trust to land by parol evidence in

favor of a party and contrary to a deed absolute on its face, the proof thereof should be clear, satisfactory and conclusive.

Admissions by loose and random conversations are the weakest of testimony and are received with great caution, pp. 579-581.

Reaffirmed in Parker v. Pierce, 16 Iowa 231; Maple v. Nelson, 31 Iowa 327; Shepard v. Oratt, 32 Iowa 298, 299; Smith v. Phelps, 32 Iowa 540; Hyatt v. Cochran, 37 Iowa 310; Sinclair v. Walker, 38 Iowa 577.

Reaffirmed and extended in Nelson v. Worrall, 20 Iowa 471, holding further that evidence of a resulting trust in favor of one furnishing the purchase money for land where the deed is taken in the name of another, must be clear and explicit, and such as goes directly to prove the facts necessary therefor.

Reaffirmed and extended in Dalby v. Cronkhite, 22 Iowa 224, holding further that where a party seeks by parol proof to overturn a legal right or title, he must do so by proof which is clear, satisfactory and conclusive—Applying the rule in a case involving a parol release of a judgment lien on land.

Reaffirmed and qualified in McAnnulty v. Seick, 59 Iowa 590, 13 N. W. 745, holding that although the rule of the first paragraph is applicable in equitable actions decided by the chancellor, yet if an issue of whether or not a paper purporting to be a bill of sale is such or is a mortgage, is submitted to a jury, the jury may determine such fact from a preponderance of the evidence.—And to the same effect is Holt v. Brown & Co., 63 Iowa 325, 19 N. W. 238 (reaffirming and qualifying the text) on a question of the enlargement of a written contract by parol evidence on a jury trial.

Reaffirmed and narrowed in Amidon, trustee, v. Snouffer, Ex'x et al, 139 Iowa 161, 117 N. W. 45, holding that in the absence of fraud an *express trust* cannot be established by parol evidence; but that an *implied trust* may.

Reaffirmed as to last paragraph in Krause v. Redman, 134 Iowa 633, 112 N. W. 92; Holmes v. Connable, 111 Iowa 309, 310, 82 N. W. 784.

(Note.—See further sustaining, explaining and qualifying, but not citing, the first paragraph of the text, Donaldson v. Emp. L. & Inv. Co., 130 Iowa 467, 106 N. W. 192; Heddleton v. Stoner, 128 Iowa 525, 105 N. W. 56; Hoon v. Hoon, 126 Iowa 391, 102 N. W. 105; Malley v. Malley, 121 Iowa 237, 96 N. W. 751; Kringler v. Rhomberg, 120 Iowa 472, 94 N. W. 1115; Gregory v. Bowsby, 115 Iowa 327, 88 N. W. 822; Andrew v. Andrew, 114 Iowa 524, 87 N. W. 494; Williams v. Williams, 108 Iowa 91, 78 N. W. 792; Hagan v. Powers, 103 Iowa 593, 72 N. W. 771; Maroney v. Maroney, 97 Iowa 711, 66 N. W. 911; Acker v. Priest, 92 Iowa 610, 61 N. W. 235; Paige v. Paige, 71 Iowa 318, 32 N. W. 360, 60 Am. Rep. 799; Epps v. Dickerson, 35

Iowa 301; *Sunderland v. Sunderland*, 19 Iowa 325; *Harris v. Stone*, 15 Iowa 273; *Ratliff v. Ellis*, 2 Iowa 59.—Ed.)

Cross references.

See further as to first paragraph, annotations under Rule 2 of *MacGregor v. Gardner* (14 Iowa 326), ante. p. 245.

See further as to second paragraph, annotations, note and cross reference under *Wallace v. Berger* (14 Iowa 183), ante. p. 226.

WASHINGTON COUNTY *v.* MILLER, 14 IOWA 584

1. Taxation—Tax Payer Refusing to Verify List of Property—Prosecution—Defense—De Facto Assessor.—In a prosecution to recover the penalty provided for by Sec. 724 of the Revision of 1860, against a tax payer for refusing to verify the assessment list of his property given by him to the assessor, irregularities in the qualification of the assessor is no defense. A *de facto* assessor may discharge the duties of such officer; and any person refusing, upon request, to verify such a list given to either a *de jure* or a *de facto* assessor, is guilty of the offense denounced, pp. 585, 586.

Cited in *Bereshein, Gd'n v. Arnd*, county treasurer, 117 Iowa 86, 90 N. W. 507, not in point.

(Note.—See further, *Marion County v. Kruidenier*, 72 Iowa 92, 60 N. W. 502.—Ed.)

THOMPSON *v.* LORD, 14 IOWA 591

(Abstract.)

1. Appeal—Insufficient Record on—Presumption on Appeal—Error to Appear Affirmatively.—Errors on appeal involving evidence will not be reviewed where the evidence introduced below is not embodied in the bill of exceptions: Nor will, in such case, the judgment be reversed because not sustained by sufficient evidence, as the Supreme Court will presume the correctness of the lower court's ruling; error must be shown affirmatively, p. 592.

Reaffirmed in *Darrance v. Preston*, 18 Iowa 404.

Cross references. See further, annotations, notes and cross references under *Woods v. Irish* (14 Iowa 427), ante. p. 260; *Rule 2* of *Mumma v. McKee* (10 Iowa 107), Vol. I, p. 652; *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764.

BETHEL *v.* LEAY, 14 IOWA 592

(Abstract.)

1. Appeal—Errors Not Objected to or Taken Advantage of Below—Review.—Where an error in a proceeding could have been corrected in the trial court and no motion was made therein therefor,

it will not be reviewed upon appeal by the Supreme Court. This rule applies to an irregular service of an original notice, pp. 592, 593.

Reaffirmed in Decatur County v. Clements, 18 Iowa 537; Pratt v. Western Stage Co., 27 Iowa 365.

Reaffirmed and extended in Van Vark v. Van Dam, 14 Iowa 233, holding further that a defective service of an original notice is waived by the defendant entering his appearance.

Cross references. See further on this question, annotations under Robison v. Saunders, Kibben & Co. (14 Iowa 539), ante. p. 282; Van Vark v. Van Dam (14 Iowa 232), ante p. 232; Pigman v. Denney (12 Iowa 396), ante. p. 66.

ROCK v. WALLACE, COUNTY JUDGE, 14 IOWA 593

(Abstract.)

1. Counties—Power to Subscribe to, or to Issue Bonds in Aid of Railroads—Injunction by Taxpayer.—Counties have no power to subscribe to stock in, or to issue bonds in aid of the construction of railroads: And the negotiation of such bonds will be restrained by injunction, and their re-delivery and cancellation compelled by a court of equity, at the instance of a tax payer of any such county, pp. 593. 594.

Special cross reference. For cases citing the text and many more on the question, see annotations under Rule 1 of State ex rel B. & M. Riv. R. R. Co. v. Wapello County (13 Iowa 388), ante. p. 165.

BUTLER v. BYINGTON, 14 IOWA 594

(Abstract.)

1. Written Instruments Import Consideration.—A note, or other written instrument imports a sufficient consideration, p. 594.

Reaffirmed and qualified in First Nat'l Bank of Cedar Rapids v. Hurford & Bro., 29 Iowa 585, holding, however, that parol evidence is competent to prove want of consideration, or failure of consideration for, or fraud in the obtaining of a note, or other written instrument, the burden of proof in such case being upon the party alleging such fact to so prove it.

(Note.—See further, Sullivan v. Collins, 18 Iowa 228; Veach v. Thompson, 15 Iowa 380.—Ed.)

STONE v. BROWN, 14 IOWA 595

(Abstract.)

1. Default—Motion to Set Aside—Meritorious Defense and Excuse to Be Shown.—A motion to set aside a default must be accompanied by an affidavit of the moving party showing a sufficient excuse for his failure to plead, and a meritorious defense to the action, p. 595.

Reaffirmed in McDonald v. Donaghue, 30 Iowa 569.

Reaffirmed in Gilbert, Hedge & Co. v. Wilcox, 33 Iowa 594 (abstract), holding further that in acting upon an application to set aside a default during the term at which the judgment is rendered thereon, the trial court has a large judicial discretion which will not be interfered with upon appeal, unless for clear abuse thereof or for disregard of some legal requirement.

Cross references. See further, annotations and cross references under Harper v. Drake (14 Iowa 533), ante. p. 281; Bolander v. Atwell (14 Iowa 35), ante. p. 200; Rule 2 of State v. Elgin (11 Iowa 216), Vol. I, p. 805.

PERKINS v. WHITTAM, 14 IOWA 596

(Abstract.)

1. Appeal From Order Overruling a Demurrer—No Exception Below—Review.—Where a party appeals from an order overruling his demurrer to a pleading, and the record does not show that he excepted thereto in the lower court, such ruling will not be reviewed by the Supreme Court, p. 596.

Reaffirmed in Brown v. Webster, 16 Iowa 589 (abstract); Harmon's Ex'rs v. Levalley, 23 Iowa 599.

Reaffirmed and explained in Beason v. Jonason, 14 Iowa 400; Snyder v. Eldridge, 31 Iowa 131, holding that rulings of the trial court will not be reviewed upon appeal to the Supreme Court, where the record does not affirmatively show that exceptions were taken thereto at the time they were made.

Reaffirmed and explained in Eason v. Gester, 31 Iowa 476, holding that in an action at law where the action is tried by the district court, a motion for a new trial must be made setting out the errors, or a motion be made to set aside, or modify an erroneous order or judgment, or the errors therein will not be reviewed upon appeal: That specific objection and exception must, in actions at law, be made and taken in the district court, in order that that court may correct errors without an appeal.

Reaffirmed and extended in Snyder v. Eldridge, 31 Iowa 131, holding further that only rulings of the trial court excepted to at the time that they were made, assigned as errors, and insisted upon in argument by the party complaining, will be considered upon appeal.

Reaffirmed and qualified in Robison v. Saunders, Kibben & Co., 14 Iowa 541, holding that unless exception is taken to a ruling or an order of the trial court at the time it is made, or a motion is made to set it aside, or modify it, as the case may be, below, it will not be considered upon appeal by the Supreme Court.

(Note.—See further, Norton v. Swearengen, 19 Iowa 566 (abstract); Darrance v. Preston, 18 Iowa 396; Graham v. Wood, 15 Iowa

600 (abstract); *Dudley v. Reid*, 15 Iowa 597 (abstract); *Cain v. Story*, 15 Iowa 378.—Ed.)

Cross references. See further on this question, annotations and cross references under *Bethel v. Leay* (14 Iowa 592), ante. p. 290; *Robison v. Saunders, Kibben & Co.* (14 Iowa 539), ante. p. 282; *Pigman v. Denney* (12 Iowa 396), ante. p. 66.

THOMAS, ADM'R *v.* EAST & MCBEE, 14 IOWA 596

(Abstract.)

1. **Appeal—Rulings of Trial Court Not Objected or Excepted To—Review.**—The Supreme Court will not consider or review rulings of the trial court which the record on appeal does not show were objected or excepted to at the time that they were made, p. 596.

Special cross reference. For cases citing and sustaining text and many others on this question, see annotations, note and cross references under *Perkins v. Whittam*, next preceding.

SHEPPARD & CO. *v.* DOWNING, 14 IOWA 597

(Abstract.)

1. **Garnishment—Answer of Garnishee Undenied—Liability of Garnishee.**—Whether the facts disclosed in an undenied answer of a garnishee show an indebtedness to the principal debtor (defendant) is a question of law for the court; and his ruling thereon will be reviewed on appeal, p. 597.

Reaffirmed and extended in *Bolton v. Bailey*, 122 Iowa 730, 98 N. W. 560, holding further that where no issue is tendered on the answer of a garnishee, it is the sole test of his liability, and if there is any doubt therefrom as to his liability, he is entitled to a judgment in his favor.

(Note.—See further sustaining and explaining, but not citing, the text, *Kerr v. Edgington*, 106 Iowa 69, 75 N. W. 669; *Church v. Simpson*, 25 Iowa 408; *Morse v. Marshall*, 22 Iowa 290.—Ed.)

Cross reference. See also Rule 2 hereof.

See further, annotations under *Smith et al v. Clark et al* (9 Iowa 241); *Fifield v. Wood* (9 Iowa 249), Vol. I, p. 571.

2. **Garnishment—Issue and Trial by Court on Garnishee's Answer—Failure to Find Facts—Presumption on Appeal—Review.**—Where in a garnishment proceeding an issue is tendered and a trial had before the court upon the answer of the garnishee, and the court fails to make a finding of facts upon his decision thereon, the Supreme Court will presume that there was sufficient evidence to support the finding and will not reverse the judgment as contrary to the evidence, p. 597.

Reaffirmed in Brainard v. Van Kuran, 22 Iowa 266.

Cross reference. See further, sustaining, explaining and qualifying the text, annotations under Warner, Adm'r v. Pace (10 Iowa 391), Vol. I, p. 710.

BROWN v. THOMPSON, 14 IOWA 597

(Abstract.)

1. Change of Venue—Unconditional Order for—Effect on Jurisdiction.—Where an unconditional order for a change of venue is made by a district court of one county to that of another, the former loses jurisdiction of the action, and any subsequent orders or judgments therein entered are without authority and will be reversed upon appeal, p. 597.

Reaffirmed in Carroll County v. Am. Emigrant Co., 37 Iowa 374.

Reaffirmed and extended in Iowa Loan Co. v. Wilson, 145 Iowa 382, 383, 385, 124 N. W. 201, holding further that where a change of venue is granted (under Revision of 1897, and Chap. 10, Sec. 1 of Acts of Twenty-eighth General Assembly) from the superior court of a city to the district court of the county having jurisdiction of the action, on the ground that the party applying therefor is not a resident of the city, the superior court loses jurisdiction of the action, although it may attach conditions as to the payment of costs to the order granting the change.

Cross reference. See further, annotations and cross references under Farr v. Fuller (12 Iowa 83), *ante*. p. 16.

Annotations to Decisions Reported in Volume 15 Iowa.

STIVERS *v.* THOMPSON, 15 IOWA 1

1. Justice's Court—Judgment by Default in—Setting Aside—Judicial Discretion—Review on Writ of Error.—A justice may set aside a judgment by default rendered in his court within six days after its rendition, upon a satisfactory excuse for the default being shown: The justice has a large judicial discretion upon the question of whether or not such satisfactory excuse is shown and his decision thereon will not be corrected upon writ of error, except in case of a clear abuse of such discretion, p. 2.

Reaffirmed in Dixon *v.* Brophey, 29 Iowa 462; Park *v.* Ratcliffe, 42 Iowa 45, 46; Breen *v.* Kuhn, 91 Iowa 327, 59 N. W. 344.

2. Justice's Court—Judgment by Default in—Motion to Set Aside—Notice.—No notice to the adverse party is required before motion to set aside a judgment by default in a justice's court when the motion is made within six days after its rendition: But if the motion is sustained and a new trial ordered, a day should be fixed therefor and the adverse party be notified thereof, p. 3.

Reaffirmed in Dixon *v.* Brophey, 29 Iowa 461, 462; Park *v.* Ratcliffe, 42 Iowa 45.

O'BRIEN *v.* YOUNG, 15 IOWA 5

1. Homestead—Deed of Trust to—Requisites—Description.—When a husband and wife concur in and execute a deed of trust to homestead, the instrument need not describe the property as homestead, p. 6.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Babcock *v.* Hoey (11 Iowa 375), Vol. I, p. 829.

DAVENPORT GAS LIGHT & COKE Co. *v.* CITY OF DAVENPORT, 15 IOWA 6 (Former Appeal, 13 Iowa 229)

1. Demurrer—Sufficiency of.—A demurrer to a pleading in an action at law must specifically point out the objection or objections thereto, but need not give reasons therefor, pp. 16, 17.

Reaffirmed and extended in Jones *v.* Brunskill, 18 Iowa 131; McGregor and Sioux City R. R. Co. *v.* Birdsall, 30 Iowa 257; Childs *v.*

Limback, 30 Iowa 400; Focker v. Martin, 32 Iowa 119, holding further that where language in a demurrer is so general that it does not notify the adverse party of the objection to the pleading demurred to, it will be disregarded.

Cross reference. See further on this question, annotations under McKellar v. Stout (13 Iowa 487), ante. p. 178.

2. Practice—Pleadings—Redundancy and Surplusage in—Motion to Strike.—Redundant and superfluous language in a pleading otherwise good, must be reached by a motion to strike such language therefrom, p. 18.

Reaffirmed in Hayden v. Anderson, 17 Iowa 163; Martin v. Swearingen, 17 Iowa 348, 349.

Cross reference. See further, annotations under Rule 1 of Keeney v. Lyon (10 Iowa 546), Vol. I, p. 744.

3. Pleadings—Evidence Not to be Pleaded—Redundancy.—Facts and not the evidence of facts must be stated in a pleading. Pleadings must not state evidence, but the result thereof; and evidence pleaded, will be stricken as irrelevant and redundant, pp. 20, 21.

Reaffirmed in Robinson & Co. v. Berkley & Martin, 100 Iowa 144, 69 N. W. 436.

(Note.—See further, Lumbert & Co. v. Palmer, 29 Iowa 104.—Ed.)

4. Pleadings—Answer—Partial Defense — How Pleaded.—A partial defense, or matters in mitigation may be set up in an answer in an action for damages; but it must be specially pleaded as such, p. 19.

Reaffirmed in Coe v. Lindley, 32 Iowa 442, holding that a partial defense may be pleaded.

Reaffirmed and extended in Ronan v. Williams, 41 Iowa 681; Herriman v. Layman, 118 Iowa 593, 92 N. W. 711, holding further that matters constituting a partial defense, or facts and circumstances in mitigation of damages in an action therefor, must be so pleaded.

Reaffirmed and qualified in Peck v. Parchen, 52 Iowa 51, 2 N. W. 601, holding (as does the present case in argument) that a *partial defense* when pleaded as a *full defense* may be stricken on motion.

Reaffirmed and qualified in Herriman v. Layman, 118 Iowa 593, 92 N. W. 711, holding that in an action for damages for breach of promise of marriage, where the defendant pleads matters in mitigation as full justification, that proof of such facts are inadmissible.

Unreported citation, 93 N. W. 600.

LAWTON v. BUCKINGHAM, Ex'r, 15 IOWA 22

1. Deed—Consideration Named in—Evidence.—The consideration stated in a deed is only *prima facie* evidence of the amount actually paid, p. 22.

Reaffirmed in Harper v. Perry, 28 Iowa 63; Trayer v. Reeder, 45 Iowa 274; Logan v. Miller, 106 Iowa 516, 76 N. W. 1007.

Unreported citation, 125 N. W. 873.

Cross reference. See Rule 2 hereof.

2. Conveyances—Breach of Covenants—Action for—Allegation and Proof of Real Consideration.—In an action to recover for breach of covenants of seizin and right to convey in a deed or other conveyance, the true consideration therefor may be proven under a general allegation that it was greater than that shown by the instrument, without averring mistake in drafting it, pp. 22, 23.

Reaffirmed and extended in Harper v. Perry, 28 Iowa 63; Logan v. Miller, 106 Iowa 516, 76 N. W. 1007, holding that the true consideration of a deed may be shown by parol, without averment of mistake therein.

Cited with approval in Puttman v. Haltey, 24 Iowa 428; Trayer v. Reeder, 45 Iowa 274, holding that the true consideration of a written contract may be shown by parol.

3. Personal Representatives—Actions Against—Judgment in.—In an action against a personal representative of a decedent, no personal judgment must be rendered against him, p. 23.

Reaffirmed and qualified in Tyler v. Langworthy, 37 Iowa 559, 560, holding that where in an action against a personal representative a judgment against him is not plain as to whether it is *personal*, or *as representative*, the court will give it a construction favorable to the latter and so as to relieve it of error, if such is possible from an examination of the entire record in the case.

Reaffirmed and narrowed in Wile v. Wright, Adm'x, 32 Iowa 461, holding that although a personal judgment against a personal representative in an action involving the estate of his decedent, be erroneous, that before he can complain thereof on appeal, he must call attention thereto in the trial court and move for its correction therein.

TIMMONS v. JOHNSON, 15 IOWA 23

1. Garnishment — Mortgage Evidence of Debt — Judgment Against Garnishee.—Where the evidence of a debt garnished is a non-negotiable mortgage, judgment cannot (under Sec. 3211 of the Code of 1860) be entered against the garnishee until the instrument is delivered, or he is fully exonerated, or indemnified from liability thereon, p. 25.

Reaffirmed and extended in Hughes v. Monty, 24 Iowa 502, holding further that under Sec. 3211 of the Code of 1860, judgment cannot be entered against a garnishee on a debt evidenced by a negotiable or assignable paper, unless it is delivered, or he is fully exonerated, or indemnified from liability thereon.

Cross reference. See further in connection herewith, annotations under Pope & Slocum v. Jacobus (10 Iowa 262), Vol. I, p. 679.

McKAY v. THORINGTON, 15 IOWA 25

(Case arising from same facts, 17 Iowa 569.)

1. Sheriffs—Liability of Succeeding Sheriff and His Sureties For Property Taken Under Writ by His Predecessor.—A succeeding sheriff and his sureties are not liable for loss or damage to property taken under a writ by his predecessor, unless he gives a receipt therefor, the property is actually delivered to the former, or he waives such delivery and agrees to be liable therefor: A mere transfer of the writ to the new sheriff will not make him liable for the care and control of the property, pp. 28, 30.

Reaffirmed in McKay v. Leonard, 17 Iowa 571; Fockler v. Martin, 32 Iowa 119.

2. New Trial—Verdict Against Weight of Evidence—Reversal on Appeal—When.—A reversal will not be had upon appeal because the verdict is against the weight of the evidence, unless it is manifestly so, conclusively shows that it was not the result of a free, sound and unbiased judgment of the jury, and results in injustice, pp. 28, 29.

Reaffirmed in Lester & Bro. v. Sallack, 31 Iowa 478; Doulon v. City of Clinton, 33 Iowa 401; Parker v. B. S. W. R. R. Co., 34 Iowa 400; McCarthy v. C. R. I. & P. Ry. Co., 83 Iowa 491, 50 N. W. 23.

Reaffirmed and explained in Donaldson v. M. & M. R. R. Co., 18 Iowa 289, 87 Am. Dec. 391; Bergert & Bro. v. Dav. City Ry. Co., 34 Iowa 572, 573 (abstract), holding that where the evidence on a trial is conflicting, its sufficiency is for the determination of the jury; and a verdict in such case will not be reversed upon appeal because it is against the weight of the evidence.

Reaffirmed and extended in Burlington Gas Light Co. v. Green, Thomas & Co., 21 Iowa 337; Roberts & Bro. v. Jones, 30 Iowa 525; New York Piano Forte Co. v. Mueller, 38 Iowa 554; Conklin v. City of Dubuque, 54 Iowa 572, 6 N. W. 894; Peebles v. Peebles, 77 Iowa 12, 41 N. W. 387, holding further that the discretion given to the district court to grant or refuse a new trial, will not be interfered with upon appeal, unless that discretion has been abused, or unless it is apparent that great injustice has been done to the party complaining; and a stronger case of such abuse, or great injustice to appellant, must be made out where the new trial has been granted than where it has been refused.

Reaffirmed and extended in Hubbell & Bro. v. Ream, 31 Iowa 296, holding further that where the evidence is conflicting on the trial of an action, that an order overruling a motion for a new trial on the ground that the verdict is against the weight of the evidence, will not be disturbed upon appeal except in case of a clear abuse of the trial court's discretion.

Cross references. See further, sustaining, explaining and qualifying, but not citing the text, annotations and cross references under Rule 4 of *Russ v. Steamboat War Eagle* (14 Iowa 363), ante. p. 247; *State v. Tomlinson* (11 Iowa 401), Vol. I, p. 833; *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764.

GRIFFIN *v.* SEYMOUR, 15 IOWA 30, 83 Am. Dec. 396

1. Res Adjudicata—What Constitutes.—In order to make the plea of *res adjudicata* applicable, the actual point in issue in a subsequent action must have been determined *on its merits* in a former action between the same parties, p. 32.

Reaffirmed in *Kern & Son v. Wilson*, 82 Iowa 412, 413, 48 N. W. 920; *McCullough v. Connelly*, 137 Iowa 686, 114 N. W. 302, 15 L. R. A. (New Series) 823.

Reaffirmed and explained in *Lemon v. Sigourney Sav. Bank*, 131 Iowa 85, 86, 108 N. W. 107, holding that in order to constitute *res adjudicata*, the issues in the two actions must be substantially the same; and that a dismissal of one part of the first action, and trial on the remainder part, not substantially the same, therein, does not preclude the party dismissing from thereafter suing on the dismissed part: That voluntary dismissal of a claim or cause of action is not an adjudication on its merits, so as to make *res adjudicata* applicable in a subsequent action thereon.

Reaffirmed and extended in *Munn v. Shannon*, 86 Iowa 366, 367, 53 N. W. 264, holding further that the burden of proof is on the party pleading *res adjudicata* to prove it as set out in the text.

Reaffirmed and qualified in *Woodward v. Jackson*, 85 Iowa 435, 52 N. W. 359, holding further that in order for *res adjudicata* to apply as to a subsequent action, it must appear that the former action was between the same parties or their privies; that the question in issue was the same, and was determined upon its merits in the first action.

Cited in *Fairfield v. McNany*, 37 Iowa 77, holding that a defendant need not set up legal or equitable defenses he may have against a demand sued on, but may suffer judgment on the latter, and bring an independent action on the former: That when a defendant has a legal or equitable defense to an action, which exceeds plaintiff's demand and suffers judgment on the latter, he cannot be compelled as garnishee to pay the judgment, to a creditor of the judgment creditor.

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, *The Telegraph v. Lee*, 125 Iowa 17, 98 N. W. 364; *Shirland v. Union Nat'l Bank of Massilon*, 65 Iowa 96, 21 N. W. 200; *Atkins v. Anderson*, 63 Iowa 739, 19 N. W. 323; *Boyer & Barnes v. Austin*, 54 Iowa 402, 6 N. W. 585; *Pfiffner v. Krapfel*, 28 Iowa 27; *McCormick v. Grundy County*, 24 Iowa 383; *Moomey v. Maas*, 22 Iowa 380; *Standish v. Dow*, 21 Iowa 363; *Corwin v. Wallace*, 17 Iowa

374; *Delany v. Reade*, 4 Iowa 292; *Arnold v. Grimes and Chapman*, 2 Iowa 1.—Ed.)

Cross references. See further, sustaining, explaining and qualifying, but not citing the text, annotations, notes and cross references under *Myers v. Johnson County* (14 Iowa 47), ante. p. 203; *Whittaker v. Johnson County* (12 Iowa 595), ante. p. 102; *Clark v. Sammons & Van Pelt* (12 Iowa 368), ante. p. 61.

GIFFORD *v.* WORKMAN, 15 IOWA 34

1. Mortgages—Action to Foreclose—Parties—Mortgagor Who Has Conveyed Interest.—In an action to foreclose a mortgage on real estate all persons whose rights are to be affected or concluded by the decree ought to be made parties; and a mortgagor who has conveyed his interest in the premises with a covenant against incumbrances may, by motion supported by affidavit claiming an interest adverse to the plaintiff (mortgagee), be made a party, pp. 35, 36.

Reaffirmed and qualified in *Day v. Baldwin*, 34 Iowa 384, holding that the admissions of a mortgagor who has sold his interest in the property cannot be received against the purchaser thereof, in an action to foreclose.

Cross references. See further on this question, annotations under Rule 2 of *Johnson v. Monell* (13 Iowa 300), ante. p. 153; Rule 2 of *Semple v. Lee* (13 Iowa 304), ante. p. 154.

BARBER *v.* LYON, 15 IOWA 37

1. Fraud—Title Acquired by—Purchaser Trustee for Equitable Owner—Rights of Innocent Purchasers and Third Persons.—Where a person obtains title to real estate by fraud, he is treated in equity as trustee for the defrauded person or equitable owner, and the latter may sue in equity for a cancellation and compel a re-conveyance, or may follow the fund which represents the property as against the former and his privies, but not as against innocent purchasers or other third persons without notice, pp. 40-42.

Reaffirmed and varied in *Davidson v. Follett*, 27 Iowa 220, 99 Am. Dec. 648, holding that where the owner of land calls on a person holding various incumbrances thereon for a statement of all such claims, and the latter produces certain ones and states that they are *all*, which the owner accordingly settles in full, the holder of such claims and incumbrances is thereafter estopped from claiming a lien on such land existent and held by him at the time of the settlement.

2. Mortgages—Person Lending Money to Discharge—Subrogation.—Where a person lends money to a mortgagor to satisfy and extinguish a mortgage debt he (the lender) is not entitled to subrogation to the mortgagee's rights as against a subsequent good faith purchaser of the mortgaged premises or other innocent third person;

or as against the mortgage, in the absence of an agreement, express or implied, that the mortgage is to be kept in existence and the lender is to hold it as security for the money loaned, p. 43.

Reaffirmed, explained and qualified in Wormer & Son v. Waterloo Agricultural Works, 62 Iowa 702, 14 N. W. 332, holding that where one in nowise bound as surety or otherwise, to pay a debt, pays it without contract, or expectation that he will be substituted in the place of the creditor, he is not entitled to be so subrogated.

Reaffirmed, explained and qualified in Nat'l L. Ins. Co. v. Ayres, 111 Iowa 205, 82 N. W. 608, holding that one who voluntarily pays a lien debt of another, or who merely furnishes the money therefor, is not entitled to subrogation: But one who pays the debt under compulsion, or to save himself from loss, or upon an agreement for subrogation is entitled thereto.

(Note.—See further, sustaining and qualifying, but not citing the text, Weidner v. Thompson, 69 Iowa 36, 28 N. W. 422; Gilbert v. Gilbert, 39 Iowa 657.—Ed.)

STATE v. ANSALEME, 15 IOWA 44

1. Grand Jurors—Selection Under Code of 1860—Informal List Not Ground for Setting Aside Indictment—Directory Statute—Substantial Compliance With.—Where, under Sec. 2727 of the Code of 1860, the judges of the election in the townships of a county, return lists of grand jurors selected at the general election as required by law, but fail to certify or authenticate them, such fact or informality will not, in the absence of proof of fraud, be ground for setting aside an indictment returned by a grand jury formed from such lists. A substantial compliance with such law is all that is required, and, it being directory, a slight departure therefrom is immaterial, pp. 45, 46.

Reaffirmed and extended in State v. Brandt, 41 Iowa 600, 632 (cited in dissenting opinion, 618, 619, 643); State v. Edgerton, 100 Iowa 65, 69 N. W. 281; State v. Dusbrow, 130 Iowa 22, 106 N. W. 264, holding further that an indictment will not be set aside because of irregularities in the selection of the grand jury, where they do not affect or prejudice the substantial rights of the accused: A substantial compliance with the statute is all that is required.

Reaffirmed and varied in State v. Pierce, 90 Iowa 510, 511, 58 N. W. 893, holding that a challenge to a grand jury on the ground of technical irregularities in its selection, not affecting the substantial rights of accused, must be overruled: That the statute in relation to the selection of the grand jury is directory, and substantial compliance therewith is all that is required.

Distinguished in State v. Russell, 90 Iowa 570, 572, 573, 58 N. W. 916, 28 L. R. A. 195, holding that the statute of 1886, requiring among other things that not more than one person shall be drawn as a grand juror from any civil township, is mandatory, and that an indictment

returned by a grand jury two of which are from the same civil township, must be set aside on motion made by accused before pleading thereto (where the accused was not held to await the action of the grand jury and had no opportunity to object to or challenge it before the indictment was returned).

(Note.—See further on this question, *State v. Becky*, 79 Iowa 368, 44 N. W. 679; *State v. Hart*, 67 Iowa 142, 25 N. W. 99; *State v. Hughes*, 58 Iowa 165, 11 N. W. 706; *State v. Adams*, 20 Iowa 486; *State v. Carney*, 20 Iowa 82; *State v. Knight*, 19 Iowa 94.—Ed.)

Cross references.

"Grand jury—Challenge to panel—When to be made—Grounds for—Proceedings"—See annotations under Rules 1 and 2 of *State v. Gillick* (10 Iowa 98); *State v. Howard and Cress* (10 Iowa 101), Vol. I, pp. 649, 650. See also, on this subject, annotations under Rule 2 of *State v. Sater* (8 Iowa 420), Vol. I, p. 523.

2. Criminal Law—Indictment—Requisites—Naming Offense—What Sufficient.—An indictment under Sec. 1564 of the Code of 1860, charging the defendant with the offense of "nuisance," when the charging allegations thereof describes the offense under the section, sufficiently names the offense, p. 46.

Reaffirmed and extended in *State v. Davis*, 41 Iowa 313, 314, holding that where an indictment alleges facts constituting the crime of murder in the first degree, but *names* the crime as *manslaughter*, the name thereof will be treated as surplusage, and the accused will be tried for murder in the first degree.

Reaffirmed and extended in *State v. Brooks*, 85 Iowa 369, 52 N. W. 241, holding further that where an averment may, without detriment to the indictment, be entirely omitted, it will be disregarded as surplusage.

Reaffirmed and extended in *State v. Ean*, 90 Iowa 536, 58 N. W. 899; *State v. Wrand*, 108 Iowa 74, 78 N. W. 789, holding that an averment which is not necessary to the sufficiency of an indictment will be treated as surplusage.

(Note.—See specially, sustaining and extending, but not citing the text, *State v. Shaw*, 35 Iowa 575; *State v. Baldy*, 17 Iowa 39; *State v. Hessenkamp*, 17 Iowa 25. See further on and analogous to this question, *State v. Porter*, 97 Iowa 450, 66 N. W. 745; *State v. Jennings*, 79 Iowa 513, 44 N. W. 799; *State v. Goode*, 68 Iowa 593, 27 N. W. 772; *State v. Crawford*, 66 Iowa 318, 23 N. W. 684; *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370; *Town of Eldora v. Burlingame*, 62 Iowa 32, 17 N. W. 148; *State v. Carr and Brown*, 43 Iowa 418; *State v. White*, 32 Iowa 17; *State v. Morrissey*, 22 Iowa 158; *State v. Emeigh*, 18 Iowa 122; *State v. Schilling*, 14 Iowa 455; *State v. Gurlock*, 14 Iowa 444; *State v. Finan*, 10 Iowa 19; *State v. Freeman*, 8 Iowa 428.—Ed.)

RALSTON *v.* BLACK, 15 IOWA 47

1. Personal Property—Wrongful Seizure by Officer—Replevin—Action by Owner of Property.—An action of replevin may be maintained by the owner of personal property against an officer seizing it under a writ as the property of another; and the fact that it is in the possession of a bailee of the officer at the beginning of the action does not change the rule, pp. 48, 49.

Cited with approval in Nockles *v.* Eggspieler, 47 Iowa 402, holding that to constitute a valid levy under an attachment, the officer must do that which amounts to a change of possession, or which is equivalent to a claim of dominion, coupled with a power to exercise it, over the property sought to be levied upon.

Cross references. See further on this question, annotations and cross references under Gimble *v.* Ackley (12 Iowa 27), ante. p. 4; Cassel *v.* Western Stage Co. (12 Iowa 47), ante. p. 7; Rule 3 of Kingsbury *v.* Buchanan (11 Iowa 387); Buck *v.* Rhodes (11 Iowa 348). Vol. I, pp. 830 and 823, respectively.

MACHINISTS' BANK *v.* KRUM, 15 IOWA 49

1. Contracts and Notes—Usury—Partnership Liability Tainted With—Who May Plead Usury.—Where a note or other contract of a partnership is tainted with usury, the plea thereof may be interposed by any partner, or by a partner who assumes the liabilities of the firm upon its dissolution: And a renewal of such a note, or contract, or other change of the evidence of the usuriously tainted debt, does not affect the rule or prevent the effectiveness of the plea, pp. 52, 53.

Reaffirmed, varied and extended in Hamlin *v.* Parsons, 33 Iowa 210, holding further that injunction lies to restrain the foreclosure by notice and sale of a chattel mortgage given to secure a debt tainted with usury, except for the principal without interest or costs; and that in such action the court should adjudge the statutory penalty in favor of the state as in an action of foreclosure.

Cross references. See further on this question, annotations under Campbell *v.* McHarg (9 Iowa 354); Rule 3 of Smith et al *v.* Coopers et al (9 Iowa 376), Vol. I, pp. 588 and 592, respectively.

"Usury—Who can interpose plea"—See annotations under Hollingsworth *v.* Swickard (10 Iowa 385), Vol. I, p. 709.

"Usury voluntarily paid cannot be recovered"—See annotations under Nichols *v.* Skeel (12 Iowa 300), ante. p. 51.

WASHINGTON BANK *v.* KRUM, 15 IOWA 53

1. Negotiable Instruments and Accommodation Paper—Transfer Before Maturity—Defenses to in Hands of Transferee.—Where a negotiable instrument is, before maturity, taken in consideration of

a loan, or advancement, or in *payment* of a pre-existing debt, or under an agreement to extend the time of payment of such a debt or for a change of securities therefor, the transferee or holder will be protected from infirmities affecting the instrument before transfer—And the rule is applicable to accommodation paper, p. 57.

Reaffirmed in Winters v. Home Ins. Co., 30 Iowa 174, 175.

Reaffirmed and extended in Jones v. Berryhill, 25 Iowa 299, 300, holding further that the plea of want of consideration of an accommodation paper is ineffective as against an indorsee or holder for value, although the latter takes with full knowledge of such infirmity.

Cross references. See further on this question, annotations under Rules 1-3 of Trustees of Iowa College v. Hill (12 Iowa 462), ante. p. 75. See also, in this connection, annotations under Kelly v. Gillespie (12 Iowa 55), ante. p. 9.

PHILLIPS v. BUSH, 15 IOWA 64

(Later Appeal, 16 Iowa 593.)

1. Vendor and Purchaser—Deed Taken in Name of Third Person—Fraudulent Representations of Vendor—Action for—Parties.—Where upon the purchase of land, the purchaser has the deed made to a third person to secure a debt due by him (the purchaser), such third person may maintain an action for fraudulent representations made by the vendor inducing the contract, pp. 64, 65.

Reaffirmed in Phillips v. Bush, 16 Iowa 593 (abstract).

ELDER v. LITTLER, ADM'R, 15 IOWA 65

1. Appeal—Questions Not Raised Below—Review.—Questions not raised and decided below will not be reviewed upon an appeal to the Supreme Court, p. 66.

Reaffirmed in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 73.

Cited with approval in Heaton v. Fryberger, 38 Iowa 207 (dissenting opinion), the majority court's opinion not in point.

Cross reference. See further, sustaining, but not citing the text, annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66.

2. Decedent's Estate—Liability of Administrator De Son Tort.—An administrator *de son tort* is liable (under Sec. 2464 of the Code of 1860), to the regularly appointed executor, or to any creditor of decedent, for the value of all property taken or received by him, and for all damages caused by his acts, pp. 66, 67.

Reaffirmed and extended in Madison v. Shockley, 41 Iowa 452, 453, holding further that where the widow and heirs of a decedent take possession of and convert to their use the assets of the estate, and purchase and improve land therewith, and there are no assets in the hands of the regular administrator to pay a claim of a creditor against the

estate, the latter may sue the widow and heirs in equity, and subject the property purchased with such assets.

Reaffirmed and extended in French v. French, 91 Iowa 141, 59 N. W. 22, holding further that a widow who takes possession of her decedent husband's assets and property, is liable on a note executed by her in renewal of a note held by a creditor of her decedent consort: That where a person assumes to act in the settlement of a decedent's estate in a manner not authorized by law, he becomes an administrator *de son tort*, and assumes a personal liability to the value of the property or assets of the estate so taken or coming into his hands.

Cited with approval in Cooley, Adm'r v. Brown, 30 Iowa 472, 473, holding that an administrator may maintain an action for property, or its value, which was either voluntarily and fraudulently conveyed, or transferred by his decedent; and that in such case the purchaser of the property from the fraudulent grantee or transferee who takes with full knowledge of the facts, has no better rights than him through whom he claims.

YOKUM v. THOMAS, 15 IOWA 67

1. Conveyances—Covenants of Seizin, Right to Convey and Against Incumbrances—Breach of—Rights of Grantee—Demand on Grantor.—Upon covenants in a conveyance to land, of seizin, right to convey, against incumbrances, and to warrant and defend title, being broken, the grantee must first demand of the grantor that he remove the cloud from the title, before he can purchase a superior title, or sue to set it aside and make the grantor liable for costs and damages, p. 69.

Reaffirmed and extended in Meservey v. Snell, 94 Iowa 225, 226, 62 N. W. 768, 58 Am. St. Rep. 391; Alexander v. Staley, 110 Iowa 611, 612, 81 N. W. 804, holding further that it is not essential to a breach of covenant of warranty that there be an actual eviction of the grantee from the land warranted, a constructive eviction being sufficient: That where a grantor in a deed to land, containing a covenant of warranty, is notified of a litigation involving the title thereto and is given an opportunity to protect his warranty, which he fails to do, he is liable for attorneys' fees and costs incurred by his grantee therein.

Distinguished and narrowed in Thorne v. Clarke, 112 Iowa 550, 84 N. W. 702, 84 Am. St. Rep. 356, holding that the rule of the text applies only where the hostile title is by patent from the government: That a covenant of warranty runs against *substantial* but not *apparent* defects in title; and that a grantor of a deed to land containing a covenant of warranty is not liable to his grantee for costs incurred in an action to quiet title against a defect which is *apparent* and not *substantial*, although he is notified to defend and protect his warranty.

Unreported citation, 125 N. W. 670.

BARKER v. BROWN, 15 IOWA 70

1. New Trial—Verdict Contrary to Evidence as Ground For—Refusal of Trial Court to Grant—Appeal—Imperfect Record.—The judicial discretion of the trial court in refusing to grant a new trial because the verdict was against the evidence will not be reviewed upon appeal, unless the whole case as tried is presented by the record, pp. 70, 71.

Reaffirmed in Brainard v. Van Kuran, 22 Iowa 266, holding that every presumption is to be indulged in favor of the verdict of a jury, or the finding of the trial court, and a judgment will not be reversed because the verdict, or finding, is against the evidence, unless such fact clearly appears from the record upon appeal.

Reaffirmed and extended in Gantz v. Clark, 31 Iowa 259; First Nat'l Bank of Dubuque v. Carpenter, Stibbs & Co., 41 Iowa 521; Loomis v. Des Moines News Co., 110 Iowa 518, 81 N. W. 791, holding further that the rulings of the trial court will, on appeal, be presumed correct, unless the record affirmatively shows error.

(Note.—See further, sustaining and explaining, but not citing the text, Nat'l State Bank v. Boesch & Son, 90 Iowa 47, 57 N. W. 641; Smith v. Yager, 85 Iowa 706 (abstract), 50 N. W. 224; Pierce v. Herrold, 83 Iowa 764, 49 N. W. 1042; State v. Drorsky, 73 Iowa 484, 35 N. W. 586; Arneson v. Thorstad, 72 Iowa 145, 33 N. W. 607; Sheppard & Co. v. Downing, 14 Iowa 597 (abstract); Shepherd v. Brenton, 15 Iowa 84; Robison v. Saunders, Kibben & Co., 14 Iowa 539; Guest v. Byington, 14 Iowa 30; Lodge v. Reznor, 13 Iowa 600 (abstract), Bellamy, Bradley & McMakin v. Doud, 11 Iowa 285; Findley v. David, 7 Iowa 3, and there are many others.—Ed.)

Cross references. See further, annotations and cross references under Rule 1 of Guest v. Byington (14 Iowa 31), ante. p. 199; Jewett & Lovejoy v. Miller & Fuller (12 Iowa 85), ante. p. 17.

2. Arbitration and Award—Agreement For—Setting Aside—Ground For.—Courts will hesitate before setting aside and declaring as void, or not binding, an agreement of parties to arbitrate their controversies; and will do so only when injustice is done one of the parties by such an agreement, or fraud is shown, p. 72.

Cited in McKnight v. McCullough, 21 Iowa 113, holding that an agreement to submit a controversy to arbitration will not be set aside because it fails to provide as to *what* court is to render judgment on the award of the arbitrators (as provided by Sec. 3676 of the Code of 1860).

Cross reference.

"Arbitration and Award—What may be submitted—Re-referring award—Conclusiveness of, etc."—See annotations under Tomlinson v. Hammond (8 Iowa 40), Vol. I, p. 490.

STATE v. ELLIOTT, 15 IOWA 72

1. Evidence—Part of Conversation—Admissibility.—A part of a conversation between an accused person and another is admissible, the question of its weight and sufficiency being for the jury to determine. If the jury believe that the conversation is given in substance, then it is entitled to more weight than if it appears that only fragments thereof are given; and they are to determine its weight from the circumstances of the case, pp. 75, 76.

Reaffirmed in Nash v. Gibson, 16 Iowa 306, as to part of a conversation of a party sought to be thereby bound, detailed by a witness in a civil action.

(Note.—See further, Mays v. Deaver, 1 Iowa 216.—Ed.)

2. New Trial in Criminal Cases—Discretion of Trial Court—Review of Ruling on Appeal.—The appellate court will more liberally review the trial court's ruling in refusing to grant defendant a new trial in a criminal case than in civil actions; and where in such case it appears on appeal, that the verdict was clearly against the weight of the evidence and resulted in injustice, the judgment will be reversed: But when the testimony is conflicting, the appellate court should be well satisfied of its insufficiency to convince the judgment, reason and conscience of the jury and its resulting injustice, before the judgment will be reversed for that reason; especially when the trial court refused a new trial therefor, pp. 77, 79.

Reaffirmed in State v. Rainsbarger, 79 Iowa 748, 45 N. W. 302; State v. Wise, 83 Iowa 599, 50 N. W. 60.

Reaffirmed and qualified in State v. McComb, 18 Iowa 51, holding that a verdict in a criminal prosecution will not be disturbed on appeal, when the evidence, although not conclusive, is sufficient, and the verdict is not clearly against the weight thereof.

Cited with approval in Todd v. Branner, 30 Iowa 440; Snyder v. Eldridge, 31 Iowa 130, being civil actions.

Cross reference. See further, annotations under Rule 2 of State v. Tomlinson (11 Iowa 401), Vol. I, p. 833.

WAY v. LAMB, 15 IOWA 79

1. Promissory Note—Assignment of—Defenses to—Set-Off.—A set-off against the holder of a promissory note, does not attach to it and affect a subsequent holder thereof, whether it is indorsed to him before or after maturity, p. 83.

Reaffirmed and explained in Stannus v. Stannus, 30 Iowa 451, holding that where a negotiable note is transferred after maturity, the indorsee takes it subject to all defenses by way of counterclaim or otherwise that the maker has against the payee, which attach to the particular note, and would control, qualify or extinguish it, but not

subject to set-offs of the maker against the payee arising from independent transactions.

Cross references. See further on this question, annotations under *Lewis v. Denton* (13 Iowa 441), ante. p. 170; *Shippman v. Robbins* (10 Iowa 208), Vol. I, p. 669. See also, in this connection, annotations under *Trustees of Iowa College v. Hill* (12 Iowa 462), ante. p. 75.

2. Injunction to Restrain Collection of Judgment—Allegations and Proof.—In an action to enjoin the collection of a judgment, and to set aside the judgment, the complainant must allege and prove that he has a meritorious defense to the action wherein such judgment was rendered, p. 83.

Cited in *Uehlein v. Burk*, 119 Iowa 745, 746, 94 N. W. 244, holding that where a person seeks in an equitable action to set aside a void judgment *in rem*, he must allege and prove some special equity entitling him to the relief.

3. Affidavit—Jurat of Officer—Requisites.—The jurat of an officer to an affidavit (under Sec. 2913 of the Code of 1860) should state that it was signed by affiant in his (the officer's) presence and was sworn to by affiant before him, p. 82.

Reaffirmed and qualified in *Shaffer v. Sundwall*, 33 Iowa 582, holding that defects in the certificate of an officer to an affidavit or sworn pleading may be cured by amendment, by leave of court.

SHEPHERD v. BRENTON, 15 IOWA 84

(Later Appeal, 20 Iowa 41.)

1. New Trial Granted Below Under Mistake or Misapplication of Legal Rule—Sufficiency of Affidavits of Jurors to Impeach Verdict, etc.—Review on Appeal.—Where the trial court grants a new trial under a mistake or misapplication of a legal proposition, the ruling will be reviewed upon appeal with the same freedom as if made at any other stage of the proceedings: The rule applies to the decision of the trial court as to the admissibility and sufficiency of affidavits of jurors to impeach the verdict, or to show that they never consented to it, to the question of whether or not newly discovered evidence is merely cumulative, and to all questions strictly of law involved on a motion for a new trial, p. 90.

Reaffirmed in *Mehan v. C. R. I. & P. Ry. Co.*, 55 Iowa 308, 7 N. W. 614, holding that where the trial court in ordering a new trial, misapplies a legal principle, the ruling will be reviewed upon appeal as any other question of law.

Reaffirmed and explained in *Stineman v. Beath*, 36 Iowa 78, holding that a new trial will not be granted on account of newly discovered evidence, which is merely cumulative; but that evidence is not cumulative when it has, in any degree, an independent and distinct bearing upon the issue in the action wherein the new trial is sought.

Reaffirmed and extended in Riley v. Monohan, 26 Iowa 509, 510, holding further that the fact that a witness for a successful litigant was not sworn, is not a ground for a new trial, where the unsuccessful party moving for the new trial on account thereof, does not negative the fact that it was unknown to him *and* his attorney until *after the verdict was returned*: That such a question is one of law strictly and the order of the trial court granting a new trial in such a case will be reversed upon appeal.

Reaffirmed and extended in Dunlavey v. Watson, 38 Iowa 402, holding that newly discovered evidence which merely impeaches the character of a witness introduced on the trial, is not a ground for a new trial: Holding further that an affidavit of a juror cannot be received, on motion for a new trial, to show that he was unduly influenced by the statements of a fellow juror.

Cited in Wright v. Ill. Cent. R. R. Co., 20 Iowa 203, fully discussing the question of misconduct of the jury as a ground for new trial, and the extent to which affidavits of jurors may be received on motion therefor.

Cross references. See other rules hereof. See further, annotations, note and cross references under State v. Accola (11 Iowa 246), Vol. I, p. 810.

2. New Trial—Appeal from Order Granting—Reversal—When.
—The discretion given to the district court to grant or refuse a new trial on grounds not strictly questions of law, will not be interfered with upon appeal, unless that discretion has been abused, or unless it is apparent that great injustice has been done to the party complaining; and a stronger case of such abuse, or great injustice to appellant, must be made out where the new trial has been granted than where it has been refused, p. 91.

Reaffirmed in Whitney v. Blunt, 15 Iowa 284; Burlington Gas Light Co. v. Green, Thomas & Co., 21 Iowa 337; Chapman v. Wilkinson, 22 Iowa 543; Robinson v. Bacon & Strohm, 24 Iowa 411; Forney & Thayer v. Ralls & Willits, 30 Iowa 563; Tegeler & Co. v. Jones, 33 Iowa 237; Barnes v. McDaniels, 35 Iowa 382; New York Piano Forte Co. v. Mueller, 38 Iowa 554; Conklin v. City of Dubuque, 54 Iowa 572, 6 N. W. 894; King v. Ch. M. & St. P. Ry. Co., 138 Iowa 627, 628, 116 N. W. 720.

Cited in Brainard v. Van Kuran, 22 Iowa 266, holding that upon appeal to the Supreme Court every presumption is in favor of the verdict, or finding below (as the case may be); and the judgment will not be reversed because the verdict, or finding, was against the evidence, unless such fact is manifest from the record.

Cross references. See Rule 1 hereof, in this connection. See further, sustaining and explaining the text, annotations under Woodward v. Horst (10 Iowa 120); Newell v. Sanford (10 Iowa 396), Vol. I, pp. 654 and 712, respectively.

STEVENSON v. GREENLEE, 15 IOWA 96

1. **Trial—Instructions Based Upon Evidence—Appeal—Imperfect Record—Review.**—If upon appeal it appears that prejudice has resulted from an instruction given below, which under no supposable state of case was the law according to the issues in the action, then it is not necessary for the record to set out all the evidence adduced below in order for it to be reviewed in the appellate court and the judgment be reversed therefor, p. 97.

Reaffirmed and extended in Murphy v. Johnson, 45 Iowa 58, holding further that a judgment will be reversed because of the erroneous rulings of the trial court in giving or refusing instructions, when the errors are apparent from the issue and other record on appeal, although no part of the evidence on the trial be made part of the record upon appeal.

DONNELLY v. RUSCH, 15 IOWA 99

1. **Mortgage—Action for Foreclosure—Parties—Subsequent Incumbrancers.**—A junior incumbrancer, and a subsequent grantee of a mortgagor of land, are proper, but not necessary parties to an action of a senior mortgagee to foreclose his mortgage on such realty; if not made a party thereto, however, such subsequent incumbrancer, or grantee, is not concluded by anything done therein, p. 101.

Special cross reference. For cases citing, sustaining, etc., the text and many others on this question, see annotations under Heimstreet v. Winnie (10 Iowa 430), Vol. I, p. 723.

DAY v. GRIFFITH, 15 IOWA 104

1. **Bill of Sale or Deed Left For Record Without Knowledge or Assent of Vendee or Grantee—Subsequent Assent—Rights of Intervening Attachment Creditor.**—A bill of sale or a conveyance which is executed and left by the vendor, or grantor, with the recorder for record without the knowledge or consent of the vendee, or grantee, therein, but which is subsequently assented to and accepted by the latter, is not effective as against the rights of an intervening attachment, or judgment creditor of the vendor or grantor, pp. 105, 106, 107, 109, 113.

Reaffirmed in Nat'l State Bank of Burlington v. Morse, Wilson & Co., 73 Iowa 176, 34 N. W. 804, 5 Am. St. Rep. 670; Deere, Wells & Co. v. Nelson, 73 Iowa 188, 34 N. W. 810.

Reaffirmed and extended in Prather & Parr v. Parker, 24 Iowa 27, holding further that where personal property included in a prior, unrecorded bill of sale, is levied on by the sheriff under an attachment of a creditor of the vendor, neither the sheriff nor the attaching creditor knowing of the sale at the time of levy, and the property being in the possession of the vendor, debtor, then the attachment is prior to the claim of the vendees in the bill of sale.

Reaffirmed and extended in Fox v. Edwards, 38 Iowa 216, 217, holding further that where a debtor sells a crib of corn, to be later measured, at a certain price per bushel and the sale is not in writing, acknowledged and recorded as provided by Sec. 1923 of the Code of 1873, that such sale is void as to all creditors of the vendor, who become such before the measuring of the corn, without actual notice, and also as to innocent subsequent purchasers.

Reaffirmed and extended in Cobb v. Chase, 54 Iowa 254, 6 N. W. 300; Wadsworth & Co. v. Barlow, 68 Iowa 601, 27 N. W. 776, holding further that the mere execution and filing of a deed or other instrument for record, does not constitute acceptance of or delivery to the grantee: Holding, however, that where a person agrees to execute a mortgage on property specifically described in the agreement, and thereafter executes and files the instrument for record, acceptance of the mortgagee will be presumed, and it will be valid as against subsequent attachment, or judgment creditors of the mortgagor; but this last rule is inapplicable, unless such agreement specifically and accurately names and describes the property on which the mortgage is to be executed: Knowledge of the mortgagee of the execution and filing for record of a mortgage, is not of itself an acceptance thereof by him.

Reaffirmed and extended in Gage & Co. v. Parry, 69 Iowa 611, 29 N. W. 825, holding further that a written assignment of certain accounts and a chattel mortgage made by a debtor to a creditor, but not delivered or accepted by the latter, are invalid as against a subsequent deed of general assignment by such debtor.

Reaffirmed and extended in O'Connor v. O'Connor, 100 Iowa 480, 69 N. W. 677, holding further that a deed is of no validity, unless it is delivered to the grantee; and where, without a previous agreement between the parties therefor, a deed is left by the grantor with the recorder to be recorded, it does not constitute delivery of or acceptance by the grantee, and the grantor may at any time before such acceptance, order the return of the deed; and in such last case, if it has been recorded, may sue in equity to have the instrument canceled or declared ineffective.

Reaffirmed and qualified in Lampson & Powers v. Arnold, 19 Iowa 490, 491, holding that where one assuming to act as agent of a creditor accepts a conveyance by a debtor to him, and his act is ratified by the grantee (creditor), before any steps are taken by others adverse thereto, the conveyance and acceptance are valid.

Reaffirmed and qualified in Reid, Murdock & Fisher v. Abernethy, 77 Iowa 440, 441, 42 N. W. 365, holding that where a mortgage is executed and placed of record in pursuance of a previous agreement by which the mortgagor agreed to execute the instrument to the mortgagee on the land described therein, that the execution and placing

the mortgage of record constitutes delivery to and acceptance by the mortgagee.

Cited with approval in Mull & Sons v. Dooley, 89 Iowa 315, 316, holding that the question of whether or not there was a delivery of a conveyance is one of intention to be gathered from all the facts and circumstances of each case; that there can be no delivery without acceptance by the grantee, with full knowledge of the facts at the time thereof.

Cited in Lord v. Allen, 34 Iowa 282, on the effect of the death of the defendant (debtor) after the levy of an attachment as to the lien thereby given.

Distinguished in Henry County v. Bradshaw, 20 Iowa 361, 362, holding that where there was in fact a delivery of a mortgage, but the proof in an action involving the question fails to show the time of its delivery, it will be presumed to have been done at the time of its execution; and in such case the date of the acknowledgment of the instrument is to be taken as the true date of its execution.

Distinguished and narrowed in Everett v. Whitney, 55 Iowa 148, 7 N. W. 487, holding that where one borrows money of a non-resident of the state, agreeing with the lender to execute to him a chattel mortgage upon personal property in a particular county of this state and to take the mortgage to the recorder's office, leave it for record for the lender, and pay the recorder's fee, that upon such borrower executing a mortgage to secure the loan, on certain personal property belonging to him in such county, and leaving it for record with the recorder, such facts constitute a delivery to the mortgagee, and the instrument is valid as against all persons from the time it is so left with the recorder.

Distinguished in Peters v. Ham & Co., 62 Iowa 660, 18 N. W. 296, not in point.

Cross references. See further on this question, annotations under Foley v. Howard (8 Iowa 56), Vol. I, p. 492; McGavran v. Haupt (9 Iowa 83), Vol. I, p. 547; Courtright & Co. v. Leonard (11 Iowa 32), Vol. I, p. 766.

STATE v. EADS, 15 IOWA 114, 83 Am. Dec. 399

1. Mechanic's or Materialman's Lien — Action to Enforce — Parties—Conclusiveness of Decree, etc., in.—In an action to enforce a mechanic's or materialman's lien on land, a mortgagee in a mortgage thereon executed after the lien attached, is not a necessary party; and a sale of such land under a decree in such action vests the purchaser with title as against such incumbrancer, after the statutory period allowed to redeem from sale under execution, of which he could have availed himself, pp. 117, 118.

Reaffirmed in Shields v. Keys, 24 Iowa 307, 308; Diddy v. Risser, 55 Iowa 701, 8 N. W. 656.

Cited in Mayer v. Farmers' Bank, 44 Iowa 215, holding that junior lien holders have the right of redemption where there has been a foreclosure of a mortgage on real estate, to which proceeding they have not been parties, and that where a sale is made under Sec. 3664 of the Code of 1873, the purchaser thereunder takes subject to the right of redemption of junior lien holders, which right must be exercised in the time and manner allowed by law.

Cited in Evans v. Tripp, 35 Iowa 375; Jones v. Hartsock, 42 Iowa 152, holding that under the Code of 1851, as amended by Chap. 111, Laws of 1862, a mechanic or materialman has a lien as against the owner, purchasers and incumbrancers, on the premises on which work is done, or materials are furnished in the erection of a house or other improvements, for ninety days after the completion of the work, or furnishing of the last materials, and a lien on the premises from the expiration of such ninety days until he files his statement, as against the owner and purchasers or incumbrancers, with actual notice of his lien.

Cited in Mathes v. Cover, 43 Iowa 513, not in point.

Distinguished in Jones v. Hartsock, 42 Iowa 152, 153, holding that under Sec. 2510 of the Code of 1873, an action to enforce a mechanic's or materialman's lien is in equity, and all parties interested in the subject-matter may be parties thereto, and *must* be so made before they can be affected by the decree therein.

Cross references. See further, as to mechanic's, etc., liens, annotations and cross references under Noel v. Temple (12 Iowa 276), ante. p. 47.

PARSONS v. HEDGES, SHERIFF, 15 IOWA 119

1. **Replevin—Issue in—What is—Burden of Proof.**—In an action of replevin the issue is as to the right of *possession* of the property involved *at the time of the commencement of the action*; and where the plaintiff introduces proof of such fact, the burden is on the defendant to disprove it: Possession of personalty under purchase from a judgment debtor at the time of the levy of an execution thereon against him, establishes a *prima facie* case for plaintiff, and shifts the burden in such an action against the sheriff levying it, to the defendant to prove such purchase to be fraudulent, p. 120.

Reaffirmed in Brody v. Cohen, 106 Iowa 310-312, 76 N. W. 683, holding that in an action of replevin, it is the right to *possession* and not the *ownership* of the property which is involved.

Cross reference. See further, annotations and cross reference under Rule 3 of Kingsbury v. Buchanan (11 Iowa 387), Vol. I, p. 830.

2. **Appeal—Harmless Error.**—A judgment will not be reversed upon appeal for an error which is not to the prejudice of the substantial rights of the party complaining: So, where the record on appeal

shows that appellant was not entitled to judgment upon the trial below, he is not entitled to complain of the rulings of the lower court, p. 121.

Reaffirmed in Myers v. Wright, 44 Iowa 39.

Cross reference. See further, annotations and cross references under Braddy & Braddy v. Lumery (11 Iowa 29), Vol. I, p. 764.

STATE v. MINNICK, 15 IOWA 123

1. Elections—Voters—Residence in Township—What Constitutes.—Any *bona fide* resident of a township is entitled to vote at an election therein. Removal to a township for any length of time before an election with the *bona fide* intention by the voter of making it his permanent home, fixes residence and entitles a person to vote; but temporarily sojourning therein for however long a time, does not have this effect. The question is one of *intention* of the party claiming residence, to be determined from the facts and circumstances of each case. Residence once fixed, is presumed to continue until the party does some act showing an intention to permanently abandon it and to establish a permanent one elsewhere, pp. 126, 127.

Reaffirmed and explained in Vandepoel v. O'Hanlon, 53 Iowa 249, 5 N. W. 121, 36 Am. Rep. 216, holding (on the question of the qualification of a voter) that if a person leaves the place of his residence with the intention of residing in another place and of making it his place of residence, but never carries out his intention, the former is not changed: But if he intends to and actually becomes a *permanent* resident of the latter, the old is abandoned and the new acquired—The *intent* and *fact* must concur in order to change residence.

Reaffirmed and extended in Love v. Cherry, 24 Iowa 209-211, holding further that where a person who has a permanent *residence and domicile* in this state, leaves it for the purpose of making some visits and transacting some business, but with the intention of returning in a convenient, but uncertain time to his domicile herein, and thereafter becomes a *resident* of another state *for the purpose of qualifying as a personal representative* in the latter state, that a substituted service of an original notice by leaving a copy thereof at his usual place of residence, etc. (his domicile in this state), is sufficient upon collateral attack of a judgment rendered thereon by a court of this state.

Reaffirmed and extended in Church v. Crossman, 49 Iowa 448 (a case involving the validity of a service of summons or notice), holding further that a mere intention to remove from an established residence to another place, and the shipping of part of his goods to the latter, does not change a person's residence.

Reaffirmed and extended in State ex rel. Killpack v. Hemsworth, 112 Iowa 3, 83 N. W. 729, holding further that temporary absence with an intention to return, of a justice of the peace from his town-

ship, does not operate to vacate his office or constitute a ground for proceedings therefor.

Unreported citation, 105 N. W. 388.

(Note.—See further, *Fitzgerald v. Arel*, 63 Iowa 104, 16 N. W. 712, and 18 N. W. 713, 50 Am. Rep. 733; *Nugent v. Bates*, 51 Iowa 77, 33 L. R. A. 117; *Cohen v. Daniels*, 25 Iowa 89.—Ed.)

Cross reference. See further on this question, annotations under *Hinds v. Hinds* (1 Iowa 36), Vol. I, p. 164.

2. Judicial Notice—General Election, etc.—Courts take judicial notice of the dates of general elections and of the officers voted for thereat, and such facts need not be averred or proven, p. 125.

Reaffirmed and extended in *State v. Braskamp*, 87 Iowa 591, 54 N. W. 533, holding further that courts will take judicial notice of matters of public notoriety; and that the population of a county of this state according to the last census of the United States, is such a matter.

MCCORMICK v. RUSCH, 15 IOWA 127, 83 Am. Dec. 401

1. Constitutional Law—Act Granting Continuance to Parties to Actions Who Are in Actual Military Service of the United States.—Chapter 109, Laws of 1862, granting a continuance of an action to any party thereto, upon his motion, who is in the actual military service of the United States, while so engaged, is constitutional, pp. 139-141.

Reaffirmed in *Butler, Keeth & Co. v. McCall & Sypher*, 15 Iowa 432, 433 (cited in dissenting opinion 434); *Clark v. Woodbury*, 23 Iowa 63.

Reaffirmed and extended in *Watts v. Everett*, 47 Iowa 271, 272; *Kossuth County v. Wallace*, 60 Iowa 509, 510, 15 N. W. 304, holding further that an act affecting or changing a remedy or procedure, and which does not impair the substantial rights of parties under contracts, may be retrospective and does not violate the Constitution.

Cited with approval in *City of Davenport v. M. & M. R. R. Co.*, 16 Iowa 360, 361, upholding constitutionality of the Act of 1862, authorizing a tax upon the gross receipts of railroad companies.

Cited with approval in *Stewart v. Board of Supervisors of Polk County*, 30 Iowa 15, 1 Am. Rep. 238, upholding the constitutionality of Chap. 102, Acts of 1870, allowing municipal corporations to aid in the construction of railroads.

Cited with approval in *Campbell v. Long*, 20 Iowa 386, holding that an act relative to the limitation of actions for the recovery of real estate which does not affect causes of actions accrued at the time of its passage, is constitutional.

Cited with approval in State v. Tait & Tait, 22 Iowa 143, upholding constitutionality of the statute granting the State the right to appeal from a justice's court in criminal prosecutions.

Cited with approval in Shaw v. Marshalltown, 131 Iowa 137, (dissenting opinion, 154) 104 N. W. 1125, 10 L. R. A. (New Series) 825, upholding the constitutionality of Chap. 9, Laws of Thirtieth General Assembly granting preference in appointment to minor municipal offices, to soldiers, sailors and marines from the Army and Navy of the United States in the late Civil War, who are citizens and residents of this state.

Cited with approval in Thompson v. Mitchell, 133 Iowa 529, 110 N. W. 902, the court holding that a court will not pass upon the constitutionality of a statute if the case may be disposed of upon any other ground.

Cross references. See further in this connection, annotations and cross references under Dalby v. Wolf & Palmer (14 Iowa 228), ante. p. 231; Holloway v. Sherman (12 Iowa 282), ante. p. 48; and Duncombe v. Prindle (12 Iowa 1), ante. p. 1.

HANNAHS v. FELT, 15 IOWA 141

1. Soldiers' Property Exempt—Statute of 1862, Construed.—The act of April 7, 1862, exempting property of volunteers in the actual military service of the United States from levy and sale, does not apply to or exempt it from levy under attachment, p. 142.

Reaffirmed in Ryan v. Wessels, 15 Iowa 145.

Cited in Shaw v. Marshalltown, 131 Iowa 138 (dissenting opinion, 154), 104 N. W. 1125, 10 L. R. A. (New Series) 825, not in point.

2. Attachment—Effect of Levy—Lien of—What Discharges.—The actual service of an attachment upon property creates a lien thereon which nothing but dissolution can destroy. The lien dates from the levy of the attachment, and not from the judgment in the action, pp. 143, 144.

Reaffirmed in Citizens' Nat'l Bank v. Converse, 101 Iowa 311, 70 N. W. 201.

Reaffirmed and extended in Lord v. Allen, 34 Iowa 282, 283, holding further that the death of the defendant (debtor) and an appointment of an administrator for his estate after the levy of an attachment, does not dissolve the writ or affect the lien thereby acquired.

(Note.—See further, sustaining, but not citing the text, Buck-Reiner Co. v. McCoy, 85 Iowa 577, 52 N. W. 514; Boothby v. Brown, 40 Iowa 104; Kuhn v. Graves, 9 Iowa 303; Rowan v. Lamb, 4 G. Greene 468.—Ed.)

DE MOSS v. HAYCOCK, 15 IOWA 149

1. Slander—Meaning of Words—What to be Considered in Arriving at.—In an action for slander the defendant is accountable for

the import of the alleged slanderous words as they would naturally have been understood by the hearer or person to whom published; and explanatory circumstances known to both the former and the latter at the time the words were uttered and published, are to be considered as part of them, p. 150.

Reaffirmed in Dixon v. Stewart, 33 Iowa 129.

Reaffirmed and extended in Sheibley v. Ashton, 130 Iowa 200, 106 N. W. 620, holding further that in an action for libel or for slander, the words complained of are, in the absence of explanatory circumstances known to the publisher and the person to whom published, to be given their natural and ordinary signification.

Reaffirmed and qualified in Barton v. Holmes, 16 Iowa 257, 258, holding that in an action for slander, inquiry of a witness to whom the words were uttered and published, as to the sense in which he understood them can arise only where, from the words themselves, there exists a doubt as to the sense in which they were understood.

2. **Appeal—Harmless Error.**—The Supreme Court will not reverse a judgment for errors of the trial court not affecting and prejudicial to the substantial rights of the party complaining upon the appeal, p. 151.

Reaffirmed in Barton v. Holmes, 16 Iowa 258; Hunt v. Ch. & N. W. R. R. Co., 26 Iowa 366.

Cross reference. See further, Rule 2 of Parsons v. Hedges (15 Iowa 119), ante. p. 313, and cross references there found.

DANIELS & CO. v. CLAFLIN, 15 IOWA 152

1. **Judgment by Confession—Sufficiency of Statement For.**—A statement of facts out of which the indebtedness arose, on which to base a judgment by confession, which sets out and describes several promissory notes, and recites the consideration as cash advanced by the plaintiff to the defendant for the purpose of buying hogs, and for "sundry articles of dry goods" and "a bill of groceries," is sufficient both as against the defendant and his subsequent creditors, pp. 152, 153.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Vanfleet v. Phillips (11 Iowa 558), Vol. I, p. 860.

STATE v. WILEY, 15 IOWA 155

1. **School Fund—Mortgage on Land to Secure Money Borrowed From—Failure to Appraise—Liability of Sureties.**—The failure of the school fund commissioner to have land appraised (as required by statute) on which a mortgage is given to secure a note for money borrowed from the school fund, will not, in the absence of fraud, release or affect the liability of the sureties on such paper, p. 156.

Reaffirmed and extended in Bremer County v. Barrick, 18 Iowa 392, 393, holding further that the borrower of money from the school fund and the surety on the note given therefor, cannot, in the absence of fraud, claim release from liability on such paper by reason of the fact that no mortgage on land was given to secure it: That if the school fund commissioner in such case fails to take such mortgage, the proper authorities may repudiate the act and make him and the sureties on his official bond liable, or may ratify the act and look to the borrower and his surety.

GUSTIN v. JEFFERSON COUNTY, 15 IOWA 158

I. Limitation of Actions—Action for Personal Injury—When Limitation Commences to Run.—An action for injury to the person is barred (under Sec. 2740 of the Code of 1860) unless action therefor is commenced within two years after the happening of the injury, from which time the statute of limitation begins to run, and not from the discovery of the full extent of the injury, pp. 159, 160.

Reaffirmed and extended in Steel & Johnson v. Bryant, 49 Iowa 117, holding further that an action against a district court clerk and his sureties for taking an insufficient stay bond, accrues at the expiration of the period of the stay: That the extent of the damage or whether fully known at the time the act of misfeasance or non-feasance of an officer takes place, in no manner affects the cause of action therefor.

LAUMAN, HEDGES & Co. v. NICHOLS, 15 IOWA 161

I. Promissory Notes — Principal and Surety — Evidence of Suretyship Other Than on Face of Note—Effect on Holders—Extension of Time of Payment.—In an action on a promissory note by an indorsee thereof against two or more makers thereof, one of the defendants may show that although he appears as principal he, in fact, signed as surety, and that such fact was known to the plaintiff (indorsee) before its maturity who extended the time of payment thereof to the real principal without his (the surety's) knowledge or consent and for a valuable consideration, thereby releasing him, pp. 163, 165.

Reaffirmed in Bonney v. Bonney, 29 Iowa 451, holding that a binding agreement with the principal extending the time of payment of a note, or other evidence of indebtedness, made without the consent of the surety, releases the latter, regardless of whether or not he was thereby prejudiced.

Reaffirmed and extended in Piper v. Newcomer & Campbell, 25 Iowa 221, 222, holding further that the fact of suretyship and its knowledge by the payee of a note whereon sureties appear as principals may be proven by evidence *aliunde*; and that in such a case a surety may, under Secs. 1819, 1820 of the Code of 1860, give the payee notice in writing requiring him to sue upon the note or permit him

(the surety) so to do, and upon such payee allowing more than ten days to thereafter elapse without complying with such notice, the surety will be discharged.

Distinguished in McAreavy v. Magirl, 123 Iowa 608, 609, 99 N. W. 195, holding that principals on a note or other instrument, cannot by an agreement not assented to by the payee or creditor, change their relations so as to affect the rights of the latter: That mere indulgence to one joint debtor by a creditor, will not release another joint debtor from liability.

Cross references. See further, on this question, annotations under Kelly v. Gillespie (12 Iowa 55), ante. p. 9; Corielle v. Allen (13 Iowa 289), ante. p. 151.

MILLER v. COREY, ADM'R, 15 IOWA 166

I. Vendor and Purchaser—Contract For Sale of Land—Liability of Purchaser for Taxes.—Where a contract by which the vendor agrees to deliver to the purchaser of land "a good and sufficient deed, clear of all incumbrances" therefor, upon the payment of the purchase money, is silent as to who is to pay the taxes until the execution of the conveyance, and the purchaser enters thereunder into possession of the property, he is liable for taxes thereon after such entry, pp. 167, 169, 171.

Reaffirmed in Baldwin v. Mayne, 42 Iowa 138.

Reaffirmed and extended in Hunt v. Rowland, 22 Iowa 55, holding further that a vendee of land in possession thereof under a contract to convey, which is silent as to who is to pay the taxes until payment of the purchase price and conveyance by vendor, must pay the taxes after his entry to such time, and cannot directly or indirectly acquire a title at a sale thereof for such taxes, so as to affect the rights of his vendor.

Reaffirmed and qualified in Nunngesser v. Hart, 122 Iowa 649, 650, 98 N. W. 506; Clinton v. Shugart & Ouren, 126 Iowa 183, 184, 101 N. W. 787, holding that the vendor in a contract to convey land and deliver possession thereof at a future date upon the payment of the purchase price, is liable for the taxes thereon up to the date of the conveyance and delivery of possession to the purchaser, in the absence of an express agreement to the contrary: That in such cases *possession* of the premises governs the liability for the payment of taxes, in the absence of express contract to the contrary.

Cited with approval in Meyer v. Dubuque County, 49 Iowa 195, a case turning upon another question.

Cited in Sheehy v. Scott, 128 Iowa 557, 104 N. W. 1141, 4 L. R. A. (New Series) 365, not in point, but on an analogous question.

Cited in In re estate of Bernhard, 134 Iowa 608, 112 N. W. 87, 12 L. R. A. (New Series) 1029, not in point, but upon analogy.

Unreported citation, 125 N. W. 340.

(Note.—See further, sustaining, explaining and qualifying, but not citing, the text, *Frost v. Clark*, 82 Iowa 298, 48 N. W. 82; *Lillie v. Case*, 54 Iowa 177, 6 N. W. 254; *Sackett v. Osborn*, 26 Iowa 146.—Ed.)

DAVIS *v.* BONAR AND KEARNS, 15 IOWA 171

1. **Execution From Supreme Court—Injunction by District Court.**—Proceedings under an execution from the Supreme Court levied upon land, may be enjoined by the district court of the county wherein the realty is situated, upon a bill in equity by a person claiming a superior title thereto, and upon sufficient allegations and proof therefor, p. 174.

Reaffirmed in *Massie v. Mann*, 17 Iowa 133, holding that the district court of a county wherein land levied upon under an execution from the Supreme Court is situated, may, upon proper showing, enjoin proceedings thereunder.

Overruled in *Phelan v. Johnson*, 80 Iowa 731, 732, 46 N. W. 70, holding that under Sec. 3396 of the Code of 1873, a suit to enjoin an action or a judgment must be brought in the county and court in which the action is pending or the judgment was obtained: And that the district court of a county other than that wherein the original action was commenced and judgment appealed from rendered, has no jurisdiction to enjoin proceedings under an execution from the Supreme Court: The court further saying: "We need not determine now whether we would entertain an original injunction proceeding, to set aside for fraud a judgment rendered in this court. It will be time enough to decide that question when a case arises which presents it. It is very clear that if we would not entertain such a case, under Code (1873), Sec. 3396, it should be commenced in Polk County, wherein this court is held, or if the case wherein this court rendered judgment is pending in the court below, it should be commenced in the proper court of the county in which the action is pending."

2. **Pleadings—Demurrer—Causes For Under Code of 1860—Argumentative Pleading.**—Secs. 2061, 2063, 2876 and 2918, of the Code of 1860, limits the causes of demurrer, and no other causes are allowed thereunder: That a pleading is argumentative is no cause therefor, p. 174.

Cited in *Beckwith v. Dargets*, 18 Iowa 304, holding that a pleading may (under Code of 1860) be assailed by demurrer for *defect* of parties, but not *misjoinder* thereof.

3. **Mortgage on Land — Action to Foreclose — Acceptance of Judgment by Plaintiff and Failure to Appeal—Rights of Innocent Purchasers—Estoppel.**—Where the plaintiff in an action to foreclose a mortgage on land, accepts the amount of the judgment therein in his favor, acknowledging the receipt thereof upon the record by his attorneys, pays the costs of the action adjudged against him, and fails

to prosecute an appeal from the judgment within six months after its rendition, he is estopped, as against an innocent purchaser of the mortgaged premises, from claiming rights therein awarded to him upon a subsequent appeal, pp. 175, 176.

Distinguished in Smith v. Kearns, 24 Iowa 590 (abstract), holding that in order for the doctrine of the text to apply, the subsequent purchaser of the mortgaged land must actually buy and *pay the consideration* for the land in reliance of the party's acceptance of the judgment and failure to appeal.

Cross reference. See further in this connection, annotations under M. & M. R. R. Co. v. Byington (14 Iowa 572), ante. p. 286.

HATFIELD v. GANO, 15 IOWA 177

1. Criminal Law—Abortion by Married Woman Upon Herself.—The causing an abortion upon herself by a married woman who is not quick with child, is not a criminal offense under the Code of 1851, or under Sec. 4221 of the Code of 1860 (which is an act of 1858); and to charge a woman therewith is not slander.

The section of the Code of 1860, mentioned, prescribes the penalty for one procuring or causing a pregnant woman to abort or miscarry, and not to the act of the woman herself, pp. 178, 179.

Reaffirmed and extended in State v. Moore, 25 Iowa 132, 95 Am. Dec. 776; State v. Crofford, 133 Iowa 479, 480, 110 N. W. 922, holding further that where a person willfully and unnecessarily performs an abortion which causes the woman's death, he is guilty of murder in the second degree under the statute.

Reaffirmed and qualified in State v. Crofford, 133 Iowa 480, 110 N. W. 922, holding that although a woman cannot be guilty of committing an abortion upon herself, yet if she conspires with another therefor, she is a co-conspirator, and her declarations and acts in furtherance thereof, are admissible against the perpetrator or other conspirators upon the trial of an indictment therefor, or for murder in thereby unnecessarily causing her death.

Cross reference.

"Criminal Common Law—To what extent abrogated by statute"
—See annotations under Rule 2 of *Estes v. Carter* (10 Iowa 400), Vol. I, p. 714.

2. Pleadings—Amendment After Cause Submitted to the Jury.
—It is not reversible error for the trial court in the exercise of his discretion, to refuse to permit an amendment to a pleading after a cause has been finally submitted to the jury, p. 179.

Reaffirmed and explained in Fulmer v. Fulmer, 22 Iowa 232; Hays v. Turner, 23 Iowa 217, holding that in the matter of allowing or refusing amendments to pleadings, the trial court has a large judicial discretion, and his ruling thereon will not be ground for reversal, except

in case of abuse thereof and resulting prejudice to the substantial rights of the party appealing and complaining.

Cross reference. See further, sustaining and explaining, but not citing the text, annotations under Rule 2 of Seevers, *Adm'r v. Hamilton* (11 Iowa 66), Vol. I, p. 773.

STRUNK v. OCHILTREE, 15 IOWA 179

1. Trial—Evidence—Witness — Discrediting or Contradicting by Previous Statement—Ground to be Laid.—A witness cannot be contradicted or discredited by reason of his previous inconsistent statements or conversations, without he is first asked, while testifying, whether or not he made or had them at the time and place thereof, and the time and place thereof must be called to his attention, p. 180.

Reaffirmed and extended in Williamson v. Peel, 29 Iowa 459, holding further that where an affidavit is read as the testimony of an absent witness, previous statements of the absent witness inconsistent with the ones in the affidavit are inadmissible.

Reaffirmed and extended in State v. Collins, 32 Iowa 41, holding the rule applicable to evidence of a witness by deposition; and holding further that in the question to the witness, the time, place and person to whom the contradictory statement was made, must be given.

(Note.—See further, sustaining and explaining, but not citing the text, State v. Shannehan, 22 Iowa 435; Samuels v. Griffith, 13 Iowa 103; Morrison v. Myers & Turner, 11 Iowa 538; State v. Ruhl, 8 Iowa 447, and there are others.—Ed.)

Cross references. See further, sustaining, but not citing the text, annotations under Rule 2 of Samuels v. Griffith (13 Iowa 103), ante, p. 125; Morrison v. Myers & Turner (11 Iowa 538), Vol. I, p. 857.

MYERS v. SMITH, 15 IOWA 181

1. Contracts and Notes to Pay Money Which Are Silent as to Interest—Rate of Interest Allowed.—When a contract, or note to pay money is silent as to interest, it will bear interest at the rate of six per cent. per annum from its maturity. So, where upon the dissolution of a partnership, one member thereof assumes *all the debts of the firm*, another partner who thereafter pays a judgment against the firm, is entitled to judgment against the first therefor, with six per cent. interest per annum from date of its payment, pp. 184, 185.

Reaffirmed and extended in Vennum v. Gregory, 21 Iowa 328, holding further that the legal rate of interest is six per cent. per annum, unless a higher rate be agreed upon and expressed in writing; and that in the absence of a written agreement therefor, the court cannot allow a rate higher than the legal, *as damages*.

Reaffirmed and extended in Richards v. Burden, 59 Iowa 729 (abstract), 7 N. W. 22, holding further that interest at a greater rate than

six per cent. per annum is allowable only when the parties agree in writing for its payment.

(Note.—See further specially, *Knapp v. Miller*, 13 Iowa 596 (abstract); *Thrift v. Redman*, 13 Iowa 25.—Ed.)

HERSHEE & HURER v. HERSHEY, 15 IOWA 185

1. Equity Action—Decree by Consent—What Does Not Constitute.—The fact that counsel for a party to an equitable action was present in court when the report of the master commissioner was filed and confirmed, and made no objection thereto, does not constitute consent of the party to a decree entered thereon, and will not estop him from appealing therefrom, p. 186.

Reaffirmed and extended in *Cooper v. Disbrow*, 106 Iowa 558, 76 N. W. 1016, holding further that in order to constitute a judgment by consent or agreement, such fact must appear of record in the action wherein it is rendered.

LEAS, HARSH & SINCLAIR v. WHITE, 15 IOWA 187

1. Pleadings — Petition — Sufficiency of Allegations of.—The facts constituting the plaintiff's cause of action and showing him entitled to recover, must be stated in the petition with clearness sufficient to enable the court to determine the pleader's rights thereon if they are undenied: Mere general terms or conclusions are insufficient, and such a petition is bad upon demurrer, p. 189.

Reaffirmed in *Holloway v. Griffith*, 32 Iowa 413, 7 Am. Rep. 208.

BEEZLEY, ADM'R v. BURGETT, 15 IOWA 192

1. Forcible Entry and Detainer—Who May Maintain Action—Personal Representative and Heir of a Decedent.—The personal representative, or the heir of a decedent may (under Sec. 3954 of the Code of 1860) maintain an action of forcible entry and detainer to recover possession of land owned by decedent at the time of his death. If the administrator brings and succeeds in such action, he holds possession for such heir, pp. 193, 194.

Reaffirmed, extended and qualified in *Kinsell v. Billings*, 35 Iowa 156, holding further that under Sec. 3954 of the Code of 1860 and Chap. 139, Laws of 1866, when there are no heirs or devisees of a decedent present, or competent to take possession of his real estate, the personal representative may demand and sue for its possession, for the rents and profits thereof, and do all other acts consistent with the interests of the person entitled thereto, thus acting as the agent or trustee for the latter: That the personal representative has nothing to do with land, or its rents and profits, except as provided by statute.

Cited in *Laverty v. Woodward*, 16 Iowa 5, holding (as announced in the present case in argument) that a personal representative of a decedent has no right to the rents and profits of the latter's land.

Cited in Crawford v. Ginn, 35 Iowa 550, holding that rents for the lands of decedent accruing before his death are assets of the estate recoverable only by the administrator.

Cited in Dexter v. Hayes, 88 Iowa 495, 55 N. W. 491; Valley Nat'l Bank v. Crosby, 108 Iowa 656, 79 N. W. 384, holding that unless otherwise provided by statute, or by will, the heirs and not the personal representative are entitled to the rents and profits of decedent's real estate.

Cited in Valley Nat'l Bank v. Crosby, et al, 108 Iowa 656, 79 N. W. 384, holding that a personal representative has no power or authority over real estate of a decedent, or of its rents and profits, except as given by statute (in the absence of a will conferring special powers); and that a note given by a personal representative for borrowed money and attempting to bind the real estate of decedent and its rents and profits, is void, although given by order of court, where no notice of the proceeding to obtain the order was given to the heirs.

CITY OF DAVENPORT v. MITCHELL, 15 IOWA 194

1. Pleadings—Petition—Supplemental — When and for What Allowed.—A supplemental petition may, after answer and by leave of court, be filed, setting out facts happening or coming to plaintiff's knowledge after the commencement of the action, and making ineffective a defense pleaded by the defendant, p. 196.

Reaffirmed, explained and extended in Leach v. Germania Bldg. Ass'n of Clinton, Iowa, 102 Iowa 126, 70 N. W. 1090, holding that the filing of a supplemental pleading is largely within the discretion of the trial court: Holding further that upon a reversal of a judgment in an action for partition of real estate, it is proper for the court to allow a supplemental petition to be filed which claims rents during the pendency of the appeal, and that such a pleading should not be stricken from the files upon motion of the defendant.

Reaffirmed and extended in Sigler v. Gondon, 68 Iowa 442, 443, 27 N. W. 373, holding further that where plaintiff sues for rent accrued on a lease, he may, by leave of court, file a supplemental petition claiming rent accrued on the same lease since the commencement of the action, and that such a pleading should not be stricken from the files.

Reaffirmed and extended in Little v. Pottawattamie County, 127 Iowa 380-382, 101 N. W. 754, holding further that where plaintiff sues a county for injuries resulting from his falling through a bridge, without, prior to the commencement of the action, service of notice as provided by Sec. 3528 of the Code of 1897, and before the proper authorities had acted on the claim, that he should be allowed to file a supplemental petition, upon proper terms, setting out the refusal by the board as provided by the Code of 1897 above.

Reaffirmed and narrowed in Zalesky v. Home Ins. Co., 102 Iowa 621, 71 N. W. 568, holding that where plaintiff is required to do a certain act as a condition precedent to his right to maintain an action, that he cannot, pending action, do or offer to do it, and thus cure the defect arising from his laches.

(Note.—But see and compare Little v. Pottawattamie County, above.—Ed.)

Cross reference. See further, annotations and cross references under Seevers, Adm'r v. Hamilton (11 Iowa 66), Vol. 1, p. 773.

HUNT v. COE AND WELLS, 15 IOWA 197

1. Statute of Frauds—Parol Transfer of Lease—Action on—Failure of Party Sought to be Bound to Confirm Under Oath—Contradiction of.—Where in an action on a parol transfer of a lease of land for years, the plaintiff calls the defendant (party sought to be bound) as a witness in order that he confirm it under oath, as allowed by Sec. 4010 of the Code of 1860, and thereby save the contract from the operation of the Statute of Frauds, and the witness (defendant) denies the execution of the contract, his testimony thereon cannot be thereafter impeached or contradicted therein by other testimony offered by plaintiff, pp. 199, 200.

Reaffirmed in Mighell v. Dougherty, 86 Iowa 484, 53 N. W. 403, 41 Am. Rep. 511, 17 L. R. A. 755; *Powell v. Crampton*, 102 Iowa 365, 71 N. W. 579.

Cited in Porter v. McKinzie, 20 Iowa 464; *Stewart v. McMillan*, 34 Iowa 457, holding that in order, under Sec. 2742 of the Code of 1860, for an action on a contract to be saved from the bar of the statute of limitation, it must affirmatively appear from the evidence of the defendant *alone*, that the cause of action thereon still justly subsists.

(Note.—See further, sustaining, extending and explaining, but not citing the text, *Dewey v. Life*, 60 Iowa 361, 14 N. W. 347; *Smith v. Phelps*, 32 Iowa 537; *Thorn & Stein v. Moore*, 21 Iowa 285; *Auter v. Miller*, 18 Iowa 405.—Ed.)

2. Statute of Frauds—Parol Transfer of Lease of Land For Years—Part Performance of Lease—Effect.—Partial performance of a lease of land for a term of years, does not take a parol transfer thereof out of the Statute of Frauds, pp. 201, 202.

Reaffirmed and extended in Thorp v. Bradley, 75 Iowa 52, 39 N. W. 178, holding further that the taking possession of land leased for a term of years by a parol lease, occupancy thereof during the term, and part payment of the rent therefor by the lessee, does not take the contract out of the Statute of Frauds.

Reaffirmed and extended in Burden v. Knight, 82 Iowa 587, 48 N. W. 986; *Powell v. Crampton*, 102 Iowa 365, 71 N. W. 579, holding further that partial performance of an oral lease of land for a term of years, does not take it out of the Statute of Frauds.

HUMPHREY v. DARLINGTON, 15 IOWA 207

1. Judgment at Law—Fraud or Wrong in Obtaining—Equitable Relief.—Where the evidence clearly and unequivocally shows that a judgment at law was wrongfully and fraudulently obtained, without fault or negligence of the defendant, it will be set aside in equity, p. 213.

Reaffirmed and extended in Barthell v. Roderick, 34 Iowa 519, holding further that a mistake in a judgment in an action at law, not the result of the negligence of the party complaining or his attorney, may be corrected by an action in equity: And that a mistake in a calculation of an attorney, whereby a judgment in an action on a promissory note is for too small a sum, may be so corrected.

Cited with approval in Whitcomb v. Collier, 133 Iowa 311, 110 N. W. 839, setting aside a settlement obtained by fraud, duress and undue influence.

Cross reference. See further, annotations under Johnson v. Lyon (14 Iowa 431), ante. p. 261, and cross reference there found.

DAVENPORT MUTUAL SAVINGS FUND & LOAN ASS'N v. SCHMIDT, 15 IOWA 213

1. County Court—Jurisdiction—What Confers — Presumption of Regularity of Proceedings—Establishment of Road—Irregularities and Error—Appeal.—The filing of a petition in the county court and the service of notice thereon for the establishment of a road, confers jurisdiction on that court; and its proceedings thereafter therein will be presumed regular, and cannot be assailed collaterally. In such case if irregularity or error occurs, the party aggrieved has his remedy by appeal, pp. 215, 216.

Reaffirmed in State v. Lane, 26 Iowa 225.

Reaffirmed and explained in Smith, Stebbins & Co. v. Engle, 44 Iowa 268; Caughlin v. Blake, 55 Iowa 637, 8 N. W. 476, holding that when jurisdiction is shown to have attached, the subsequent proceedings of a court of limited, is presumed as regular as those of a court of general jurisdiction and all its orders and judgments are binding until reversed upon appeal, and cannot be attacked collaterally.

Reaffirmed and extended in Knowles v. City of Muscatine, 20 Iowa 250, holding further that a judgment of the county court, having jurisdiction of the subject-matter and of the parties, establishing a public road of a greater width than allowed by statute, is *erroneous* and not *void*, and may be reversed upon appeal, but cannot be collaterally attacked.

Reaffirmed and extended in Pursley v. Hayes, 22 Iowa 36-38, 92 Am. Dec. 350, holding further that a court will not presume facts inconsistent with the return of a writ in order to divest rights acquired thereunder, nor to defeat a judgment of a court of competent jurisdiction.

Reaffirmed and extended in Danforth v. Thompson, 34 Iowa 246, holding further that where the jurisdiction of a foreign court, as to the subject-matter and parties to an action, is shown, its judgments and proceedings will be presumed as regular and conclusive as those of courts of general jurisdiction of this state.

Unreported citation, 48 N. W. 730.

Cross references. See further on this question, annotations and cross references under Rule 2 of Long v. Burnett (13 Iowa 28), ante. p. 113; Boker v. Chapline (12 Iowa 204), ante. p. 33.

DUNTON v. THORINGTON, 15 IOWA 217

1. Justice's Court—Appeal From—Additional Pleadings in District Court—When Allowed.—Upon an appeal from a justice's to the district court the latter may, in his discretion and upon proper terms, allow a party to file a further or additional pleading; and the ruling of the district court thereon will not be ground for reversal in the Supreme Court, except for abuse of discretion and resulting prejudice to the substantial rights of the party complaining thereon, p. 218.

Reaffirmed in Griswold v. Bowman, 40 Iowa 369.

Reaffirmed and extended in Fulmer v. Fulmer, 22 Iowa 232; Hays v. Turner, 23 Iowa 217, holding further that in the matter of allowing or refusing amendments to pleadings, the trial court has a large judicial discretion, and his ruling thereon will not be ground for reversal, except in case of abuse thereof and resulting prejudice to the substantial rights of the party appealing and complaining.

Cross references. See further on this question, annotations and cross references under Rule 1 of Dicks v. Hatch (10 Iowa 380), Vol. I, p. 707; Rule 2 of Seevers, Adm'r v. Hamilton (11 Iowa 66), Vol. I, p. 773.

DAVENPORT v. CUMMINGS, 15 IOWA 219

1. Appeal—Objections Not Made in the Trial Court—Review.—A judgment will not be reversed for errors of the trial court which were not objected to below, p. 224.

Reaffirmed in State v. Brainard, 25 Iowa 584, 585.

(Note.—See further, sustaining, but not citing the text, Stanberry, et al v. Dickerson, 35 Iowa 493; McClintock v. Sutherland, 35 Iowa 487; Snyder v. Eldridge, 31 Iowa 129; Barlow, et al v. Brock, 25 Iowa 308; Finley v. Brown, 22 Iowa 538; Beason v. Jonason, 14 Iowa 399; Peck v. Hendershott, 14 Iowa 40, and there are many others.—Ed.)

Cross reference. See further in this connection, annotations and cross references under Perkins v. Whittam (14 Iowa 596), ante. p. 292.

2. Instructions—Construction of Language in.—Language in an instruction should receive a reasonable construction in view of all the circumstances in the case, and not a strained or forced one, p. 227.

Reaffirmed in Callan & Co. v. Hanson, 86 Iowa 423, 53 N. W. 283.

3. Fraudulent Conveyances—When Actual Intent to Defraud is Unnecessary—Rights of Existing Creditors of Mortgagor.—Where the parties to a conveyance had, at the time of its execution and delivery, an intent to hinder and delay creditors of the grantor, it is fraudulent and void as to existing creditors of the latter. Intent to hinder and delay creditors by parties to a conveyance is as much fraud as an actual intent to defraud, p. 225.

Reaffirmed in Wilson v. Horr, 15 Iowa 492; McCreary v. Skinner, 83 Iowa 366, 49 N. W. 987.

Reaffirmed and explained in Lombard v. Dows & Co., 66 Iowa 244, 23 N. W. 650; Taylor v. Wendling, 66 Iowa 564, 24 N. W. 40, holding that when a mortgage is executed in contemplation of insolvency for an amount in excess of the actual indebtedness, it constitutes a badge of fraud, and casts on the mortgagee the burden of showing that the mortgage was executed in good faith for honest purposes, and of satisfactorily explaining why an amount greater than the actual indebtedness was secured by the mortgage.

Reaffirmed and extended in Brainard v. Van Kuran, 22 Iowa 266-268, holding further that the question of whether or not a conveyance is fraudulent and made with intent of the parties to hinder and delay creditors, is one of fact, and the verdict of a jury, or finding of the court, in such a case will not be disturbed upon appeal, unless clearly against the weight of the testimony.

Reaffirmed and extended in Bixby v. Carskaddon, 55 Iowa 534, 535, 8 N. W. 355, holding further that fraud may be established by a preponderance of the evidence.

Reaffirmed and qualified in Kohn Bros. v. Clement, Morton & Co., 58 Iowa 592, 12 N. W. 552, holding that in order to make a conveyance void, the intention to defraud, or to hinder and delay creditors of the grantor must be participated in by both parties thereto; and that knowledge on the part of a grantee of the fraudulent intent of the grantor is, of itself, insufficient therefor.

(Note.—See further specially on this question, Crawford v. Nolan, 70 Iowa 97, 30 N. W. 32; Headington v. Langland, 65 Iowa 276, 21 N. W. 650; Craig v. Fowler, 59 Iowa 200, 13 N. W. 116; Wood v. Scott, 55 Iowa 114, 7 N. W. 465; Chapman v. Ransom, 44 Iowa 377; Chapel, et al v. Clapp, 29 Iowa 191.—Ed.)

Cross references. See further specially, annotations and cross references under Rule 1 of Lyman v. Cessford, next succeeding this present case; Fifield v. Gaston (12 Iowa 218), ante. p. 35. See also, in this connection, annotations and cross references under *Wilhelmi v.*

Leonard (13 Iowa 330), ante. p. 157; and Campbell v. Leonard (11 Iowa 489), Vol. I, p. 848.

4. Trial—Papers Allowed the Jury—Reversible Error—Objection by Appellant.—Where the jury takes a deposition of a party to their room, which taking is assented to by the opposing party, the latter cannot complain thereof upon appeal; especially where it is favorable to him, pp. 227, 228.

Reaffirmed and qualified in Coffin v. Gephart, 18 Iowa 259, holding that where a deposition, material to the issue and not read as evidence on the trial, is taken and read by the jury without the knowledge or consent of the party appealing or his attorney, it is cause for reversal.

Cross reference. See further, sustaining, explaining, and qualifying, but not citing the text, annotations under Shields v. Guffey (9 Iowa 322), Vol. I, p. 583; Rule 1 of Turner v. Kelley (10 Iowa 573), Vol. I, p. 750.

5. New Trial — Affidavits of Jurors in Support of — For What Facts Not Admissible.—Without determining the question, the court is of opinion that affidavits of jurors are inadmissible in support of a motion for a new trial, to show how they construed or understood an instruction given to them by the court upon the trial; and especially where the jurors had no reasonable grounds for misconstruing such instruction, p. 228.

Cited in Jack v. Naber, 15 Iowa 452, a case wherein the question of whether or not affidavits of jurors in support of a new trial were receivable to show that they misunderstood the testimony, and the question was not expressly decided, the court saying: "Conceding that their affidavits were properly received, and that for such a cause a new trial should even be granted, it should at least appear that the jurors had reasonable ground for their alleged misapprehension."—And to the same effect is Moffit v. Rogers, 15 Iowa 455 (citing the text), on the same question and not deciding it.

Cited in Wright v. Ill. & Miss. Tel. Co., 20 Iowa 203; Cowles, Adm'x v. Ch. R. I. & P. R. R. Co., 32 Iowa 518; State v. Beste, 91 Iowa 569, 60 N. W. 113, holding that affidavits of jurors may be received for the purpose of avoiding their verdict, to show any matter occurring during the trial or in the jury room which does not essentially inhere in the verdict itself; as that a juror was improperly approached by a party, his attorney or agent; that witnesses or others conversed as to the facts or merits of the case in the presence of the jurors; that the verdict was determined by aggregate or average, or by lot, or by game of chance, artifice or other improper manner: But such an affidavit will not be received to show any matter which essentially inheres in the verdict itself; as that the juror did not assent to it; that he did not understand the instructions of the court, the statements

of the witnesses, or the pleadings; that he was unduly influenced by his fellow jurors, or was mistaken in his calculation, judgment, or any other matters resting alone in his breast.

Cited in Schrimper v. Heilman, 24 Iowa 507, a case wherein affidavits of jurors to show that they misunderstood the instructions, were held insufficient as a ground for a new trial.

Cited in Kruidenier Bros. v. Shields, 70 Iowa 431, 30 N. W. 682, holding that where the jury obtained and considered in their retirement (without plaintiff's knowledge) a paper, not in evidence, and were influenced thereby in arriving at their verdict, that it was sufficient ground for a new trial; and that affidavits of jurors were admissible in support of the motion therefor, to prove such fact.

Cited in State v. Beste, 91 Iowa 569, 60 N. W. 113, as expressly deciding that affidavits of jurors cannot be received in support of a motion for a new trial, to show that they misunderstood the instructions; the court holding that affidavits of jurors cannot be received in support of a new trial, to show arguments used by jurors with their fellow jurors, deductions drawn by them from the testimony, or the want of testimony, or other matters essentially inhering in the verdict itself.

Cited in Christ v. Webster City, 105 Iowa 121, 74 N. W. 743, holding that affidavits of jurors are not receivable in support of a motion for a new trial, to show that they misunderstood instructions given to them by the court.

Unreported citation, 126 N. W. 815.

(Note.—See further, specially, Turney v. Barr, 75 Iowa 758, 38 N. W. 498.—Ed.)

Cross reference. See further on this question, annotations, note and cross references under Stewart v. B. & M. Riv. R. R. Co. (11 Iowa 62), Vol. I, p. 771.

LYMAN v. CESSFORD, 15 IOWA 229

1. Voluntary Conveyances—When Not Fraudulent as to Subsequent Creditors of Grantor.—A good faith voluntary conveyance, is valid as to subsequent creditors of the grantor, and is not affected by his later becoming financially embarrassed or insolvent, p. 231.

Reaffirmed in Phillips v. Potter, 32 Iowa 590 (abstract).

Reaffirmed and explained in Stewart v. Rogers, 25 Iowa 398, 95 Am. Dec. 794, holding that in the absence of an existing actual intent to defraud, whether a voluntary conveyance to a child will be void as to the creditors of the father (grantor) will depend upon its reasonableness, and the condition of the grantor as respects his ability to pay his debts out of the property retained by him.

Reaffirmed and explained in Shepard v. Pratt, 32 Iowa 301, holding that a good faith voluntary conveyance by a grantor, solvent at the time, is not fraudulent.

Reaffirmed and explained in Rock Island Stove Co. v. Walrod, 75 Iowa 480, 39 N. W. 812, holding that where at the time of a conveyance to his daughter without valuable consideration, the grantor owed no debts and had no intention of contracting any, such conveyance is not fraudulent as to subsequent creditors of such grantor.

Reaffirmed and qualified in Barhydt & Co. v. Perry, 57 Iowa 419, 10 N. W. 821, holding that where one member of a partnership conveys his entire individual real estate, without consideration, to a third person, such conveyance is constructively fraudulent and void as against the partnership creditors, although the conveyance was made in good faith: And further holding that where a debtor borrows money with which he directly or indirectly satisfies creditors existing at the time of a fraudulent conveyance, such subsequent creditor has the same rights as the prior creditors so satisfied.

Reaffirmed and narrowed in Bonnell v. Allerton, 51 Iowa 176, 7 N. W. 466, holding that a deed made intentionally to defraud existing creditors, is void as to subsequent ones.

Cited in Wood v. Scott, 55 Iowa 116, 7 N. W. 465, holding that a mortgage given by a debtor for more than is due a particular creditor is not *conclusively* fraudulent as to the other creditors of the mortgagor; that such fact is only a *badge* of fraud: That fraud will not be imputed, but must be proven; and both parties to the alleged fraudulent conveyance must concur in the fraudulent intent to hinder, delay, or defraud the creditors of the grantor.

Cross references. See other rules hereof. See further on this question, annotations under Whitescarver v. Bonney (9 Iowa 480), Vol. I, p. 611; Johnson v. McGrew (11 Iowa 151), Vol. I, p. 792; Rule 2 of Rutledge v. Evans (11 Iowa 287), Vol. I, p. 818; Rules 1-3 of Field v. Gaston (12 Iowa 218), ante. p. 35; Rule 1 of Culbertson & Reno v. Lucky (13 Iowa 12), ante. p. 109; Rule 3 of Davenport v. Cummings, next preceding this present case.

2. Voluntary Conveyance—When Fraudulent as to Subsequent Creditors.—In order to render a voluntary conveyance fraudulent as to subsequent creditors, it must satisfactorily appear that it was executed with a view or intention by the grantor, of contracting future indebtedness, and to thereby defeat subsequent creditors, pp. 231, 232.

Reaffirmed and extended in Daggett, Bassett & Hill Co. v. Bulfer, 82 Iowa 103, 47 N. W. 978, 31 Am. St. Rep. 464, holding further that in order for a voluntary conveyance to be fraudulent as to subsequent creditors of the grantor, the fraudulent intention to defeat them, must exist in the minds of both parties to the conveyance.

Reaffirmed and qualified in Brundage v. Cheneworth, Adm'r, 101 Iowa 263, 70 N. W. 214, 63 Am. St. Rep. 382, holding that where a conveyance is merely voluntary and the grantor had no fraudulent intent, it cannot be set aside by a subsequent creditor: That a conveyance actually and intentionally fraudulent as to existing creditors, as

a general rule is not fraudulent as to subsequent creditors, but that this rule admits of exceptions; such as when the conveyance is made by the grantor with the express intent and view of defrauding those who may thereafter become creditors; or cases wherein the grantor makes the conveyance with the express intent of thereafter becoming indebted; or cases of voluntary conveyances where the grantor pays existing creditors by contracting other indebtedness in a like amount, when the subsequent creditors are subrogated to the rights of the creditors whose debts their money has paid; or cases in which one makes a conveyance to avoid the risks or the losses, likely to result from new business ventures: And that if a conveyance is actually fraudulent as to existing creditors and is merely colorable, and the property is held in secret trust for the grantor who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors.

Reaffirmed and narrowed in Romans v. Maddux, 77 Iowa 208, 41 N. W. 763, holding that when, in an action attacking a conveyance as fraudulent, it is made to appear that the instrument was not made in good faith, and for a good consideration, it is voidable as to existing and subsequent creditors.

Cross reference. See other rules hereof, and cross references there found.

3. Fraud Will Not be Imputed—Burden of Proof.—Fraud will not be imputed when the facts and circumstances claimed to constitute it, are consistent with the honesty and purity of intention of the parties to the alleged fraudulent transaction. Fraud, if denied, must be proven, the burden of proof being on the party alleging it, p. 232.

Reaffirmed in Schofield & Co. v. Blind, 33 Iowa 176; Drummond v. Couse, 39 Iowa 443; Kellogg v. Aherin, 48 Iowa 301; Wood v. Scott, 55 Iowa 116, 7 N. W. 465; Bixby v. Carskaddon, 55 Iowa 536, 8 N. W. 354; Sunberg v. Babcock, 66 Iowa 520, 24 N. W. 19; Knudson v. Litchfield, 87 Iowa 118, 54 N. W. 201; Ley v. Met. L. Ins. Co., 120 Iowa 208, 94 N. W. 569, all holding that when the facts and circumstances of an alleged fraudulent transaction are consistent with the honesty and purity of intention of the parties thereto and the fraud is denied, the party alleging it must make it appear by satisfactory evidence.

(Note.—See further, sustaining and explaining, but not citing the text, Austin v. Bowman Bros. & Burr, 81 Iowa 277, 46 N. W. 1111; Warfield, et al v. Lynd, 67 Iowa 722, 25 N. W. 896; Bradford v. Bradford, 60 Iowa 201, 14 N. W. 254; Raymond v. Morrison, 59 Iowa 371, 13 N. W. 332; Prichard v. Hopkins, 52 Iowa 120, 2 N. W. 1028; Hamilton v. Bishop, 22 Iowa 211; Hughes v. Cory, Adm'r, 20 Iowa 399; Torbert v. Hayden, 11 Iowa 435.—Ed.)

Cross reference. See other rules hereof, and cross references there found, in connection herewith.

HEAD AND METZGER *v.* LANGWORTHY & BROS., 15 IOWA 235

1. Trial—Instructions to be in Writing—Waiver of Objections to Oral Instructions.—Instructions to the jury in a civil action, must be in writing, unless the parties agree that the court may instruct orally; and where the court orally explains or modifies a written instruction over the objection of a party and to which he excepts, it is reversible error: But where instructions are given by the court to the jury orally, and a party, with full knowledge of the fact, fails to object thereto, he cannot thereafter complain thereof, pp. 236, 237.

Reaffirmed and extended in State *v.* Harding, 81 Iowa 602, 47 N. W. 878, holding, further that instructions to the jury in a criminal prosecution must be in writing and be delivered to them before they arrive at a verdict; and that where the jury in such a case are instructed orally, and upon their returning a verdict, written instructions are delivered to them, which they read, and thereupon again agree to their verdict, that such facts do not cure the error of failing to instruct in writing.

(Note.—See further sustaining, but not citing the text, Strattan *v.* Paul, 10 Iowa 139; Pierson *v.* Baird, 2 G. Greene, 235.—Ed.)

2. New Trial—Appeal From Order Granting—Reversal.—The trial court has a large judicial discretion in passing upon a motion for a new trial in an action at law, where such motion does not involve a question of law only, and his ruling thereon will not be ground for reversal, except in case of clear abuse of such discretion, and resulting prejudice to the substantial rights of the party complaining, p. 237.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Newell *v.* Sanford (10 Iowa 396), Vol. I, p. 712.

REYNOLDS, ELY & CO. *v.* KINGSBURY, 15 IOWA 238

1. Conveyances—Acknowledgment of—Curative Act of 1858.—The act of 1858, Chap. 33, Session Laws of that year, is retrospective only, and curative of acknowledgments to conveyances made before it took effect, and does not affect a deed made after that time, p. 239.

Reaffirmed in Jones *v.* Berkshire, 15 Iowa 249, 250, 83 Am. Dec. 412.

Cited in State *v.* Squires, 26 Iowa 347, on the general question of retrospective statutes.

KROGAN *v.* KINNEY, 15 IOWA 242

1. Aliens—Right to Inherit—Real Estate.—Under the Code of 1860, aliens who are residents of this state may take property by descent: And a non-resident alien may take property by devise, provided he will become a resident of this state after the date of the devise: But non-resident aliens cannot inherit real estate in this state, p. 243.

Reaffirmed in Rheim v. Robbins, 20 Iowa 46; Brown v. Pearson, 41 Iowa 483; King v. Ware, 53 Iowa 100, 4 N. W. 861.

Cited in Furenes v. Mickelson, 86 Iowa 510, 53 N. W. 417, holding that under Chap. 85 of the Session Acts of 1888, a naturalized citizen of the United States and a resident of this state, cannot inherit the lands of a great uncle who is a naturalized citizen, where the former must inherit through his father who is a non-resident alien.

Cited in Meyer v. Meyer, 23 Iowa 369, 92 Am. Dec. 432, not in point.

Distinguished and narrowed in Ruppin v. McLachlin, 122 Iowa 348, 98 N. W. 155; Ahrens v. Ahrens, 144 Iowa 488, 123 N. W. 165, and 125 N. W. 334, holding that a Treaty of the United States with a foreign country allowing citizens or subjects of the latter to take, hold and inherit property in the United States, is paramount to a statute of this state prohibiting aliens to inherit; and that citizens or subjects of such a country inherit in this state: The last case holding, however, that such a Treaty does not affect the statute of this state requiring non-resident aliens to sell real estate within a "reasonable time."

Distinguished and doubted in Purczell v. Smidt, 21 Iowa 542, 548, 559, by a divided court.

(Note.—See further specially in this connection, Doehrel v. Hilmer, 102 Iowa 169, 71 N. W. 204; Opel v. Shoup, 100 Iowa 407, 39 N. W. 560, 37 L. R. A. 583; Bennett v. Hibbert, 88 Iowa 154, 55 N. W. 93; Greenheld v. Stanforth, 21 Iowa 595; Lorieux v. Keller, 5 Iowa 196; Stemple v. Herminghouser, 3 G. Greene, 408.—Ed.)

Cross reference. See further, annotations under Stemple v. Herminghouser (3 G. Greene 408), Vol. I, p. 105. See also, in this connection, Schultze v. Schultze, 36 Am. St. Rep. 432, 19 L. R. A. 90.

WEAVER v. COOLEGE, 15 IOWA 244

I. Courts—Special Term—Presumption of Regularity of Court of General Jurisdiction.—Where a special term of court of the district court is held in one county at a time fixed by law for such court to be held in another county, it will be presumed upon appeal, in the absence of facts to the contrary in the record, that the latter term was adjourned in order for the holding of the former.

Upon appeal, the proceedings of a court of general jurisdiction in an action wherein it has jurisdiction, will be presumed regular, in the absence of facts in the record to the contrary, pp. 245, 246.

Reaffirmed and extended in State v. Knight, 19 Iowa 99, holding further that where at the close of a regular term of the district court of one county, a trial of a cause is pending, the court may adjourn to a certain day, the term of court of the county wherein the next term is to commence; and complete the trial of the cause pending in the court of the first county.

Reaffirmed and extended in State v. Clark, 30 Iowa 170, 171; Cook v. Smith, 54 Iowa 639, 640, 6 N. W. 259, and 7 N. W. 16; State v. Van Auken, 98 Iowa 686, 68 N. W. 458, holding further that the district court may adjourn the regular term of court in one county, and go to another county and hold a special term of court.

Reaffirmed as to last paragraph in Gantz v. Clark, 31 Iowa 259.

(Note.—See further, sustaining and explaining, but not citing the text, In re Estate of Hunter, 84 Iowa 388, 51 N. W. 20; State v. Peterson, 67 Iowa 564, 25 N. W. 780; State v. Stevens, 67 Iowa 557, 25 N. W. 777.—Ed.)

Cross references.

"Courts—Proceedings in—Presumption of regularity upon appeal"—See annotations under State v. Berry (12 Iowa 58), ante. p. 10; Boker v. Chapline (12 Iowa 204), ante. p. 33.

WILSON v. PRESTON, 15 IOWA 246

1. Pleadings—Verification of Petition After Answer Filed—Defendant to Verify Answer—Effect of Failure—Default.—The plaintiff may, by leave of court, verify his petition after an answer thereto is filed; and the defendant must thereupon, and upon motion of plaintiff, verify his answer or he will be in default, p. 247.

Reaffirmed and varied in Blair v. S. C. & P. Ry. Co., 109 Iowa 385, 80 N. W. 678, holding that the trial court may, in his discretion, permit a verified petition to be filed, with interrogatories thereto attached.

(Note.—See further, specially, Martin v. Shannon, et al, Adm'rs, 101 Iowa 620, 70 N. W. 720; Guyer & Hoshaw v. Minn. Thresher Mfg. Co., 97 Iowa 132, 66 N. W. 83; Hintrager v. Richter, 85 Iowa 222, 52 N. W. 188.—Ed.)

Cross references.

"Amendments to pleadings, etc.—When allowed, etc.—Substitution of previous pleading by amendment"—See annotations under Rule 1 of Bates v. Kemp (12 Iowa 99), ante. p. 18; Seevers, Adm'r v. Hamilton (11 Iowa 66), Vol. I, p. 773.

JONES v. BERKSHIRE, 15 IOWA 248, 83 Am. Dec. 412

1. Conveyances — Foreign Deed — Defective Certificate of Acknowledgment—What Constitutes.—Under Secs. 2245 and 2246 of the Code of 1860, where the certificate of acknowledgment of a foreign deed has no seal attached, and there is no certificate of the proper authority attesting the official character of the officer taking it and making the certificate, it is insufficient; and such a deed, when recorded, in this state, imparts no constructive notice, p. 249.

Reaffirmed and extended in Bresser v. Saarman, 112 Iowa 726, 84 N. W. 921, holding further that the certificate of an acknowledgment of a justice of the peace of a foreign state is insufficient, unless

accompanied by a certificate of the proper authorities showing the official character of the justice, the genuineness of his signature, and his authority to take acknowledgments.

Reaffirmed and qualified in Waterhouse v. Black, 87 Iowa 320, 54 N. W. 343, holding that an acknowledgment of a conveyance is not necessary to its validity as between the parties thereto and others with actual notice thereof; and that a conveyance so defectively acknowledged as, when recorded, to impart no constructive notice, is good as against such parties.

(Note.—And to the same effect is, Morse v. Beale, 68 Iowa 463, 27 N. W. 461; Lake v. Gray, 30 Iowa 416, and there are many others.—Ed.)

Cross references. See further in this connection, annotations under Chase v. Street (10 Iowa 593), Vol. I, p. 756.

“Conveyances — Acknowledgment — What certificate of officer to show”—See annotations under Rule 2 of Bell v. Evans (10 Iowa 353), Vol. I, p. 704.

“Defective deed—When operates as covenant to stand seized”—See annotations under Rule 3 of Switzer v. Knapps (10 Iowa 72), Vol. I, p. 645.

2. Conveyances — Defective Acknowledgments of — Curative Act of 1858, Section 2248, Code of 1860—Effect.—The Act of 1858, Sec. 2248 of the Code of 1860, curing defects in acknowledgments and records of conveyances, is retrospective only, and does not affect a deed made after its taking effect, pp. 249, 250.

Cited in State v. Squires, 26 Iowa 347; Bennett v. Fisher, 26 Iowa 500, on the general question of retrospective statutes, and the power of the Legislature to pass, their effect, etc.

Cited in Palmer v. Howard County, 45 Iowa 64, on the question of what constitutes a curative statute.

(Note.—See further, sustaining, but not citing the text, Reynolds, Ely & Co. v. Kingsbury, 15 Iowa 238.—Ed.)

3. Conveyances—Record of—Sufficiency of Index Entry—Constructive Notice.—Where the recitals of an index entry of a recorded conveyance to land are sufficient to necessarily put a cautious and prudent person upon inquiry as to the title and description thereof, it is sufficient to impart constructive notice, p. 251.

Reaffirmed and explained in Hodgson, Adm'r v. Lovell, 25 Iowa 98, 95 Am. Dec. 775, holding that it is not essential to a valid registration that the index contain a description of the lands conveyed: It is sufficient if it points to the record with reasonable certainty.

Reaffirmed and varied in Watkins v. Couch, treasurer, et al, 134 Iowa 4, 111 N. W. 316, holding the rule applicable to a description of property and where it was assessed for taxation as shown by an assessment roll.

Distinguished in Disque v. Wright, 49 Iowa 541, holding that in cases of constructive notice, the true state of the title must be imparted by the record itself, and not by facts *aliunde*; and that where a mortgage of land does not state the name of the mortgagee, or where the description in the index entry is so vague as to lands mortgaged as to not, on its face, suggest or stimulate further inquiry into the record by a subsequent purchaser, or incumbrancer, it will not constitute constructive notice.

Unreported citation, 128 N. W. 1103, 1105.

Cross reference. See further, sustaining, explaining and qualifying, but not citing the text, annotations and cross references under Bostwick v. Powers (12 Iowa 456), ante. p. 74.

COUSINS v. WESTCOTT, 15 IOWA 253

1. Trial—Instructions—Exceptions as a Whole to the Charge of the Court—Review on Appeal.—Where the instructions, or charge to the jury, are or is numerous or voluminous and exception is taken thereto as a Whole, errors therein will not (under the Code of 1860) be reviewed upon appeal where any one, or any part is correct, pp. 254, 255.

Special cross reference. For cases citing the text, and many more on the question, see annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

2. Trial—Instructions—Refusal of Those Asked Which Are Already Covered.—The trial court may properly refuse to give an instruction which is covered by one already given, p. 255.

Reaffirmed in Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404; Todd v. Branner, 30 Iowa 441, 442.

Cross references. See further, sustaining, but not citing the text, annotations, notes and cross references under Rule 4 of Trustees of Iowa College v. Hill (12 Iowa 462), ante. p. 75; Rule 3 of State v. Hockenberry and Brandt (11 Iowa 269), Vol. I, p. 814.

3. Account—Written Assignment of—Parol Evidence to Prove Purpose of.—The purpose for which a written assignment of an account was made, may be proved by parol, pp. 255, 256.

Reaffirmed and extended in Ayers v. Home Ins. Co., 21 Iowa 189, holding further that parol evidence is admissible to show that an assignment, absolute on its face, of a bond, was in fact made as collateral security to the assignee thereof.

Reaffirmed and extended in Neilson, Benton & O'Donnell v. Iowa Eastern R. Co., 51 Iowa 186, 1 N. W. 436, 33 Am. Rep. 124, holding further that parol evidence is admissible to prove the purpose for which materials were furnished by a materialman under a written contract.

Distinguished in Harrison v. McKim, 18 Iowa 488, 493, holding that parol evidence is admissible to show fraud in the execution of a written instrument.

Distinguished and narrowed in Evans v. Burns, 67 Iowa 181, 25 N. W. 120, holding that parol evidence is not admissible to put a meaning upon a written assignment, contrary to its express terms.

(Note.—In this last case neither fraud, accident or mistake, or a custom varying the terms of the assignment, was in issue.—Ed.)

(Note.—See further, specially, Singer Sewing Mach. Co. v. Holcomb, 40 Iowa 33; Roberts v. McMahan, 4 G. Greene 34; Friend & Co. v. Beebe, 3 G. Greene 279.—Ed.)

UMBARGER v. BEAN, 15 IOWA 256

1. Public Roads and Highways—Vacating and Re-locating—Assessment of Damages by Supervisors—Appeal to District Court.—An appeal lies to the district court from an order assessing damages by the county board of supervisors in the vacation of and re-locating a public road, or highway, p. 257.

Reaffirmed and explained in Newell v. Perkins, 39 Iowa 245, holding that an appeal lies to the district court from the final order of a board of supervisors in the establishment, change, or vacation of a county road: But that under Chap. 160, Sec. 2, Laws of Twelfth General Assembly, no appeal lies from orders of the county auditor in relation thereto, as they are subject to review and approval by such board.

Reaffirmed and extended in Prosser v. Wapello County, 18 Iowa 330; Sigafos v. Talbot, 25 Iowa 215, holding further that an appeal lies to the district court from an assessment of damages by the board of supervisors to a land owner, occasioned by the establishment of a public road; and upon the appeal the question of the amount of such damages may be tried *de novo* and by a jury: That no motion to set aside appraisement or claim of appeal before such board, is necessary before taking it.

Reaffirmed and extended in Vancleave v. Clark, 37 Iowa 185, 18 Am. Rep. 6, holding further that a land owner whom the board of supervisors has refused to allow any damages upon a change in a county road, may appeal therefrom to the district court.

Reaffirmed and varied in Lippencott v. Allander, 25 Iowa 446, holding that a party may appeal to the district court from an order of the board of supervisors revoking a ferry license.

Cited with approval in Garber v. Clayton County, 19 Iowa 29; Lippencott v. Allander, 23 Iowa 537, not in point, but construing the same section of the Code of 1860 as to right to appeal from order of board of supervisors in certain cases.

(Note.—See further, sustaining and explaining, but not citing the text, City of Des Moines v. Layman, 21 Iowa 153.—Ed.)

BARTRUFF v. REMEY, 15 IOWA 257

1. **Statutes—When Given Retrospective or Retroactive Effect.**
—Unless a statute clearly shows on its face an intention on the part of the Legislature that it have a retrospective or retroactive operation, it will not be so construed, p. 258.

Reaffirmed in Purcell v. Smidt, 21 Iowa 553, 554; State v. Squires, 26 Iowa 347; Polk County v. Hierb, 37 Iowa 369; McIntosh v. Kilbourne, Leighton & Co., 37 Iowa 421, 422; Knoulton v. Redenbaugh, 40 Iowa 116; Payne v. C. R. I. & P. R. R. Co., 44 Iowa 238; Starr v. City of Burlington, 45 Iowa 92; Perkins v. Lyons, 111 Iowa 198, 82 N. W. 488.

Reaffirmed and extended in City of Davenport v. D. & St. P. R. R. Co., 37 Iowa 625, holding further that unless otherwise clearly shown on its face, a statute only applies from its taking effect; and the words "heretofore," "hereafter," and "prior to the passage," etc., in a statute, relate to the time of its taking effect and not to its passage.

Reaffirmed and extended in Tobin & Neary v. Harthorn, 69 Iowa 651, 29 N. W. 765, holding further that under Sec. 45 of the Code of 1873, the repeal of a statute does not affect rights accrued under it at the time thereof.

Reaffirmed and qualified in Kaskel v. City of Burlington, 30 Iowa 235, holding that the Act of 1868, authorizing cities to sell real and personal property for delinquent taxes, operates upon delinquents at the time of its passage, as well as to those delinquent thereafter.

Reaffirmed and qualified in Sully v. Kuehl, 30 Iowa 278, holding that Sec. 762 of the Code of 1860, providing that an error or irregularity in a tax sale shall not affect its validity, applies to a sale for a delinquency existing at the time of its passage.

Reaffirmed and qualified in Galusha, treasurer v. Wendt, Ex'x, 114 Iowa 602, 608, 87 N. W. 513; Waples et al v. City of Dubuque, et al, 116 Iowa 168, 89 N. W. 195, holding, also that a curative or remedial statute is unconstitutional so far as it affects vested rights arising out of obligations under contracts made before its taking effect.

Cited in Boardman v. Beckwith, 18 Iowa 295, upholding an act legalizing prior assessments and levies for taxes.

Cross references. See further on this question, annotations under Rule 2 of Brinton v. Seevers (12 Iowa 389), ante. p. 64; Rosier v. Hale (10 Iowa 470), Vol. I, p. 732.

BRIDGMAN & CO. v. MCKISSICK AND BOUE, 15 IOWA 260

1. **Bill of Discovery in Aid of Execution—What Property May be Subjected by—Debtor's Interest in Real Estate.**—A bill of discovery may be brought in equity by a judgment creditor (under Chap.

127, Code of 1860 in relation to equitable actions supplemental to execution) to subject any interest, legal or equitable, the debtor may have in either personal or real property, moneys or choses in action; but the remedy of the creditor as to interests of the debtor in real estate, is cumulative; and the filing of such a bill will give such creditor the same lien on the debtor's interests in real estate as the issuance and levying of the attachment therein provided, pp. 264, 265.

Reaffirmed and explained in Hitt et al, Adm'rs v. Sterling-Gould Mfg. Co., 111 Iowa 461, 82 N. W. 919, holding that a judgment creditor is not obliged to have an execution returned "no property found" before he may file his bill in chancery to subject real estate fraudulently conveyed by the judgment debtor, but may so proceed at once.

(Note.—See further, specially, Miller v. Dayton, 47 Iowa 312; Brainard v. Van Kuran, 22 Iowa 261; Crosby v. Elkader Lodge, 16 Iowa 399; Harrison v. Kramer, 3 Iowa 543, important cases, sustaining and explaining, but not citing the text.—Ed.)

Cross reference. See Rule 2 hereof and cross references there found.

2. Judgment Lien—Debtor's Equitable Interest in Land—Action in Chancery to Subject—Priority of Judgment Liens.—Under Chap. 127, Code of 1860, a judgment creditor may proceed in equity by bill of discovery and by attachment, to subject the equitable interest of a judgment debtor in land: And where there are two or more judgment creditors, the one first instituting such an action is entitled to priority of lien on such property, pp. 265, 266, 268.

Reaffirmed in Boyle v. Maroney, 73 Iowa 76, 35 N. W. 147, 5 Am. St. Rep. 657; Fordyce v. Hicks, 76 Iowa 43, 40 N. W. 80.

Reaffirmed and explained in Howland v. Knox, 59 Iowa 48, 49, 12 N. W. 779; Boggs v. Douglass, Ex'r, 89 Iowa 157, 158, 162, 56 N. W. 414, 416; Kingman Plow Co. v. Knowlton, 143 Iowa 43, 119 N. W. 761, holding that a judgment creditor may, in equity, attack a fraudulent conveyance of land by his judgment debtor, or he may sell such land under his judgment by execution, become the purchaser, and proceed in equity to quiet title as against the judgment debtor and his fraudulent grantee: But that a judgment debtor has no such interest in real estate which he has fraudulently conveyed to defeat his creditors, as will give a judgment creditor a lien thereon without such proceedings.

Reaffirmed and extended in Bartle v. Curtis, 68 Iowa 204, 26 N. W. 74, holding further that the vendee of an executory contract for the sale of an equitable interest of a judgment debtor which is subject to a judgment lien, is not bound to comply therewith, but may abandon it by placing his vendor (the judgment debtor) in *statu quo*.

Reaffirmed and qualified in Boardman v. Willard, 73 Iowa 23, 34 N. W. 488, 5 Am. St. Rep. 652, holding that an action in equity by a judgment creditor, to subject an equitable interest of the judgment

debtor in land, does not create a lien thereon, but prevents its being conveyed by the debtor pending the action.

Cited in Hultz v. Zollars, 39 Iowa 593, holding (as does the present case in argument) that a judgment is not a lien upon an equitable interest in real estate, of the judgment debtor, and is not such a lien as will affect a *bona fide* purchaser without notice.

Cited in Weare & Allison v. Williams, 85 Iowa 265, 52 N. W. 332, holding that a party is charged with constructive notice of the condition of a title, if he has knowledge of such facts as will put him upon inquiry which, if pursued, would have discovered its exact status.

Cited with approval in Kisterson v. Tate, sheriff, 94 Iowa 667, 63 N. W. 351, 58 Am. St. Rep. 419, not in point.

Cited in Sheppard v. Messenger, 107 Iowa 720, 77 N. W. 516, not in point.

Distinguished and narrowed in Lippencott, Johnson & Co. v. Wilson, 40 Iowa 428, holding that in the absence of fraud and where an equitable interest of a judgment debtor in land is apparent of record, a judgment creditor who sells it under execution and purchases thereat, has a superior right to another judgment creditor who commences his action in equity to subject the property before the levy and sale under the execution.

Distinguished and narrowed in Albia State Bank v. Smith, 141 Iowa 257, 258, 119 N. W. 609, holding that a decree in an equitable action by a judgment creditor to subject the equitable interest of his debtor in land, and to set aside a conveyance thereof, does not affect the rights of holders of prior equities under unrecorded conveyances thereto: That in order for such a creditor to be so protected, he must become a purchaser at a sale under such decree, without actual or constructive notice of such equities or conveyances.

(Note.—See further, sustaining, explaining, qualifying and intimately connected with, but not citing the text, Milliman v. Eddie, 115 Iowa 530, 88 N. W. 964; Bush v. Herring and Skelton, 113 Iowa 158, 84 N. W. 1036; Rea v. Wilson, 112 Iowa 517, 84 N. W. 539; Zuber v. Johnson, 108 Iowa 273, 79 N. W. 76; Waughtal & Sons v. Kane, 108 Iowa 268, 79 N. W. 91; Ramsdell v. Tama Water Power Co., 84 Iowa 484, 51 N. W. 245; Clark, Adm'r v. Bullard, 66 Iowa 747, 24 N. W. 561; McDonald v. Johnson, 48 Iowa 72; Chapman v. Coats, 26 Iowa 288; Thomas v. Kennedy, 24 Iowa 397.—Ed.)

Cross references. See other rules hereof. See further, annotations under Cook & Sargent v. Dillon (9 Iowa 407), Vol. I, p. 598; Norton, Jewett & Busby v. Williams (9 Iowa 528), Vol. I, p. 620.

HARRIS v. STONE, 15 IOWA 273

1. Vendor and Purchaser of Real Estate—Prior Equity, or Title of Third Person in—Notice to Purchaser—Effect.—A purchaser of

real estate who purchases with knowledge that a third person claims a prior equity, or a title therein or thereto, takes subject to it, p. 275.

Reaffirmed in Mallory v. Luscombe, 31 Iowa 271.

Reaffirmed and extended in Phillips v. Blair, 38 Iowa 656, holding further that a purchaser of real estate is charged with notice of the equities therein of the person in possession thereof at the time of the purchase.

Cross references. See further, on this question, annotations, notes and cross references under Rule 1 of Wilson v. Holcomb (13 Iowa 110), ante. p. 126; Rule 1 of English v. Waples (13 Iowa 57), ante. p. 118; Rules 1 and 2 of Suiter v. Turner (10 Iowa 517), Vol. I, p. 739.

2. Real Estate—Purchase Price Furnished by One Person, Title Taken in Another—Resulting Trust.—Where the purchase price of real estate is furnished by one person and the title thereto is taken in another, a trust therein results in favor of the former, pp. 275, 276.

Reaffirmed in Mallory v. Luscombe, 31 Iowa 271.

Reaffirmed and explained in Amidon, trustee v. Snouffer, Ex'x, et al, 139 Iowa 161, 117 N. W. 45, holding that in the absence of fraud an express trust cannot be established by parol; but an implied trust may.

Cross references. See further on this question, annotations, note and cross references under Cooper v. Skeel (14 Iowa 578), ante. p. 288.

BAKER v. HALL, 15 IOWA 277

1. Personalty—Conditional Sale—Innocent Purchaser—Caveat Emptor.—A sale and delivery of personal property upon the express condition that the title is not to pass until the vendee performs certain specified acts or conditions, does not pass title thereto to the vendee until he complies with such conditions: And in such case a purchaser of the property from the vendee before such compliance, gets no title as against the vendor thereof, although he so purchases in good faith and without notice of the conditions of the sale, p. 279.

Reaffirmed in Moseley & Bro. v. Shuttuck, 43 Iowa 543, 544.

Distinguished and narrowed in Warner v. Jameson, 52 Iowa 72, 2 N. W. 953; Warner v. Johnson & Hakeman, 65 Iowa 127, 21 N. W. 483; Nat'l Cash Register Co. v. Maloney, 95 Iowa 575, 64 N. W. 619, holding that, under Sec. 1922 of the Code of 1873, an agreement, such as set out in the text, in order to be good as against a creditor, or purchaser without notice, must be in writing and acknowledged and recorded as a chattel mortgage; but that such an agreement is good as between the parties, and against creditors or a purchaser, or vendee with notice, although not in writing.

Cross references. See also, in this connection, annotations under Bailey v. Harris (8 Iowa 331); Robinson v. Chapline (9 Iowa 91), Vol. I, pp. 515 and 549, respectively.

BAYLISS v. PEARSON, 15 IOWA 279

1. Principal and Agent—Officers of Corporation, Public or Private—When Personally Liable on Note Given For its Debt.—Where officers of a corporation, public or private, execute a note for its debt, and there are no descriptive words either on the face of the instrument or to their signatures thereto, showing that it is executed on behalf of the corporation, they are personally liable thereon, p. 282.

Reaffirmed and explained in Wheelock v. Winslow, 15 Iowa 468; Armstrong v. Borland, 35 Iowa 540; Lacy v. Dubuque Lumber Co., 43 Iowa 511, holding that if the name of the principal and the relation of the agency is disclosed in a contract, and the agent is authorized to act, the principal alone is bound, unless a contrary intention is thereby clearly shown.

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, Harvey v. Irvine, 11 Iowa 82; Lyon v. Adamson, 7 Iowa 509; Winter v. Hite, 3 Iowa 142; Harkins v. Edwards & Turner, 1 Iowa 426; Baker v. Chambles, 4 G. Greene 428.—Ed.)

Cross references. See further, annotations under Wheelock v. Winslow (15 Iowa 464), *Infra*, p. 365; Baker v. Chambles, (4 G. Greene 428), Vol. I, p. 148; Lyon v. Adamson (7 Iowa 509), Vol. I, p. 487.

WHITNEY v. BLUNT, 15 IOWA 283

1. New Trial—Appeal From Order Granting—Judicial Discretion of Trial Court—Abuse—Reversal.—The trial court has a large judicial discretion in determining motions for a new trial, on a matter not involving a question of law only, and his ruling thereon will not be ground for reversal, except in case of abuse thereof, and resulting prejudice to the substantial rights of the party complaining; and a stronger case of abuse of such discretion and resulting prejudice must be shown by the record on an appeal from an order granting, than from one refusing a new trial, p. 284.

Reaffirmed in Burlington Gas Light Co v. Green, Thomas & Co., 21 Iowa 337; Worthington v. Olden, 31 Iowa 421; New York Piano Forte Co. v. Mueller, 38 Iowa 554; Conklin v. City of Dubuque, 54 Iowa 572, 6 N. W. 894.

Cited with approval in Cole v. Cole, 23 Iowa 439, holding (as does the present case) that where the evidence upon a jury trial is conflicting, its weight and sufficiency is for the jury to determine; and a judgment in such case will not be reversed because the verdict was contrary to the evidence.

Cross references. See further, sustaining, explaining and qualifying, but not citing text, annotations, notes and cross references under Shepherd v. Brenton (15 Iowa 84), *ante*, p. 308; State v. Tomlinson (11 Iowa 401), Vol. I, p. 833; Newell v. Sanford (10 Iowa 396), Vol. I, p. 712.

DUNHAM v. ISETT, 15 IOWA 284

1. **Mortgages—Injunction by Mortgagee to Restrain Sale of Mortgaged Property by Another Attachment, or Judgment Creditor of Mortgagor.**—Injunction lies in favor of a mortgagee to restrain the sale of the mortgaged property under an inferior attachment, or execution against the mortgagor. Mortgaged property cannot be subjected to a subsequent attachment, or execution by another creditor of the mortgagor. The rule applies to a mortgage on the property and revenues of a railroad company, pp. 290, 291.

Cited in Standish v. Dow, 21 Iowa 369, an action in equity to quiet title to land.

Cross reference. See Rule 2 hereof.

2. **Mortgage of Future Earnings, etc.—Power of Railroad Company to so do, etc.**—A railroad company may, under Chap. 43 of the Code of 1860, mortgage its future net earnings, as well as all other property it possesses, for the purpose of constructing its road, p. 292.

Reaffirmed in State v. Cent. Iowa Ry. Co., 71 Iowa 415, 32 N. W. 412, 60 Am. Rep. 806, holding that a railroad company may (under Sec. 1300 of the Code of 1873) mortgage, or lease its property.

Reaffirmed and extended in Schaffenburg v. Bishop, 35 Iowa 66, holding further that a mortgage on property to be thereafter acquired by the mortgagor, is valid, where such property is capable of identification and is definitely described in the instrument.

Reaffirmed and extended in Sandwich Mfg. Co. v. Robinson, 83 Iowa 569, 49 N. W. 1031, 14 L. R. A. 126, holding that demands or accounts not yet earned, may be mortgaged.

Cited in Riddle v. Dow, 98 Iowa 20, 66 N. W. 1070, 32 L. R. A. 811 (concurring opinion), the majority court holding that a mortgage on property to be thereafter acquired, or on individual crops, is valid as against creditors of the mortgagor: Provided that the property is sufficiently described and identified in the instrument.

Distinguished and explained in Traer v. Lucas Prospecting Co., 124 Iowa 112, 113, 116, 119, 99 N. W. 293, holding that a *solvent* private corporation may only sell or dispose of its property for the purposes for which it was organized and as authorized by its charter: But an *insolvent* private corporation, or one in failing circumstances, may sell, transfer, or mortgage its property, although not expressly so authorized by its charter.

(Note.—See further in this connection, and as to powers of private corporations to buy and sell property, West v. Averill Grocery Co., 109 Iowa 488, 80 N. W. 555; White v. Marquardt & Sons, 105 Iowa 145, 74 N. W. 919; Latimer & Inglis v. Citizens' State Bank, 102 Iowa 162, 71 N. W. 225; Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362; Price v. Holcomb, 89

Iowa 123, 56 N. W. 407; Sawyer v. Dubuque Printing Co., 77 Iowa 242, 42 N. W. 300; Warfield, Howell & Co. v. Marshall County Canning Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. Rep. 263; Iowa Lumber Co. v. Foster, 49 Iowa 25; Thompson v. Lambert, 44 Iowa 239; Mahaska County R. R. Co. v. Des M. Val. R. R. Co., 28 Iowa 437; Buell v. Buckingham & Co., 16 Iowa 284.—Ed.)

Cross references. See further on this question, annotations and note under Jessup et al trustees v. Bridge et al (11 Iowa 579), Vol. I, p. 862. See also, in this connection, Lauman v. Lebanon Valley R. R. Co., 72 Am. Dec. 685; Treadwell v. Salesbury Mfg. Co., 66 Am. Dec. 490; Elyton Land Co. v. Dowdell, 56 Am. St. Rep. 76, 33 L. R. A. 264; People v. Ballard, 34 Am. St. Rep. 275; Franklin County v. Lewis Sav. Bank, 28 Am. Rep. 9; Byrne v. Schuyler Electric Mfg. Co., 28 L. R. A. 304.

SWITZ v. PLATTS, 15 IOWA 298

1. Usury—Money Loaned to Pay Usurious Note—Note Given Therefor Not Usurious.—Where at the instance of the payee of a usurious note, a person lends money to pay it, and the payee executes a note therefor, secured by a deed of trust to land, to such lender, the last note and trust deed are not tainted with usury by reason of the money for which they were executed being applied to the payment of the usurious note: Such a transaction is valid, pp. 300, 301.

Reaffirmed in Brown v. Cass County Bank, 86 Iowa 535, 53 N. W. 412.

(Note.—See further, sustaining and explaining, but not citing the text, Mason v. Searles, 56 Iowa 532, 9 N. W. 370; Wendlebone v. Parks, 18 Iowa 547.—Ed.)

Cross references. See further on this question, annotations under Campbell v. McHarg (9 Iowa 354), Vol. I, p. 588; Rule 3 of Smith et al v. Coopers et al (9 Iowa 376), Vol. I, p. 592.

DENTON v. LEWIS, 15 IOWA 301

1. Trial—Instructions—Refusal of Instruction Asked Which is Already Covered by Others Given, Not Error.—It is not error for the court to refuse to give an instruction asked by a party, where it is already substantially covered by others given, p. 302.

Reaffirmed in Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404 405; Todd v. Branner, 30 Iowa 442.

Cross reference. See further, sustaining the text, annotations under Rule 3 of State v. Hockenberry and Brandt (11 Iowa 269), Vol. I, p. 814.

2. Trial—Verdict—Irregular Conduct of Jury in Determining—Quotient Verdict—New Trial.—Where, upon their retirement, the jury agree that each juror mark down the sum he is willing to allow, and that the aggregate amount thereof shall be divided by twelve, the

resulting sum to constitute the amount of the verdict, such a verdict will be set aside and a new trial be granted, p. 302.

Reaffirmed in Williams v. Dean, 134 Iowa 217, 111 N. W. 932, 11 L. R. A. (New Series) 410.

Reaffirmed and qualified in Fuller v. Ch. & N. W. R. R. Co., 31 Iowa 213, 214, holding that where a verdict of a jury is severable, and the jury *regularly* determine part of its amount, but improperly and as in the text, determine the residue thereof, such fact will not be cause for reversal upon appeal, if the successful party will thereon remit the part of the verdict improperly determined.

Distinguished and narrowed in Barton v. Holmes, 16 Iowa 259, holding that in order for the rule to be applicable, the jury must agree to abide by the result of the calculation mentioned in the text; and that such an agreement and calculation made by the jury for the purpose of "ascertaining the amount of the verdict, *in case it was adopted*," is not a ground for a new trial or for reversal upon appeal.

(Note.—See further, sustaining and explaining, but not citing the text, Sylvester v. Town of Casey, 110 Iowa 256, 81 N. W. 455; Wright v. Ill. & Miss. Telegraph Co., 20 Iowa 195; Schanler v. Porter, 7 Iowa 482; Manix v. Malony, 7 Iowa 81.—Ed.)

Cross reference.

"Trial—Misconduct of jury—Affidavits of jurors in support of new trial—To what extent received"—See annotations, notes and cross references under Stewart v. B. & M. Riv. R. R. Co. (11 Iowa 62), Vol. I, p. 771.

O'CONNOR v. O'CONNOR, 15 IOWA 303

1. Real Estate—Partition—Actions For—Appeal Not Tried De Novo.—An action for partition of real estate is (under the Code of 1860) ordinary, not equitable, and an appeal from a judgment in such case will be reviewed by the Supreme Court only upon exceptions taken to the rulings and proceedings of the trial court, p. 304.

Cited in Hackworth, Gd'n v. Zollars, 30 Iowa 436, on the question of trial *de novo* of an equitable action upon an appeal to the Supreme Court.

Cross reference. See further in this connection, annotations under Warner, Adm'r v. Pace (10 Iowa 391), Vol. I, p. 710.

MORRISON v. SPRINGER, 15 IOWA 304

1. Constitutional Law—Legislative Powers—Election Laws—Qualifications of Voters, etc.—The General Assembly possesses full legislative power, except that delegated to the general government, on all subjects, unless either expressly prohibited by the Constitution, or where such prohibition is necessarily implied from some provision thereof. Hence the General Assembly may fix the qualifications of voters; and may prescribe the time, place and manner of holding elections, pp. 342, 343, 351.

Reaffirmed and explained in McGuire v. Ch., B. & Q. R. R. Co., 131 Iowa 349, 108 N. W. 905, holding that all powers not delegated to the United States by the terms of the Federal Constitution and its amendments nor prohibited by it from being exercised by the states, are reserved to the latter, and that unless specially forbidden by its own or the United States Constitutions, the General Assembly of a state may pass any law on any subject.

Reaffirmed and extended in Coggeshall, et al v. City of Des Moines, et al, 138 Iowa 737, 117 N. W. 311, holding that Sec. 1131 of the Code of 1897, authorizing women to vote at certain municipal elections and exempting them from registration, is constitutional.

Reaffirmed and varied in Stewart v. Board of Supervisors of Polk County, 30 Iowa 18, 44, 1 Am. Rep. 238, upholding constitutionality of an act enabling municipal corporations to aid in the construction of railroads.

Reaffirmed and varied in City of Davenport v. C. R. I. & P. R. Co., 38 Iowa 642, 643, 648, holding that the General Assembly possesses general legislative power to subject all kinds and classes of property, both of individuals and private corporations, to taxation: But that, under Art. 8 of the Constitution, Chap. 26, Laws of Fourteenth General Assembly, releasing railroad companies that have paid taxes on their gross earning as provided by Chap. 106, Laws of Thirteenth General Assembly, from certain municipal taxation, is unconstitutional.

Reaffirmed and varied in Hawkeye Ins. Co. v. French, 109 Iowa 588, 589, 591, 80 N. W. 661, holding that under Sec. 2, Art. 8, of the Constitution, property of private corporations are to share equally the burden of taxation as the property of private individuals: And that Sec. 1333 of the Code of 1897, in so far as it relieves insurance companies from payment of taxes on personal property, and from taxation for road, school, city, and county purposes, is unconstitutional.

Cross reference. See Rule 2 hereof.

2. Statutes — Construction of — Constitutionality. — A statute will not be declared unconstitutional except where it is so palpably in violation of the constitution as to leave no doubt as to such fact in the mind of the court, p. 348.

Reaffirmed in State v. Tait, 22 Iowa 143, upholding constitutionality of the statute granting the state the right to appeal from a justice's court in criminal prosecutions.

Reaffirmed in Stewart v. Board of Supervisors of Polk County, 30 Iowa 15, 19, 1 Am. Rep. 238, upholding constitutionality of the act of April 12, 1870, authorizing municipal corporations to aid in the construction of railroads.

Reaffirmed in Richman v. Board of Supervisors of Muscatine County, 77 Iowa 523, 42 N. W. 425, 14 Am. St. Rep. 308, 4 L. R. A. 445, upholding an act of Twenty-first General Assembly curing de-

fects in the proceedings of the board of supervisors in the construction of a levee, and enabling it to assess costs of its construction and maintenance against lands thereby benefited.

Reaffirmed in B. C. R. & N. Ry. Co. v. Dey, et al, railroad com'rs., 82 Iowa 342, 343, 48 N. W. 106, 31 Am. St. Rep. 477, 12 L. R. A. 436, upholding constitutionality of Chap. 28, Laws of Twenty-second General Assembly, authorizing the railroad commissioners to regulate and fix the rates of railroad companies, etc., and to recover attorneys' fees in an action against a railroad company for violation thereof, etc.

Reaffirmed in Sisson v. Board of Supervisors of Buena Vista County, 128 Iowa 453, 104 N. W. 459, 70 L. R. A. 440, upholding the constitutionality of the public drainage law, Chap. 68, Acts of Thirtieth General Assembly.

Cited in Koehler & Lange v. Hill, 60 Iowa 589, 14 N. W. 761 (dissenting opinion), the majority court opinion not in point.

Cross reference. See further, annotations under Duncombe v. Prindle (12 Iowa 1), ante. p. 1.

WHITLOCK v. WORKMAN & CO., 15 IOWA 351

1. Intoxicating Liquors—Foreign Contract for Purchase of—What Constitutes—When Lawful.—Where a citizen of this state orders intoxicating liquors from a merchant of another state, the buyer to pay freight, etc., the delivery of such liquors to the carrier in the foreign state, constitutes a delivery to the buyer, and the contract is made in the foreign state. The fact that the buyer thereafter executes notes to the seller for the price thereof, does not change the rule.

In order for a foreign contract for the sale of intoxicating liquors to be delivered to a person in this state to be invalid here, it must be pleaded and proven in an action for the purchase price, that they were sold with the intent on the part of the seller to enable the buyer to violate the laws of this state, pp. 354, 356.

Reaffirmed in Second Nat'l Bank of Louisville, Ky. v. Curren, 36 Iowa 558.

Reaffirmed and explained in Wind v. Iler & Co., 93 Iowa 321, 322, 61 N. W. 1002, 1003, 27 L. R. A. 219, holding that knowledge on the part of the foreign seller of intoxicating liquors that the intoxicating liquors were to be sold in violation of law here, or that the buyer (resident of this state) had no legal right so to sell, is a fact from which the jury, in an action for the purchase price, may infer that they were sold with the intention that the buyer violate the laws of this state, and thus render the contract invalid.

Reaffirmed and extended in Sachs & Sons v. Garner, 111 Iowa 425, 82 N. W. 1008, holding that where an agent takes orders for intoxicating liquors, *to be accepted* by his principal in a foreign state,

the contract is made when the order is accepted by the latter and is made in the foreign state.

Reaffirmed and varied in Leggett & Meyer Co. v. Collier, 89 Iowa 147, 148, 56 N. W. 418, holding that where goods are ordered from a merchant, who acts on the order by delivery to a carrier to be shipped to the buyer, the title thereto thereupon vests in the latter, subject to the seller's right of stoppage *in transitu* before they are actually delivered to the buyer.

Reaffirmed and narrowed in Brown & Sons v. Wieland, 116 Iowa 714, 89 N. W. 18, 61 L. R. A. 417, holding that where a foreign seller of intoxicating liquors ships them to a place in this state, and takes the bill of lading in his own name, which he sends to a bank of the latter place, with directions to deliver to the buyer, who has no authority under the law to sell them, upon his making a certain payment and executing certain notes, all of which is done, that the contract is made in this state, is in violation of law, and is invalid.

Distinguished and narrowed in Tolman & King v. Johnson, 43 Iowa 129, holding that where a foreign seller of intoxicating liquors, ships them to a person in this state, who is to pay therefor after he inspects and finds them satisfactory, the contract is made in this state and is invalid, they having been sold by the buyer in violation of the law of this state.

Unreported citations, 104 N. W. 372; 128 N. W. 12; 130 N. W. 117.

(Note.—See further, specially on this question, Gross v. Feehan, 110 Iowa 163, 81 N. W. 235; Gipps Brew. Co. v. DeFrance, 91 Iowa 108, 58 N. W. 1087, 51 Am. St. Rep. 329, 28 L. R. A. 386; Miller Brew. Co. v. DeFrance, 90 Iowa 395, 57 N. W. 959; Engs & Sons v. Priest, 65 Iowa 232, 21 N. W. 580; Tegler & Co. v. Shipman, 33 Iowa 194; Garretson v. Selby, 37 Iowa 529; Alsberg, Yourdan & Co. v. Latta, 30 Iowa 442; Monty v. Arneson, 25 Iowa 383; Davis v. Slater, 17 Iowa 250; Smith v. Grable, 14 Iowa 429; Dalton v. Laue & Guye, 13 Iowa 538; Davis v. Bronson, 6 Iowa 410.—Ed.)

LEWIS v. ATKINSON, 15 IOWA 361, 83 Am. Dec. 417

1. Real Estate—Joint Tenants and Tenants in Common—Mortgage of Interest in—Subsequent Partition Proceedings—Mortgagee Not a Party to—Effect.—Where a joint tenant, or a tenant in common mortgages his interest in land so held, a subsequent partition proceeding, to which the mortgagee is not a party, and orders, judgments and proceedings therein, will not affect his lien and right of foreclosure, p. 362.

Cited with approval in Aplington v. Nash, 80 Iowa 491, 45 N. W. 906, holding that pending a partition proceeding a creditor of a joint tenant, or a tenant in common, of land, may, by judgment, execution

and sale of the latter's interest, obtain whatever interest he has in the result of the partition proceeding, although such creditor be not a party thereto.

NICHOLS v. LEVINS, 15 IOWA 362

1. Usury—Assignment of Note Tainted With—Knowledge by Assignee—Effect—Device to Avoid Usury Statute.—Where an assignee of a promissory note tainted with usury, takes it with knowledge of such fact, the plea of usury attaches to it in his hands. And where the lender of money has the note therefor, which is tainted with usury, executed to a third person who thereafter assigns it to him (the lender), the plea of usury attaches to it in the hands of the latter, p. 365.

Reaffirmed and extended in Burrows & Prettyman v. Cook & Sargent, 17 Iowa 444, holding that any device to defeat the usury law is ineffectual; and sales or transfers of notes for such purpose, will not defeat the right of the debtor to plead usury against all parties with knowledge of the usurious taint.

Distinguished and qualified in Phillips v. Columbus City Building Ass'n, 53 Iowa 721, 6 N. W. 122, holding that by agreement of parties to a usurious contract, or note, the usury may be refunded to the party who has paid it, or such usury may, by agreement of the parties, be credited on the just indebtedness, leaving the contract or note to thereafter draw the legal rate of interest, and thus the contract or note be purged of usury.

Cross references. See further, annotations under Campbell v. McHarg (9 Iowa 351), Vol. I, p. 588; Rule 3 of Smith, et al v. Coopers, et al (9 Iowa 376), Vol. I, p. 592.

HILL v. SHERMAN, 15 IOWA 365

1. Promissory Notes — Principal and Surety — Discharge of Surety by Giving Notice—What Notice to Contain.—Where a surety on a promissory note seeks to be discharged as provided in Chap. 75 of the Code of 1860, he must give the notice as required in such chapter and fairly comply with the requirements thereof. Upon such notice being given, if the holder of such a note refuses, or neglects to institute action within ten days thereafter, and does not permit the surety so to do, the latter is discharged, p. 367.

Reaffirmed and extended in Piper v. Newcomer & Campbell 25 Iowa 222; Thornburgh v. Madren, 33 Iowa 383, holding further that one of several joint makers of a promissory note who appears as principal thereon, but who is in fact a surety, may comply with the statute mentioned in the text, and, upon the failure, or refusal of the holder to comply therewith, be discharged.

Reaffirmed and extended in Thornburgh v. Madren, 33 Iowa 383, holding further that the notice mentioned in the text, may be given by the surety to an agent having power to collect the note.

(Note.—In this last case the owner of the note was absent from the state at the time the notice to sue, etc., was given to the agent.—Ed.)

McNAIR v. McCOMBER, 15 IOWA 368

1. New Trial—Appeal from Order Granting—Reversal—When. The trial court has a large judicial discretion in passing upon a motion for a new trial; and an order granting a new trial, on a ground not involving a question of law, will not be reversed upon appeal unless it is manifest that such discretion has been abused, p. 369.

Reaffirmed in Burlington Gas Light Co. v. Green, Thomas & Co., 21 Iowa 337; Worthington v. Olden, 31 Iowa 421; New York Piano Forte Co. v. Mueller, 38 Iowa 554; Conklin v. City of Dubuque, 54 Iowa 572, 6 N. W. 894.

Cited with approval in Cole v. Cole, 23 Iowa 439, holding (as does the present case) that where the evidence upon a jury trial is conflicting, its weight and sufficiency is for the jury to determine; and a judgment in such case will not be reversed because the verdict was contrary to the evidence.

Cross references. See further, sustaining, explaining, and qualifying, but not citing the text, annotations under *Shepherd v. Brenton* (15 Iowa 84), ante. p. 308; *State v. Tomlinson* (11 Iowa 401), Vol. I, p. 833; *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764; *Newell v. Sanford* (10 Iowa 396), Vol. I, p. 712.

TOLL v. KNIGHT, 15 IOWA 370

1. Attachment—Garnishment—Right of Creditor to Judgment Against Garnishee.—The right of plaintiff (creditor) to a judgment against a garnishee in an attachment and garnishment proceeding, does not exist until there is a final judgment against the defendant (debtor) in the attachment; and the record must show such judgment against the defendant (debtor), or a judgment against a garnishee will be reversed upon appeal, p. 370.

Reaffirmed in Hawarden State Bank v. Hessler, 131 Iowa 691, 692, 109 N. W. 211; *Schaller & Son v. Marker*, 136 Iowa 577, 114 N. W. 44.

Cross reference. See further, sustaining and intimately connected with the text, annotations, note and cross references under *Bean v. Barney, et al* (10 Iowa 498), Vol. I, p. 734.

McCoy v. JULIEN, 15 IOWA 371

1. Trial by Jury—Erroneous Ruling Upon Admission or Exclusion of Evidence Excepted to at Time—Appeal Without Pre-

vious Motion for New Trial Below.—Where on a jury trial the court rules on a question of the admissibility, or rejection, of evidence, and the ruling has the effect of disposing of the case and is excepted to, the party against whom it is made may appeal, without a motion for new trial based upon the ground that the ruling was incorrect, p. 375.

Reaffirmed and extended in Presnall v. Herbert, 34 Iowa 540, holding further that under Chap. 49, Act of 1866, errors of law occurring upon a jury trial and excepted to by the party complaining at the time they were made, may be reviewed upon appeal to the Supreme Court, although not made grounds for a motion for a new trial below; and that the rule applies to errors of the trial court in admitting, or excluding evidence, and in giving, or refusing instructions.

Cited and narrowed in Richards v. Burden, 31 Iowa 309, holding that appeals can only be prosecuted from *final* orders and judgments; that intermediate errors of law in the proceedings excepted to at the time they were made, may be determined upon such an appeal: Hence, holding that an appeal cannot be prosecuted from a ruling of a referee, sustained by the trial court, that a certain witness offered before him was incompetent to testify.

Cited and doubted in Rindskoff Bros. & Co. v. Lyman, 16 Iowa 269, the court being equally divided as to whether errors of law occurring upon a jury trial, and errors of law in instructions, can be reviewed upon appeal, where they are not embodied in a motion for a new trial.

Cross references.

"Action at law—Trial by court—Proceedings"—See annotations under Warner, Adm'r v. Pace (10 Iowa 391), Vol. I, p. 710. See also in this connection, annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66.

2. Sales of Personal Property—Delivery to be at a Fixed Place and Date—Breach by Purchaser—What is—Duty of Seller.—In order to entitle the seller of personal property which, by the contract, is to be delivered to the purchaser at a fixed place and date, to recover damages for breach of contract, he must allege and prove that he had such property at the place and at the time stipulated, and that the purchaser either was not there to receive it, or refused so to do, p. 376.

Reaffirmed and qualified in Padden v. Marsh, 34 Iowa 523, 524, holding that where defendant executed a written warranty of a harvester machine, by the terms whereof if the machine did not comply therewith, the plaintiff (purchaser) was to deliver it to defendant at a certain place, and upon its failing to so comply the plaintiff offered to so deliver, and defendant told him that he would not receive it, such delivery was thereby waived, and plaintiff could recover for the breach of warranty without so doing.

CAIN v. STORY, 15 IOWA 378

1. Appeal from Order Overruling Demurrer—Exception Not Taken Below—Affirmance.—Where an appeal is taken from an order overruling a demurrer, and the record does not show that such ruling and order was excepted to below, it will be affirmed, p. 379.

Reaffirmed in Brown v. Webster, 16 Iowa 589 (abstract).

Unreported citation, 126 N. W. 175.

(Note.—See further specially, Cameron v. Hopkins, 15 Iowa 600 (abstract).—Ed.)

Cross reference. See further, sustaining and explaining the text, annotations and cross references under Perkins v. Whittam (14 Iowa 596), ante. p. 292.

VEACH v. THOMPSON, 15 IOWA 380

1. Promissory Notes — Duress in Obtaining — Effect of — Indorsement Before Maturity—Right of Innocent Indorsee.—Where a promissory note is obtained by duress, it is *voidable* and not *void*: And such duress is no defense to an action on such a note by an indorsee thereof, who took it before maturity, for a valuable consideration, and without knowledge of the duress, p. 382.

Reaffirmed and extended in Callendar Sav. Bank v. Loos, 142 Iowa 8, 130 N. W. 320, holding further that in an action on a promissory note by the indorsee thereof, the burden of proof is on the defendant (maker) to prove both duress by which it was obtained, and knowledge thereof on the part of the plaintiff (indorsee) at the time he took it.

(Note.—See further in this connection, Kennedy v. Roberts, 105 Iowa 521, 75 N. W. 363; King v. Williams, 65 Iowa 167, 21 N. W. 502.—Ed.)

Cross references. See Rule 2 hereof. See further specially, on the subject of duress, Joannin v. Ogilvie, 32 Am. St. Rep. 581, 16 L. R. A. 376; Galusha v. Sherman, 47 L. R. A. 424.

2. Negotiable Notes — Blank Indorsement by Person Other Than Payee, or Indorsee—Consideration for Imported.—A blank indorsement of a negotiable note by one who is not a payee, or indorsee thereof, imports a sufficient consideration therefor; such indorser is a guarantor thereof, pp. 383, 384.

Reaffirmed and extended in Jones v. Berryhill, 25 Iowa 297, holding that in all contracts in writing a sufficient consideration therefor is implied, in the same manner as was formerly the consideration of instruments under seal.

Reaffirmed and qualified in First Nat'l Bank of Cedar Rapids v. Hurford & Bro., 29 Iowa 585, holding, however, that parol evidence is competent to prove want of consideration, or failure of consideration for, or fraud in the obtaining of a note, or other written instrument,

the burden of proof in such case being upon the party alleging such fact to so prove it.

(Note.—See further, sustaining and explaining, but not citing the text, *Sullivan v. Collins*, 18 Iowa 228; *Butler v. Byington*, 14 Iowa 594 (abstract); *Henderson v. Booth*, 11 Iowa 212; *Dowsley v. Olds*, 6 Iowa 526; *Linder and Rees v. Lake and Clark*, 6 Iowa 164.—Ed.)

Cross reference. See further on this question, annotations and cross references under *Marvin v. Adamson* (11 Iowa 371), Vol. I, p. 828.

3. Pleadings—Demurrer—Motion in Arrest of Judgment—What Reached by.—A question which strikes at the plaintiff's right to recover, or the sufficiency of his cause of action, must be raised by demurrer, or, by motion in arrest of judgment, and not by motion for a new trial, p. 383.

Reaffirmed in *Egleston v. Bassfield*, 38 Iowa 699 (abstract); *Linden v. Green, sheriff*, 81 Iowa 369, 46 N. W. 1109, holding that defects in pleadings are cured by verdict and judgment.

Cross references. See further, sustaining and explaining the text, annotations under Rule 2 of *Draper v. Ellis* (12 Iowa 316), ante. p. 53; Rule 2 of *Nollen v. Wisner and VanVark* (11 Iowa 190), Vol. I, p. 800; Rules 3 and 4 of *Cotes & Patchin v. City of Davenport* (9 Iowa 227), Vol. I, p. 568.

SMITH v. HENRY COUNTY, 15 IOWA 385

1. Pleadings—Demurrer—What Admitted by.—A demurrer admits for the purposes thereof, facts well pleaded, but not the law as claimed by the pleader, or his conclusions therefrom, p. 385.

Reaffirmed in *Burhans v. Squires*, 75 Iowa 62, 39 N. W. 183.

(Note.—See further, sustaining, but not citing the text, *Freeman v. Hart*, 61 Iowa 525, 16 N. W. 595; *Games v. Robb*, 8 Iowa 193, and there are others.—Ed.)

2. Counties—Power to Subscribe to or to Issue Bonds in Aid of the Construction of Railroads.—Counties have no power to subscribe to stock in or to issue bonds in aid of the construction of railroads, p. 386.

Reaffirmed and extended in *McPherson v. Foster Bros.*, 43 Iowa 60, 61, 22 Am. Rep. 215, holding further that negotiable bonds issued by a city, county, or other municipal corporation without authority, are *void*, even in the hands of *bona fide* holders.

Special cross reference. For other cases citing the text, and many more on the question, see annotations under *State, ex rel. B. & M. Riv. R. R. Co. v. Wapello County* (13 Iowa 388), ante. p. 165.

Cross reference. See further, in this connection, annotations under *Hull & Argalls v. Marshall County* (12 Iowa 142), ante. p. 29.

GELPCKE, WINSLOW & CO. v. BLAKE, 15 IOWA 387, 83 Am. Dec. 418
(Later Appeal, 19 Iowa 263.)

1. Written Contracts and Instruments—Fraud, Accident or Mistake—Parol Evidence to Prove—Sufficiency.—Parol evidence is admissible to prove that a written contract or other instrument, on account of fraud, accident or mistake, fails to show the entire, or true contract; but in order to establish such a fact, such evidence must be clear and satisfactory, p. 389.

Reaffirmed in Jack v. Naber, 15 Iowa 452; Rohrabacher v. Ware, 37 Iowa 87; Hunt v. Gray, 76 Iowa 272, 41 N. W. 15; Stewart v. McArthur, 77 Iowa 166, 41 N. W. 606.

Reaffirmed and explained in West v West, 90 Iowa 44, 47, 57 N. W. 639, holding that a written contract or other instrument will be reformed in equity for fraud, accident or mistake when the proof thereof is of such a degree as to produce in the unprejudiced mind, in view of all the facts and circumstances surrounding the transaction, the belief and conviction of its existence.

Reaffirmed and extended in Hervey v. Savery, 48 Iowa 319; First Presbyterian Church of Logan v. Logan, 77 Iowa 328, 42 N. W. 311; Ch. Title & Trust Co., rec'r v. Smith, 94 Iowa 405, 62 N. W. 793; Murphy v. First Nat'l Bank of Cedar Falls, et al, rec'r, 95 Iowa 329, 63 N. W. 703; Marshall & Sharp v. Westrope, 98 Iowa 332, 67 N. W. 260, holding further that before a written instrument will be reformed in equity on the ground of fraud, accident or mistake, the proof must make out the fact so as to strike all minds that it is unquestionable and free from reasonable doubt.

Reaffirmed and extended in Marshall & Sharp v. Westrope, 98 Iowa 332, 333, 67 N. W. 260, holding further that a mistake which will warrant a court of equity in reforming a written contract must be one made by both parties thereto, or one of one party by which his intentions have failed of correct expression, and there must be fraud in the other party in taking advantage thereof.

Reaffirmed and extended in Chapman v. Dunwell, 115 Iowa 534, 88 N. W. 1068, holding further that in order to justify a court of equity in reforming a written contract or other instrument on the ground of fraud, accident or mistake, the proof thereof must be "clear, unequivocal and satisfactory."

Cited in Johnson v. Tantlinger, 31 Iowa 502, the court declining to determine whether a parol reservation of growing crops at the time of the sale and conveyance of the land on which they are growing can be shown in a controversy respecting them between the parties to the conveyance.

(Note.—See further, sustaining, extending, explaining and qualifying, but not citing the text, Dirkson v. Knox, 71 Iowa 728, 30 N. W. 49; Winans v. Huyck, 71 Iowa 459, 32 N. W. 422; Wachendorf v. Lancaster, 61 Iowa 509, 14 N. W. 316, and 16 N. W. 533; Clute

v. Frazier, 58 Iowa 268, 12 N. W. 327; Strayer v. Stone, 47 Iowa 333; McTucker v. Taggart, 29 Iowa 478; Tufts & Colly v. Larned, 27 Iowa 330; Pierce v. Walker, 23 Iowa 424; Warren v. Crew, 22 Iowa 315; Van Wagner v. Van Nostrand, 19 Iowa 422; Price v. Brayton, 19 Iowa 309; Wickersham v. Orr, 9 Iowa 253; Ralston v. Ralston, 3 G. Greene 534.—Ed.)

Cross reference. See Rule 2 hereof.

2. Written Contracts — Parol Evidence of Contemporaneous Agreement Varying or Controlling—When Admissible.—Parol evidence of contemporaneous agreements or stipulations varying or controlling a written contract is only admissible, both at law and in equity, where they were omitted therefrom by reason of fraud, accident or mistake, p. 390.

Reaffirmed in Jack v. Naber, 15 Iowa 451, 452; Atherton v. Dearmond, 33 Iowa 355.

Reaffirmed and narrowed in Dicken v. Morgan, 54 Iowa 686, 7 N. W. 145, holding that an independent oral agreement which constitutes all or part of the consideration for a written contract or note, may be shown by parol, in an action on the latter.

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, Trayer v. Reeder, 45 Iowa 272; Puttman v. Hallett, 24 Iowa 425; Warren v. Crew, 22 Iowa 315; Pilmer v. Branch of State Bank at Des Moines, 16 Iowa 321.—Ed.)

Cross reference. See Rule 1 hereof.

MIDDLETON SAVINGS BANK v. CITY OF DUBUQUE, 15 IOWA 391
(Later Appeal, 19 Iowa 467.)

1. Cities and Towns—Restraint on Alienation of Property Does Not Prevent Mortgaging—City of Dubuque.—A restraint upon alienation of city property in its charter, does not prevent such a city from borrowing money and executing a mortgage on corporate property to secure the debt.

So, Sec. 25 of the Charter of the City of Dubuque (in force in 1863) prohibiting the city council thereof from *selling* any real estate thereof without the consent of the voters at an election as therein provided, does not inhibit the council from borrowing money and executing a mortgage on city realty for its security, without such election and consent of the voters thereof, p. 401.

Reaffirmed and explained in Krider v. Trustees of Western College, 31 Iowa 552, holding that a statutory inhibition upon the power of a public or *quasi* public corporation to sell or alienate, does not prevent it from executing a valid mortgage.

Cited in Fuller & Co. v. Hunt, 48 Iowa 166, not in point.

(Note.—See further in this connection, City of Dubuque v. Miller, 11 Iowa 583.—Ed.)

2. Mortgage on Land is a Chose in Action—Rights of Mortgagee—Rights of Creditors and Heirs of.—A mortgage on land is a chose in action, a lien upon the land mortgaged to secure the payment of the debt; and the mortgagee acquires no right thereunder which may be reached by attachment, or by levy under an execution against him: Nor can the mortgage be inherited in case of the death of the mortgagee, p. 401.

Reaffirmed and extended in Warren v. Davenport F. Ins. Co., 31 Iowa 469, 7 Am. Rep. 160, holding further that a mortgagee has an insurable interest in mortgaged property; but that in case of loss he is only entitled to the amount of his debt: Holding, also, that the rule is applicable as to the insurable interest of a stockholder of a corporation in the corporate property.

(Note.—See further, sustaining and explaining, but not citing, the text, Newman v. De Lorimer, 19 Iowa 244; Burton v. Hintrager, 18 Iowa 348; Baldwin v. Thompson, 15 Iowa 504.—Ed.)

STATE v. SHEELEY, 15 IOWA 404

1. Trial—Instructions—Refusal of Instructions Offered, Already Covered by Others Given is Not Error.—It is not error for the trial court to refuse to give an instruction which is already substantially covered by others given to the jury, p. 406.

Reaffirmed in Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404.

Cross reference. See further, sustaining, but not citing the text, annotations and note under Rule 3 of State v. Hockenberry and Brandt (11 Iowa 269), Vol. I, p. 814.

2. Trial—Challenge to Juror—Ground for—What Insufficient.—The fact that a juror called on a panel to try an indictment has been upon another jury which convicted another defendant of a similar offense, is not cause for his challenge for implied bias, under Sec. 4771 of the Code of 1860, unless the former trial and conviction was of a defendant jointly indicted with the challenging, defendant but who had had a separate trial, p. 406.

Reaffirmed in State v. Leicht, 17 Iowa 29.

Cross reference. See further, specially on this question, annotations and cross references under Rule 3 of State v. Arnold (12 Iowa 479), ante. p. 80.

3. Criminal Law—Elections—Willfully Voting by Person Not a Citizen of the United States—Good Faith—Advice of Counsel.—One indicted under Sec. 4337 of the Code of 1860 for willfully voting when not a citizen of the United States, may prove as a defense that he in good faith acted upon the advice of counsel, who after knowing all the facts, advised him that he had the right to vote at the election: But advice to accused, of friends and others not learned in the law, to such effect, is no defense to such indictment, and evidence thereof is incompetent on the trial thereunder, p. 407.

Reaffirmed and extended in State v. Savre, 129 Iowa 134, 135, 105 N. W. 391, 113 Am. St. Rep. 452, 3 L. R. A. (New Series) 455, holding that on the trial of an indictment for willfully voting in a precinct other than his (the defendant's) residence, as denounced by Sec. 4921 of the Code of 1897, the accused may prove that being in doubt as to what place was his residence, he fairly stated all the facts to an attorney at law, and acted on his advice in voting—such evidence being admissible to prove that the accused did not act *willfully*.

BROWN v. WILCOX AND SAWYER, 15 IOWA 414

1. **Usury—Assignee of Usurious Note Who Takes With Knowledge of Taint—Recovery Against Usurer of Consideration.**—An assignee of a note tainted with usury who takes with knowledge thereof, cannot (under Sec. 1792 of the Code of 1860) recover of the usurer (indorser) the amount of the consideration paid therefor, less the amount of the principal money. Section 1792 of the Code of 1860, allows such right only to a *bona fide* assignee of such a note who takes without knowledge of the usurious taint, p. 416.

Reaffirmed in Spinney v. Miller and Holliday Bros., 114 Iowa 213, 86 N. W. 318, 89 Am. St. Rep. 351, holding that Sec. 3042 of the Code of 1897, does not allow the assignee of a usurious note or other contract, who takes with knowledge of such usurious taint, to interpose the plea of usury thereto: That such section only gives such right to an assignee of a usurious note, or other contract, who takes it in good faith and without knowledge of the taint.

(Note.—See further on this question, Sullivan Sav. Institution v. Copeland, 71 Iowa 67, 32 N. W. 95; Burlington Mut. L. Ass'n v. Heider, 55 Iowa 424, 5 N. W. 578, and 7 N. W. 686; Nat'l L. Ins. Co. v. Olmsted, 52 Iowa 354, 3 N. W. 113; Miller v. Clarke, 37 Iowa 325.—Ed.)

Cross reference.

"Usury—Who can interpose plea"—See annotations under *Hollingsworth v. Swickard* (10 Iowa 385), Vol. I, p. 709.

ANDREWS v. ANDREWS, 15 IOWA 423

1. **Divorce—Decree of and Order as to Custody of Children and Property Rights—Power of District Court Rendering to Modify.**—The district court rendering a decree of divorce and an order relating to the custody of children and property rights, may modify such decree and order at any time before it is executed. The fact that the parties to the action may, after the entry of the decree and order, become non-residents does not affect the court's power. An order respecting the custody of children made in an action for divorce may be modified by the court making it upon application, when the good of the children and the interest of the parties, require it, pp. 424, 425.

Distinguished and narrowed in Shaw v. McHenry, 52 Iowa 186, 2 N. W. 1100, holding that where a decree of divorce grants the custody of a child to the wife who thereafter places it in the custody of a third person, that the father, or the child by him as next friend, cannot under a writ of habeas corpus obtain the custody of the child from the third person, or have it placed in the custody of another: That a decree or order in an action of divorce, respecting the custody of children, cannot be obstructed, changed, modified or revoked in a collateral proceeding.

STATE v. DUFFY, 15 IOWA 425

1. Contempt—Refusal of Witness to Answer Question Before Grand Jury—Excusing Contempt—Procedure.—Where a witness before the grand jury refuses to answer a question propounded to him, he must (under Sec. 2693 of the Code of 1860), be allowed, upon his request, a reasonable time to prepare and file an explanation of or excuse for his conduct, before the district court may fine him for contempt; and where in such a case the district court refuses to grant such time to prepare and file the explanation, or excuse, and proceeds at once to enter an order fining the witness for contempt, the order will be annulled upon *Certiorari*; However, this rule does not apply, where after the order is entered, the witness files such a statement and it fails to show that he properly refused to answer the question, p. 427.

Reaffirmed in State on Petition of Arthand v. Dist. Court of Taylor County, 124 Iowa 189, 99 N. W. 713, under Secs. 4464, 4465 of the Code of 1897.

Cited in Robb v. McDonald, 29 Iowa 333, 4 Am. Rep. 211, holding that the validity or regularity of contempt proceedings cannot be tested by *Habeas Corpus*.

(Note.—See further on power of courts to punish for contempt, Drady v. Dist. Ct. and Given, 126 Iowa 345, 102 N. W. 118; Eikenberry & Co. v. Edwards, 67 Iowa 619, 25 N. W. 834, 56 Am. Rep. 360; Ex parte Grace, 12 Iowa 208, 79 Am. Dec. 529.—Ed.)

SMITH v. HUMPHREY, 15 IOWA 428

1. Actions—Non-resident Plaintiff—Security for Costs—In What Court Required.—Chapter 136, Code of 1860, requiring a non-resident plaintiff to give security for costs, applies only to actions by such plaintiff in the district court, p. 429.

Cited with approval in Adae & Co. v. Zangs, 41 Iowa 540, the court holding that if a motion to require a non-resident plaintiff in an action commenced in a justice's court and appealed to the district court can (under Sec. 2927 of the Code of 1873) be made at all in the latter court, it must be made by the defendant before answer, or,

where the answer was filed in the justice's court, at the earliest practicable moment in the district court: And that such a motion in the latter court comes too late after the jury is therein sworn to try the issue.

Distinguished in Valley Nat'l Bank v. Garretson, 104 Iowa 657, 658, 74 N. W. 12, holding that Sec. 3446 of Chap. 163 of the Code of 1860 and Sec. 2931 of the Code of 1873, corresponding to it, prohibiting an attorney at law from becoming surety in any proceeding in court, applies to all proceedings and to all courts; and that an attorney at law cannot thereunder become surety upon an appeal bond appealing a judgment in a justice's court to the district court: That in such a case where there are no other sufficient sureties on the bond, the appeal will be dismissed.

BUTLER, KEITH & CO. v. MCCALL & SYPHER, 15 IOWA 430

1. Trial—Continuance—Absence of Party in Military Service of the United States.—Under Chap. 109, Laws of 1862, where it appears to the court that a party to an action is absent from home in the military service of the United States, he is entitled to a continuance as a matter of Right, during the time of his enlistment in the United States Army, p. 433.

Reaffirmed in Clarke v. Woodbury, 23 Iowa 63.

FORT DODGE CITY SCHOOL DISTRICT v. DISTRICT TOWNSHIP OF WAHKANA, 15 IOWA 434

(Later Appeal, 17 Iowa 85.)

1. School Districts—Organization of Under Code of 1860.—An incorporated city or town may organize into a separate school district under and by complying with Art. 4, Chap. 88 of the Code of 1860; and the same power is given an unincorporated town or village containing less than three hundred inhabitants, under Art. 5 of that Chapter. Because such a district contains one or two townships rather than one or two square miles, will not render it illegal. The extent of the territory of such a district, so organized, is left to the voters thereof, and this question will not be controlled by the courts, pp. 435, 436.

Reaffirmed in Indep. Sch. Dist. of Granville v. Board of Supervisors, 25 Iowa 307, 308, under Chap. 172, Acts of 1862, as amended by Chap. 143, Acts of 1866, allowing any city, town or sub-district having not less than two hundred inhabitants, and certain territory contiguous thereto, to organize into a separate school district.

2. School Districts—Action by—Petition—Allegation as to Organization in.—In an action by a school district it is sufficient for the petition to aver its corporate capacity in general terms, without setting out the manner in which the district was formed. Under Sec. 2923 of the Code of 1860, it is sufficient for the petition in an

action by a corporation to aver generally and as a legal conclusion, the corporate capacity or relation without setting out facts constituting it, p. 435.

Special cross reference. For cases citing the text and others on the question, see annotations under *Byington v. M. & M. R. R. Co.* (11 Iowa 502), Vol. I, p. 850.

CHILDS *v.* GRISWOLD, 15 IOWA 438

(Later Appeal, 19 Iowa 362.)

1. Pleadings—When Demurrer Proper—Irrelevant or Redundant Matter in Pleading—Practice.—Where a party claims that allegations in a pleading, adverse to him, are insufficient in law to constitute a cause of action or defense, such question must be raised by demurrer. Where allegations in a pleading are irrelevant, or redundant, they will be stricken out upon motion: But before any such allegations will be so stricken, it must (under Sec. 2946 of the Code of 1860) appear that the party moving to strike them will be prejudiced by their remaining in the pleading: Such a motion should not be sustained when the allegations of the pleading sought to be stricken therefrom are statements of *facts* and not *evidence*, and are stated in such a manner as not to prejudice the opposite party, p. 440.

Reaffirmed in *Rock v. Rhinehart*, 88 Iowa 42, 55 N. W. 23, a case wherein irrelevant allegations in a petition were stricken out; they being no part of the facts on which the plaintiff based his action.

RUDDICK *v.* LLOYD, 15 IOWA 441, 83 Am. Dec. 423

1. Negotiable Instrument—Indorsement of as Collateral for Pre-existing Debt—When Assignee is Not a Bona Fide Holder—Defenses.—Where the assignee or indorsee of a negotiable instrument takes it in good faith, from the payee or drawee without notice of defenses or infirmities, and before maturity, as collateral security for a pre-existing debt, he is not a holder for value in the usual course of trade, and it is subject to all defenses and equities which exist against the payee or drawee in favor of the maker or drawer at the time of the indorsement or assignment: But the rule is the contrary where it is so taken in consideration of a loan, or advancement, or in *payment* of a pre-existing debt, or under an agreement to extend the time of payment of such a debt, or for a change of securities therefor, p. 443.

Special cross reference. For cases citing the text and many more on the question, see annotations under Rule 3 of *Trustees of Iowa College v. Hill* (12 Iowa 462), ante. p. 75.

LEVI *v.* KARRICK, 15 IOWA 444

1. Appeal to Supreme Court—Effect on Powers of District Court Over Action.—When a final decree in a chancery action is ap-

pealed, the district court loses jurisdiction of the cause during its pendency, and has no power to entertain a motion, or to enter an order therein, until it, or some part of it, is remanded, p. 446.

Reaffirmed in Carmichael v. Vandebur, 51 Iowa 226, 227, 1 N. W. 519; Stillman v. Rosenberg, 111 Iowa 374, 82 N. W. 769; Dunton v. McCook, 120 Iowa 447, 100 N. W. 345, 104 Am. St. Rep. 354; Berkey v. Thompson, 126 Iowa 396, 10 N. W. 135; Guinn v. Iowa & St. L. Ry. Co., 131 Iowa 683, 109 N. W. 210, all reaffirming the rule on appeals both in chancery and at law.

Reaffirmed and extended in Shors v. Shors, 133 Iowa 25, 26, 28, 110 N. W. 18, holding further that after an appeal of a decree granting alimony and divorce, the district court cannot (under Sec. 3177 of the Code of 1897) allow the wife an additional sum for suit money and alimony pending the appeal: That such an order may, when proper, be made by the Supreme Court.

Reaffirmed and narrowed in Maxon v. Ch. M. & St. P. Ry. Co., 67 Iowa 229, 25 N. W. 145, holding that an appeal to the Supreme Court does not deprive the district court of the power to correct mistakes or errors in its own records during the pendency thereof.

(Note.—And to the same effect is, Mahaffy v. Mahaffy, 63 Iowa 55, 18 N. W. 685, not citing the text.—Ed.)

Cited in Turner v. First National Bank of Keokuk, 30 Iowa 194, the case turning on other questions.

Unreported citation, 78 N. W. 915.

(Note.—See further on this question, Mitchell v. Roland, 95 Iowa 314, 63 N. W. 606; Jamison v. B. & W. Ry. Co., 87 Iowa 265, 54 N. W. 242; McGlaughlin v. O'Rourke, 12 Iowa 459.—Ed.)

HUGHES v. BOWEN, 15 Iowa 446

1. Negotiable Notes—Waiver of Protest by Indorser—What Constitutes.—Where an indorser of a negotiable promissory note promises to pay it after it is due, with full knowledge that it has not been presented to the maker and protested, such promise waives presentment for payment, protest and notice thereof, and the indorser is liable thereon without such acts being done, p. 448.

Reaffirmed in Lomax v. Smyth & Co., 50 Iowa 229.

Reaffirmed and explained in Creshire v. Taylor, 29 Iowa 493, 494, holding that where the indorser of a negotiable promissory note, with full knowledge, acknowledges his liability thereon, promises to pay it, and arranges for delay in proceedings at law for its collection, he thereby waives want of demand, notice of non-payment, and other failures of duty and laches of the holder thereof.

Cited in Closz & Mickelson v. Miracle, 103 Iowa 200, 72 N. W. 503, the case turning on another question.

(Note.—See further, sustaining, explaining and qualifying but not citing the text, Peck v. Schick & Co., 50 Iowa 281; Freeman v.

O'Brien, 38 Iowa 406; Allen v. Harrah, 30 Iowa 363; Lumbert & Co. v. Palmer, 29 Iowa 104; Ballin v. Betcke and Schunk, 11 Iowa 204; Abbott v. Striblen, 6 Iowa 191.—Ed.)

Cross reference. See further on this question, annotations and note under Ballin v. Betcke and Schunk (11 Iowa 204), Vol. I, p. 803.

JACK v. NABER; CEDAR RAPIDS & MO. RIV. R. R. CO. v. WILLETS;
SAME v. RICE, 15 IOWA 450

1. Written Contracts—Parol Evidence of Contemporaneous Agreement Varying or Controlling—When Admissible—Fraud, Accident or Mistake—Sufficiency of Proof.—Parol evidence of contemporaneous agreements or stipulations varying or controlling a written contract is only admissible, both at law and in equity, where they were omitted therefrom by reason of fraud, accident or mistake; but in order to establish such a fact, such evidence must be clear and satisfactory, p. 452.

Reaffirmed in Williams v. Everham, 90 Iowa 422, 57 N. W. 901.

Special cross reference. For further cases citing the text and many more on the question, see annotations under Gelpcke, Winslow & Co. v. Blake (15 Iowa 387), ante. p. 355.

2. Trial—Instructions—Exceptions to Those Given—Certainty Required—Review on Appeal.—General exceptions to the charge of the court or the instructions to the jury will not (under the Code of 1860) justify a review of specific errors therein upon appeal, where any part of such charge, or any of such instructions, is or are correct, p. 452.

Special cross reference. For cases citing the text, and many more on the question, see annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

3. New Trial—Jurors Misunderstanding Testimony as Ground for.—Conceding that affidavits of jurors are receivable to show, and that a new trial should be granted because jurors misunderstood the testimony introduced on the trial, it should at least further appear in support of a motion for a new trial for such cause, that such jurors had reasonable grounds for their misapprehension of such testimony, p. 452.

Special cross reference. For cases citing the text and others on this question, see annotations under Rule 5 of Davenport v. Cummings (15 Iowa 219), ante. p. 327.

MOFFITT v. ROGERS, 15 IOWA 453

1. New Trial—Misapprehension by Jury as Ground for.—The fact that jurors misapprehended the issues submitted to them, is not

a ground for a new trial, where it does not appear that they had reasonable grounds for so doing, p. 455.

Special cross reference. For cases citing the text and many others on the question, see annotations under Rule 5 of *Davenport v. Cummings* (15 Iowa 219), ante. p. 327.

Cross reference. See further on this question, annotations under *Stewart v. B. & M. Riv. R. R. Co.* (11 Iowa 62), Vol. I, p. 771.

CARROLL & COX v. SHELLEY, 15 IOWA 455

1. Real Estate—Possession Under Parol Contract for Sale of—Statute of Frauds.—In order for possession of real estate by a purchaser under a parol contract for its sale, to take the transaction out of the Statute of Frauds, such possession must be taken with the actual or implied assent of the vendor and under and by virtue of the contract, p. 456.

Reaffirmed and extended in *Mahana v. Blunt*, 20 Iowa 144, holding further that in order to take a parol contract for sale of real estate out of the Statute of Frauds, by reason of the purchaser taking possession thereof, such possession must unequivocally refer to and result from the contract: That a continuance in possession of land by a tenant, does not take a parol contract for its sale to him, out of such statute.

Cited in *Nelson v. Worrall*, 20 Iowa 471, a case involving a resulting trust in favor of a person who furnished the purchase price for land, the title to which was taken in another under a verbal agreement that the title was to be held by the latter in trust for the former, the court upholding the agreement in equity.

(Note.—See further, *Benedict v. Bird and Engle*, 103 Iowa 612, 72 N. W. 769; *Thayer v. Reeder*, 45 Iowa 273; *Sweeney v. O'Hora*, 43 Iowa 348; *McCoy v. Hughes*, 1 G. Greene 373.—Ed.)

RAMOT v. SCOTENFELS, 15 IOWA 457, 83 Am. Dec. 425

1. Promissory Note—Indefinite Time of Payment—When Due.—Where a promissory note fixes no time when it is to become due and payable, it is due and payable within a reasonable time after its date. So, where after the maturity of a promissory note the maker and payee indorse on the back thereof that it is "renewed for an indefinite time at ten dollars interest per month, and the whole amount then to pay when both parties may agree," such note is renewed for an indefinite period of time, and is due and payable within a reasonable time after the date of such indorsement, pp. 458, 460.

Reaffirmed and extended in *Works v. Hershey*, 35 Iowa 343, holding further that a note "payable at Cincinnati *when convenient*" is payable there within a reasonable time after its date.

HARDIN v. SNYDER, 15 IOWA 460

1. Trial—Demurrer to Evidence—What Admits—When Peremptory Instruction is Proper.—Even if a demurrer to the evidence in an action at law tried by a jury is permissible at all under our reformed system of procedure (Code of 1860), the demurrant must conform to the rules governing it at Common Law.

So, where the defendant in an action at law tried by a jury demurs to plaintiff's evidence as being insufficient to entitle him to recover, such defendant must admit on record, not only the truth of the facts introduced, but every conclusion which the evidence offered by plaintiff, conduces to prove, p. 463.

Reaffirmed in Coats v. G. & Ch. U. R. R. Co., 18 Iowa 279, 280.

(Note.—See further, materially changing, but not citing, the rule, Meyer & Bros. v. Houck, 85 Iowa 319, 52 N. W. 235; Bothwell v. C. M. & St. P. R. Ry. Co., 59 Iowa 192; 13 N. W. 78; Starry v. Dub & S. W. Ry. Co., 51 Iowa 419, 1 N.W. 605; Way, Adm'r v. Ill. Cent. Ry. Co., 35 Iowa 585.—Ed.)

Cross reference. See further in this connection, annotations under Rules 3 and 4 of Potter, et al v. Wooster, et al (10 Iowa 334), Vol. I, p. 697.

WHEELLOCK v. WINSLOW, 15 IOWA 464

1. Principal and Agent—Contracts and Notes—Personal Liability of Agent Signing.—If, in a contract or promissory note executed by an agent, the name of the principal and the relation of the agency is disclosed, and the agent is authorized to act, the principal alone is bound, unless a contrary intention is thereby clearly shown, p. 468.

Reaffirmed and qualified in Woodbury & Wolff v. Blair, 18 Iowa 572 (abstract), holding that where a contract is signed "J. J. B., President of Iowa Railroad Contracting Company," and there is nothing in the contract to show that company had a corporate existence, or as a partnership or otherwise was capable of contracting, that in an action on such contract against such president personally, he must plead and prove one of the above facts in order to escape personal liability.

Cross reference. See further on this question, annotations, note and cross references under Bayliss v. Pearson (15 Iowa 279), ante, p. 343.

GREITHER v. ALEXANDER, 15 IOWA 470

1. Appeal—Harmless Error.—An error of the trial court which is not to the prejudice of appellant's substantial rights is not cause for reversal. So, the action of the trial court in refusing to suppress certain depositions in a chancery action is not ground for reversal, when the record on appeal shows that there was sufficient evidence not objected to below, to sustain the decision of the chancellor, pp. 474, 475.

Reaffirmed and explained in McCrary v. Deming, 38 Iowa 532, holding that where the judgment of the chancellor is sufficiently sustained by proper evidence, it will not be reversed on account of the admission of improper evidence below.

(Note.—See further, sustaining, but not citing the text, Ticonic Bank v. Harvey, 16 Iowa 141.—Ed.)

Cross references.

"Appeal—Harmless error"—See annotations under Fletcher v. Burroughs (10 Iowa 557), Vol. I, p. 748; Rule 2 of Woodward v. Horst (10 Iowa 120), Vol. I, p. 654.

2. Mortgages—Subsequent Purchaser With Notice Takes Subject to.—A subsequent purchaser of mortgaged property who buys with notice of the mortgage, takes it subject thereto, p. 474.

Reaffirmed and extended in Phillips v. Blair, 38 Iowa 656, holding that one who purchases property with notice of the right of another (other than his vendor) therein, is liable in equity to the same extent and in the same manner as his vendor: And a purchaser of real estate takes it charged with notice of the equities therein of the person in possession thereof at the time of the purchase.

Reaffirmed and extended in Bank of Corning v. Reid, et al 122 Iowa 284, 98 N. W. 109, holding further that where one creditor accepts a mortgage on property, which expressly provides that it is subject to other mortgages thereon, that the subsequent mortgagee (creditor) cannot thereafter attack as fraudulent such a prior recorded mortgage given by the mortgagor (debtor) to another creditor.

Reaffirmed and varied in Shafer v. Wilson, et al, 113 Iowa 479, 85 N. W. 791, holding that the grantees of real estate cannot escape liabilities they assume by the conveyance, although such conveyance may misdescribe the property conveyed.

(Note.—See further, sustaining, extending and explaining, but not citing the text, Key v. Nat'l L. Ins. Co., 107 Iowa 446, 78 N. W. 68; Gammon v. Bull, 86 Iowa 754 (abstract), 53 N. W. 340.—Ed.)

Cross references. See further, sustaining, extending and explaining, but not citing the text, annotations and cross references under Rule 1 of Harris v. Stone (15 Iowa 273), ante. p. 341; Rule 1 of English v. Waples (13 Iowa 57), ante. p. 118.

3. Usury—Who Can Interpose Plea.—Only Parties to an alleged usurious contract may interpose the plea of usury, p. 475.

Special cross reference. For cases citing the text and others on the question, see annotations under Perry v. Kearns (13 Iowa 174), ante. p. 134; Hollingsworth v. Swickard (10 Iowa 385), Vol. I, p. 709.

ARMSTRONG v. PIERSON, 15 IOWA 476

1. Trial—Instructions—Exceptions to Those Given—Certainty Required—Review on Appeal.—Instructions given to the jury will

not be reviewed on appeal if not excepted to below: And general exceptions to the charge of the court or the instructions to the jury (under the Code of 1860) will not justify a review of specific errors therein upon appeal, where any part of such charge, or any of such instructions, is or are correct, p. 476.

Reaffirmed in Norton v. Swearengen, 19 Iowa 566.

Special cross reference. For further cases citing the text and many others on the question, see annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 299), ante. p. 140.

2. Trial—Verdict—Reforming by Court—Extent Allowed.—

Although a verdict does not conclude formally in the words of the issue, yet if the point in issue can be collected from the finding, the court will put the verdict into form. If, however, the amount found by the jury cannot be definitely ascertained by reference to the pleadings, or to some certain data given by the jury, the court cannot assume the power to fix the amount of the judgment. The court has no power to weigh evidence, or go outside of the record, in order to ascertain the intentions of a jury or to reform a verdict, p. 478.

Reaffirmed and explained in State v. Funck, 17 Iowa 371, 372, holding that formal defects in a verdict are immaterial; but it must be responsive to the issue, and so expressed as to show that the jury decided the questions submitted: If from the pleadings and the verdict, the intention of the jury be shown, it is sufficient.

Reaffirmed and narrowed in Bartle v. Plane, 68 Iowa 229, 26 N. W. 88, holding that where plaintiff sues for a definite sum in a justice's court and the jury return a verdict "for plaintiff" (not fixing the amount thereof), that the justice has no right to enter judgment thereon for plaintiff for the amount claimed, but should direct the jury to retire and reform their verdict; that a judgment so entered by the justice should be set aside by writ of error from the circuit court, and the cause be remanded (under Sec. 3603 of the Code of 1860) to the justice's court for another trial.

Cross references. See further on this question, annotations under Rule 5 of Fromme v. Jones (13 Iowa 474), ante. p. 176; Rule 1 of Cassel v. Western Stage Co. (12 Iowa 47), ante. p. 7.

WAHL v. PHILLIPS, 15 IOWA 478

1. Actions—Assignment of Subject-Matter Pendente Lite—Effect—Judgment in Such Case.—When pending action the plaintiff assigns all his interest in the subject-matter thereof, and the court thereafter enters judgment in the name of and in favor of the assignee, the defendant cannot complain thereof upon appeal, p. 480.

Reaffirmed and extended in Forney & Thayer v. Ralls & Willetts, 30 Iowa 562, 563, holding further that in case of the transfer pending action of any interest therein, it may be continued in the name of the

original party, or the court may allow the transferee to be substituted.

Unreported citation, 99 N. W. 575.

Cross references. See further on this question, annotations and notes under *Howey v. Willtrout* (10 Iowa 105), Vol. I, p. 651; *Ferry v. Page* (8 Iowa 455), Vol. I, p. 527; *Allen v. Newbery* (8 Iowa 65), Vol. I, p. 493.

COE, TREASURER *v.* WINTERS, 15 IOWA 481

1. Chancery Action Tried as Ordinary One—Finding of Facts, New Trial, Exception, Etc.—Review on Appeal.—A chancery cause tried according to the second method (as an ordinary action) prescribed by Secs. 2999 and 3000 of the Code of 1860, will be reviewed upon appeal only as to the errors of law duly presented, as in an ordinary action; and where, in such case, there is no finding of the facts by the court, no motion for a new trial is made, and no exception is taken to the rulings of the court below, the decree of the chancellor will be affirmed.

An action for the foreclosure of a mortgage on land and involving the rights of a subsequent purchaser thereof, may be tried according to such second method, at least where no objection is made thereto, pp. 482, 483.

Cited in *Knight v. Knight*, 13 Iowa 452, where the constitutionality of the sections of the text was questioned by counsel for appellant, the court declined to decide thereon, but decided a chancery cause tried below by the second method of Secs. 2999 and 3000 of the Code of 1860, upon its merits upon appeal.

(Note.—See further sustaining and explaining, but not citing, the text, *Cole v. Cole*, 23 Iowa 433; *Carleton v. Byington*, 17 Iowa 579 (abstract); *Docterman v. Webster*, 15 Iowa 522; *Barney v. McCarty*, 15 Iowa 510.—Ed.)

Cross references. See further in this connection, annotations under *Warner, Adm'r v. Pace* (10 Iowa 391), Vol. I, p. 710.

"Chancery actions—Appeals in—Trial de novo"—See annotations, notes and cross references under Rule 2 of *Blake v. Blake* (13 Iowa 40), ante. p. 115; *Cook v. Woodbury County* (13 Iowa 21), ante. p. 111.

TAYLOR *v.* DICKINSON, 15 IOWA 483

1. Injunction—When May be Dissolved on Bill and Answer.—Where in an injunction action the answer specifically denies every allegation and all the equities in the bill, the court may dissolve the injunction, p. 486.

Reaffirmed in *Ingraham, Kenedy & Day v. Ch., D. & M. R. R. Co.*, 34 Iowa 253.

Reaffirmed and explained in C. G. W. Ry. Co. v. I. C. Ry. Co., and I. C. Ry. Co. v. C. G. W. Ry. Co., 142 Iowa 472, 119 N. W. 265, holding that where the bill and answer in an injunction action show an adequate remedy at law, the injunction may be dissolved upon motion.

Reaffirmed and narrowed in Russell v. Wilson & Co., 37 Iowa 377, 378, holding that where in an action for injunction the petition states facts showing plaintiff to be entitled to an injunction and the answer makes an issue, the plaintiff is entitled to a trial on the merits.

Cross references. See further on this question, annotations and notes under Rules 1-3 of Shricker v. Field (9 Iowa 366), Vol. I, p. 590; Rule 1 of Anderson v. Reed (11 Iowa 177) Vol. I, p. 798.

TEN EYCK v. MAYOR OF KEOKUK, 15 IOWA 486

1. Cities and Towns—Power to Issue Bonds in Aid of Railroads—Injunction to Restrain Collection of Tax For.—Cities and towns have no power to subscribe to stock in, or to issue bonds in aid of the construction of railroads: And the collection of a tax to pay any such bonds or their interest, or to pay for such subscription of stock in railroads, will be enjoined upon the complaint of a tax payer of such a city, p. 487.

Special cross reference. For cases citing the text and many others on the question, see annotations under Rule 1 of State ex rel. B. & M. Riv. R. R. Co. v. Wapello County (13 Iowa 388), ante. p. 165.

WILSON v. HERR, 15 IOWA 489

1. Fraudulent Conveyance to Hinder, Delay or Defraud Creditors—What Constitutes.—Where the parties to a conveyance had, at the time of its execution and delivery, an intent to hinder and delay creditors of the grantor, it is fraudulent and void as to existing creditors of the latter. Intent to hinder and delay creditors by parties to a conveyance is as much fraud as an actual intent to defraud, pp. 491, 492.

Reaffirmed in McCreary v. Skinner, 83 Iowa 366, 49 N. W. 987.

Reaffirmed and extended in Brainard v. Van Kuran, 22 Iowa 265-268, holding further that the question of whether or not a conveyance is fraudulent and made with intent of the parties to hinder and delay creditors is one of fact, and the verdict of a jury, or finding of the court in such a case will not be disturbed upon appeal, unless clearly against the weight of the testimony.

Reaffirmed and extended in Liddle & Carter v. Allen, 90 Iowa 739, 740 (abstract), 57 N. W. 605, holding further that where property is conveyed with the fraudulent intent, participated in by both parties to the conveyance, to hinder, delay, or defraud creditors, the

vendee's title will not be protected, even though he paid a sufficient consideration therefor.

Reaffirmed and extended in Milliman v. Eddie, 115 Iowa 532, 88 N. W. 965, holding further that a voluntary confession of judgment for a debt which does not in fact exist, made with the fraudulent intent on the part of the parties thereto to hinder and delay creditors of the defendant, is fraudulent and void; and that an assignment of such judgment made in furtherance of such design, is equally void.

(Note.—See further on this question, Williamson v. Wachenhein, 58 Iowa 277, 12 N. W. 302; Sweet v. Wright & Spencer, 57 Iowa 510, 10 N. W. 870; Chapman v. Ransom, 44 Iowa 377; Chapel, et al v. Clapp, 29 Iowa 191.—Ed.)

Cross references. See Rule 3 hereof. See further on this question, annotations under Rule 3 of Davenport v. Cummings (15 Iowa 219), ante. p. 327.

2. Pleadings—Bill in Chancery—Prayer for General Relief—Decree Under.—Under a prayer for general relief in a bill in chancery, complainant is entitled to any relief consistent with the case made in it, but not to a decree including matters not referred to therein, and as to which the respondent has never properly had his day in court, pp. 492, 493.

Reaffirmed in Lavery v. Sexton & Son, 41 Iowa 438.

Reaffirmed and explained in Johnston v. Myers, 138 Iowa 500, 116 N. W. 601, holding that under a prayer for general relief, a party is entitled in equity to any relief which is consistent with the allegations of the petition and sustained by the proof.

(Note.—See further, sustaining and explaining, but not citing the text, Bottorff v. Lewis, 121 Iowa 27, 95 N. W. 262; Browne, Ex'x v. Kiel, 117 Iowa 316, 90 N. W. 624; Walker v. Walker, 93 Iowa 643, 61 N. W. 930; Johnson v. Mantz, 69 Iowa 710, 27 N. W. 467; Hoskins v. Rowe, 61 Iowa 180, 16 N. W. 78; Pond v. Waterloo Agricultural Works, 50 Iowa 596.—Ed.)

Cross reference. See further in this connection, annotations and note under Rule 1 of Singleton v. Scott (11 Iowa 589), Vol. I, p. 865.

3. Fraudulent Conveyance to One Creditor to Defeat, Hinder or Delay Others—Action in Equity to Set Aside—Rights of Fraudulent Creditor.—In an action in equity by creditors to set aside a conveyance by their debtor to another creditor with the actual intent, participated in by both parties to the fraudulent conveyance, to hinder, delay, or defeat the former, some part of the consideration therefor being a debt due the grantee (creditor) the fraudulent creditor is not entitled to participate in a distribution of the proceeds of the property, fraudulently conveyed, among the creditors of the grantor (fraudulent debtor), p. 493.

Reaffirmed in *Rosenheim & Son v. Flanders*, 114 Iowa 297, 298, 86 N. W. 296.

Reaffirmed in *Liddle & Carter v. Allen*, 90 Iowa 740 (abstract), 57 N. W. 605; *Rosenheim & Son v. Flanders*, 114 Iowa 298, 86 N. W. 296, holding that where property is conveyed with the fraudulent intent, participated in by both parties to the conveyance, to hinder, delay, or defraud creditors, the vendee's title will not be protected, even though he paid a sufficient consideration therefor: That such a fraudulent grantee cannot, in equity, participate in the proceeds of the property with good faith creditors of the fraudulent grantor.

Cross reference. See Rule 1 hereof and cases in note thereunder, in connection herewith.

WELTON *v.* TIZZARD, 15 IOWA 495

1. Judgment Lien on Land — Extent of — Prior Unrecorded Mortgage by Judgment Debtor Misdetecting Land—Effect.—The lien of a judgment attaches to the interest of a judgment debtor in land and not to the naked legal title; and an unrecorded mortgage which was intended to convey a lien on certain land, but which by accident or mistake misdescribed it, gives the mortgagee a right in equity, to the land intended to be conveyed which is superior to a subsequent attachment, or judgment creditor: An attachment or judgment creditor is entitled to the rights of the judgment debtor and to no more, pp. 497, 499.

Reaffirmed in *Loomis v. Hudson*, 18 Iowa 417.

Reaffirmed in *Moore v. Scruggs*, 131 Iowa 695, 109 N. W. 206, 117 Am. St. Rep. 437, holding that a judgment is a lien only on the interest of the judgment debtor in land.

Reaffirmed and explained in *Lathrop v. Brown*, 23 Iowa 47, 49, 51, holding further that a judgment creditor has a lien only on the interest of a judgment debtor in lands; that a judgment creditor whose judgment is first rendered has a superior lien, on the interest of the judgment debtor to land, to that of a subsequent judgment creditor.

Reaffirmed and extended in *Rea v. Wilson*, 112 Iowa 519, 522, 84 N. W. 540, holding that a prior unrecorded mortgage, which by mistake fails to correctly describe the land mortgaged, is superior to an attachment subsequently levied thereon.

Reaffirmed and extended in *City Nat'l Bank of Marshalltown v. Crahan*, 135 Iowa 237, 112 N. W. 796, holding further that the levy of an attachment upon land gives the attachment creditor a lien on the real interest of the defendant (debtor) therein, whatever that may be, but no further: An equitable interest therein owned by a third person at the time of such levy is superior to such lien.—And to the same effect is *Wright & Taylor v. Dougherty*, 138 Iowa 198, 115 N. W. 909, reaffirming the text and applying the rule to the levy of an attachment on or garnishment of personal property.

Reaffirmed and qualified in Holloway v. Platner, 20 Iowa 123, 124, 89 Am. Dec. 517, holding that an attachment, or judgment creditor is not protected in equity against a prior, unrecorded deed or mortgage, which by mistake misdescribes the realty intended to be conveyed or incumbered: But that when a judgment creditor becomes a purchaser at a sale under his judgment, without actual or constructive notice of prior equities or unrecorded conveyances, he is entitled to the same protection as any other *bona fide* purchaser.

Reaffirmed and qualified in Jones v. Brandt, 59 Iowa 342, 10 N. W. 854, and 13 N. W. 310, holding that a purchaser, without notice, at a sheriff's sale of land is protected against latent equities therein.

Cited in Vannice v. Bergen, 16 Iowa 569, (dissenting opinion), 85 Am. Dec. 531, the majority court holding that the purchase of the legal title by the mortgagee will not extinguish the mortgage when it is the intention of the parties to keep it alive, or if this is to the interest of the mortgagee, and it can be done without prejudice to the mortgagor, or to the rights of third persons: Holding further that where a mortgagee of a recorded mortgage is induced by fraud of the mortgagor to purchase the legal estate, and the mortgage is not released of record, the mortgage will be revived in equity, as against the mortgagor and subsequent purchasers, or mortgagees of the property, and judgment creditors of the mortgagor.

Cited in Fyffe v. Beers, 18 Iowa 11, 85 Am. Dec. 577, not in point.

Cited in Hays v. Thode, 18 Iowa 53, the case turning on another point.

Cited in Wood v. Rankin Bros., 119 Iowa 451, 93 N. W. 388, a case involving the right of a junior judgment lien holder to redeem from a sale of land by a senior lien holder, the court holding that such redemption must be made as provided by statute (decision under Code of 1897) and in no other manner.

Special cross reference. For other cases citing, sustaining, etc., the text and many more on the question, see annotations under Norton, Jewett & Busby v. Williams (9 Iowa 528), Vol. I, p. 620.

Cross references. See further, sustaining, explaining, etc., the text, annotations under Rule I of Cook & Sargent v. Dillon (9 Iowa 407), Vol. I, p. 598; Seevers v. Delashmutt (11 Iowa 174), Vol. I, p. 796; Patterson v. Linder (14 Iowa 414), ante. p. 258; Bridgman & Co. v. McKissick and Bone (15 Iowa 260), ante. p. 339.

DUNCAN v. ROSELLE, 15 IOWA 501

1. **Husband and Wife—Property Rights of Wife Under Code of 1851.**—The marital rights of husband and wife as they existed under the Common Law are modified by the Code of 1851, but the Common Law on such subject is still in force except as so expressly changed:

Hence, under such Code, money earned by the wife, and real estate purchased therewith, is subject to the satisfaction of debts of the husband, p. 503.

Reaffirmed in *McTighe v. Bringolf*, 42 Iowa 457.

Reaffirmed and extended in *Presnall v. Herbert*, 34 Iowa 543, holding further that personal property of a wife under the control of her husband at the time he contracts a debt, is subject to be taken under execution, or attachment, therefor, although the wife files notice of her ownership of record (as provided by Secs. 2499-2503 of the Code of 1860) before the issuance of the writ.

Reaffirmed and qualified in *Jones v. Crosthwaite*, 17 Iowa 399, 400; *Laing v. Cunningham*, 17 Iowa 513, holding that the Code of 1860, has extended the wife's rights to contract and to hold property in certain particular cases, to that extent abrogating the Common Law.

Reaffirmed and qualified in *Mitchell & Sons v. Sawyer and wife*, 21 Iowa 583, holding that (under the Code of 1860) where a wife has separate property she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of her husband.

Reaffirmed and qualified in *Shields v. Keys, Adm'r*, 24 Iowa 311-313, holding that a wife may (under the Code of 1860), acquire real estate, relying upon receiving and paying therefor with money received from her son, such property not being subject to the satisfaction of her husband's debts.

Cited with approval in *Fowler v. Doyle*, 16 Iowa 536, a case turning on another question.

Cited in *Grant v. Green*, 41 Iowa 93 (dissenting opinion), the majority court holding that under the Code of 1873 (Sec. 2507 thereof) the wife is bound for the expenses incurred in the necessary restraint, protection and care of her insane husband; that where she renders such services herself, she cannot charge the estate of the husband therewith; and a contract between her and such husband's guardian agreeing to pay her therefor, is without consideration.

Impliedly overruled in *Mewhirter v. Hatten*, 42 Iowa 289-291, 20 Am. Rep. 618, holding that Sec. 2211 of the Code of 1873, allows a wife to receive and own wages for her personal labor independent of her duties as wife, and to maintain an action therefor; but that a husband may (under such section) maintain an action against a physician for damages for malpractice on the wife.

Cross references. See further in this connection, annotations under *Smith v. Hewitt* (13 Iowa 94), ante. p. 123; *Musser & Co. v. Hobart* (14 Iowa 248), ante. p. 234. See also, Rule 2 of *Finn & Co. v. Rose* (12 Iowa 565), ante. p. 96.

BALDWIN v. THOMPSON, 15 IOWA 504

1. Statute of Frauds—Real Estate—Parol Contract for Sale of—Delivery of Possession.—A contract by parol for the sale, or exchange of lands when accompanied by the delivery of actual possession thereof, is not within the Statute of Frauds, p. 507.

Reaffirmed and qualified in Burden v. Sheridan, 36 Iowa 127, 135, 14 Am. Rep. 505, holding that a resulting trust to land, the title to which is taken in another than the person claiming the trust, cannot be established by parol where no part of the purchase price was paid by the party complaining: That fraud against which a court of equity will relieve notwithstanding the Statute of Frauds, must be such as misleads an innocent person to his injury; as where the party relying on the statute has received benefits under the parol contract, etc.

Cited in Nelson v. Worrall, 20 Iowa 471, a case involving a resulting trust in favor of a person who furnished the purchase price for land, the title to which was taken in another under a verbal agreement that the title was to be held by the latter in trust for the former, the court upholding the agreement in equity.

Cross references. See Rule 2 hereof. See further, annotations under Carrolls v. Cox and Shelley (15 Iowa 455), ante. p. 364.

2. Real Estate—Possession of by Vendee Under Parol Contract of Purchase—Constructive Notice.—Actual possession by a purchaser of real estate under a parol contract of purchase thereof, operates as constructive notice of his title and equity therein, to subsequent purchasers and other persons dealing therewith adversely to him, p. 507.

Reaffirmed in Phillips v. Blair, 38 Iowa 656.

Reaffirmed and extended in Hubbard v. Long and Bush, 20 Iowa 150, 151, holding further that actual possession of land by the grantee under a deed misdescribing it, is notice of his equitable title thereto.

Reaffirmed and extended in Thompson v. Miner, 30 Iowa 390, holding further that where a person purchases a building with knowledge of its plan and construction, and of the common use of a passage-way and stairway by his vendor and a third person, or third persons, he is charged with notice of the easement of the latter.

Reaffirmed and extended in Simmons v. Church, 31 Iowa 387, holding further that actual possession of land by the grantee in an unrecorded deed is constructive notice of his title, as if his deed were recorded.

Reaffirmed and extended in Watrous & Snouffer v. Blair, 32 Iowa 63, 64, holding further that specific performance of a parol contract for the sale of land will be decreed in equity, where actual possession thereof has been delivered to the purchaser.

Distinguished in Rogers v. Hussey, 36 Iowa 699 (opinion on rehearing), the original opinion holding that a purchaser of land at an

execution sale under a judgment rendered against a debtor before he (the debtor) conveys it as shown by deed of record at the time of such execution sale, is not bound to look behind the record of the deed, and is not charged with notice of the grantee's title by reason of his having possession of the land under an executory contract before the rendition of the judgment against the debtor (grantor in the deed).

Cross references. See further on this question, annotations and notes under Rule 1 of *Wilson v. Holcomb* (13 Iowa 110), ante. p. 126; Rule 1 of *English v. Waples* (13 Iowa 57), ante. p. 118; Rules 1 and 2 of *Suiter v. Turner* (10 Iowa 517), Vol. I, p. 739.

3. Vendor's Lien on Real Estate—Nature of—Subjection to Debt Against Vendor—Proceedings.—A vendor's lien on real estate is only an incident to the debt it secures, and can only be subjected to a debt against him by garnishment, or by equitable proceedings by his creditor, p. 508.

Reaffirmed in *Woodward v. Dean*, 46 Iowa 500; *Scott v. Me-whirter*, 49 Iowa 489, 490.

Reaffirmed and extended in *Burton v. Hintrager*, 18 Iowa 351; *Shields v. Keys*, 24 Iowa 307, holding further that the mortgagee in a mortgage to land, has only a chattel interest, which follows the debt it is given to secure; and that upon such mortgagee's death, it descends as personalty to the personal representative in trust for the heirs, but subject to the rights of the decedent's (mortgagee's) creditors.

Reaffirmed and extended in *Warren v. Davenport F. Ins. Co.*, 31 Iowa 469, 7 Am. Rep. 160, holding further that a mortgagee has an insurable interest in the mortgaged property; but that in case of loss he is only entitled to the amount of his debt: Holding, also, that the rule is applicable as to the insurable interest of a stockholder of a corporation in the corporate property.

Reaffirmed and varied in *In re Estate of Miller*, 142 Iowa 564, 566, 119 N. W. 978, holding that a vendor's lien upon land is personal property, and does not pass to a devisee of his will under a clause therein devising "all of the land of which I (vendor) die seized, etc."

Reaffirmed and narrowed in *Sheehy v. Scott, et al*, 128 Iowa 556, 558, 104 N. W. 1141, 4 L. R. A. (New Series) 365, holding that where the owner of land grants a person the option to purchase it, not delivering possession thereof, that upon such owner's death, before acceptance of the option, the land descends to the heirs, and the interest of such an heir therein may be sold under execution.

Cited in *Porter v. City of Dubuque*, 20 Iowa 443, 445, holding that where a vendor of city lots, for a valuable consideration, agrees to release all claims thereon, he thereby loses his lien.

Cited in *First Nat'l Bank of Davenport v. Bennett*, 40 Iowa 539, holding that a judgment creditor's lien attaches to the judgment debtor's leasehold interest in land.

Cross references. See Rule 4 hereof. See further in this connection, annotations and cross references under *Welton v. Tizzard* (15 Iowa 495), ante. p. 371.

4. Judgment Lien on Land—Vendor's Lien—Payment of Debt by Vendee After Judgment Against Vendor—When Discharges Debt.—A vendor's lien on real estate is personal property, incident to the debt it secures, and a judgment against the vendor is no notice to the vendee; and if the latter after the rendition of the judgment, without further notice, pays his debt to the vendor, it is extinguished, p. 508.

Reaffirmed and extended in *Dickey v. Lyon*, 19 Iowa 553, holding further that where the vendee of real estate pays the balance of the purchase price to his vendor, without notice that the latter has assigned it, such debt is extinguished: And the recording of a deed executed by the vendor to the land to a third person after the contract and sale to the first vendee, does not operate as such notice of such assignment of the purchase money debt due by the first vendee.

Cross reference. See other rules hereof and cross references there found.

5. Execution Sale of Land—Land Not Owned by Execution Defendant—Action to Set Aside—Parties.—In an action to set aside an execution sale of land on the ground that it was not owned by the execution defendant, the latter need not (under Sec. 2765 of the Code of 1860) be made a party, pp. 509, 510.

Special cross reference. For cases citing the text and many others in this connection, see annotations under *Heimstreet v. Winnie* (10 Iowa 430), Vol. I, p. 723.

BARNEY v. McCARTY, 15 IOWA 510, 83 Am. Dec. 427

1. Action to Foreclose Mortgage—Appeal—Review—Necessity for Finding of Facts, Motion for New Trial, etc., Below.—Under Secs. 2999 and 3000 of the Code of 1860, an action to foreclose a mortgage is reviewed upon appeal as ordinary actions; and where in such case there is no finding of the facts by the court, motion for new trial, or exceptions taken below to the rulings of the court and errors of law there occurring, the decree will be affirmed, p. 513.

Reaffirmed in *Barney v. Little*, 15 Iowa 537.

Special cross reference. For further cases citing the text and others on the question, see annotations, note and cross references under *Coe, treasurer v. Winters* (15 Iowa 481), ante. p. 368.

2. Deed of Trust to Land to Secure Debt—Rights of Grantee in, Without Notice of Prior Unrecorded Mortgage.—Where the grantee in a deed of trust to land, which is given to secure a loan to the grantor, parts with his money and accepts the deed without notice

of a prior unrecorded mortgage on it, he will have the superior right, and any subsequent notice of the existence of such mortgage does not affect his rights, p. 514.

Reaffirmed and extended in Sillyman v. King, 36 Iowa 214, holding further that one who purchases and pays the purchase price of land before notice of prior unrecorded mortgages, or equities thereon or therein, is protected as to them.

Reaffirmed and varied in Reeves & Co. v. Sebern, 16 Iowa 237, 238, 85 Am. Dec. 513, holding that where, before he makes a levy on goods, the sheriff has actual knowledge that there is a valid pledge of them in favor of the plaintiff, then plaintiff has the better right to such goods: Actual notice is equivalent to recording, whether the transaction be a sale, a pledge or a mortgage.

Special cross reference. For other cases citing the text and many more on the question, see annotations, note and cross references under Rule 1 of English v. Waples (13 Iowa 57), ante. p. 118.

3. Conveyances—Recording—Index Entry—Sufficiency of—Constructive Notice—Time Constructive Notice Commences.— Constructive Notice dates from the time of *recording* a conveyance and not from the time of *filing* it for record. The index entry of a recorded conveyance is part of the recording thereof; and where it fails to show a mortgage on realty, the recording of such instrument does not impart constructive notice, pp. 515, 519.

Reaffirmed in Whalley v. Small, 25 Iowa 188, 189, holding that a deed which is filed for record, but never in fact recorded and indexed, does not impart constructive notice.

Reaffirmed and explained in Barney v. Little, 15 Iowa 532, 536, 537, holding that an index entry need not contain a description of the land conveyed: It is sufficient if it points to the record with reasonable certainty.

Reaffirmed and extended in Yerger v. Barz, 56 Iowa 81, 8 N. W. 770, holding further that a conveyance which is withdrawn from the files of the recorder before it is recorded and properly indexed, does not impart constructive notice.

Cited in Nickson v. Blair, 59 Iowa 532, 13 N. W. 642, not in point, but on a parity.

Distinguished in Dickinson v. Crowel, 120 Iowa 256, 257, 94 N. W. 495, holding that a written instrument or decree granting a mere easement over land, is not required to be recorded and indexed: Holding, also, that a party is chargeable with notice of facts which he should have ascertained as a reasonably cautious man, when facts known to him would have put the latter order of man upon inquiry.

Cross reference. See further, sustaining and explaining the text, annotations and cross references under Bostwick v. Powers (12 Iowa 456), ante. p. 74.

DOCTERMAN *v.* WEBSTER, 15 IOWA 522

1. Mortgage—Action to Foreclose—Review on Appeal—Proceedings Below Necessary to.—An action to foreclose a mortgage is (under Secs. 2999 and 3000 of the Code of 1860), to be tried as an ordinary action, and will be reviewed as such, upon appeal to the Supreme Court: And where in such case there is no finding of facts, or no motion for a new trial made in the trial court, and no assignment of errors in the Supreme Court, the decree will be affirmed, p. 524.

Reaffirmed in Barney *v.* McCarty, 15 Iowa 510, 83 Am. Dec. 427; Dumont *v.* Barrall, 19 Iowa 568 (abstract).

Reaffirmed and extended in Cole *v.* Cole, 23 Iowa 439, a case wherein the issue in an action for divorce and alimony was submitted to a jury, the court holding further that equitable actions tried according to the second method of Sec. 3000 of the Code of 1860 (by oral evidence), are reviewed upon appeal as ordinary actions; and where in such case the evidence is conflicting, a judgment will not be reversed because the verdict of the jury, or finding of the court, was against the weight of the evidence.

Cited in Knight *v.* Knight, 31 Iowa 452, where the constitutionality of the sections of the text was questioned by counsel for appellant, the court declined to decide thereon, but decided a chancery cause tried below by the second method of Secs. 2999 and 3000 of the Code of 1860, upon its merits upon appeal.

Cross reference. See further on this question, annotations, note and cross references under Coe, treasurer *v.* Winters (15 Iowa 481), ante. p. 368.

TEN EYCK *v.* CASAD AND ROWLEY, 15 IOWA 524

1. Mortgages—Sale Under Foreclosure Decree—Right of Junior Mortgagee to Redeem—Limitation of.—A junior incumbrancer who is not made a party to an action of foreclosure of land by a senior mortgagee, has not the right (under Code of 1860) to redeem at any time within ten years from a sale under a foreclosure decree in the senior's action, to such an extent as to prevent a purchaser thereunder from suing in equity to quiet title and require him (the junior) to redeem, p. 525.

Reaffirmed and explained in Anson *v.* Anson, 20 Iowa 58, 59, 89 Am. Dec. 514, holding that a junior mortgagee who is not made a party to an action by a senior mortgagee of foreclosure of a mortgage on land, may redeem from a sale made under a decree therein, after the time prescribed by Sec. 3664 of the Code of 1860; that such redemption may be from the senior mortgagee, his assignee, or the purchaser at the sale—And to the same effect is, Newell *v.* Penick, 62 Iowa 124, 125, 17 N. W. 433 (reaffirming the text), under Secs. 3102, 3103 and 3321 of the Code of 1873.

Reaffirmed and explained in American B. etc. Co. v. B. Mut. L. Ass'n, 61 Iowa 465, 16 N. W. 528, holding that where a junior mortgagee is not made a party to an action to foreclose by the senior mortgagee, he is not precluded by proceedings therein or thereunder from foreclosing against the mortgagor, or of his right to redeem from the senior mortgagee or his assignee, or from the purchaser at the foreclosure sale in the senior mortgagee's action.

Reaffirmed and qualified in Gower v. Winchester, 33 Iowa 307, 308, holding that the right of a junior mortgagee to bring his action for foreclosure and redemption from a senior mortgagee's debt, is barred unless commenced within ten years after his cause of action for foreclosure accrued.

Reaffirmed and qualified in Johnson v. Harmon, 19 Iowa 60, holding that a junior mortgagee, not a party to an action of the senior mortgagee to foreclose, may bring his action to foreclose his lien and to redeem, after sale under decree in the senior mortgagee's action; but that redemption must be by paying the amount of the senior mortgagee's debt, and not the amount the mortgaged property brought under the foreclosure sale.

(Note.—See further, specially on this question, Jones v. Hartsock, 42 Iowa 147; Wright v. Howell, 35 Iowa 288.—Ed.)

Cross references. See Rule 2 hereof. See further, annotations and cross references under Stoddard v. Forbes (13 Iowa 296), ante, p. 152; Heimstreet v. Winnie (10 Iowa 430), Vol. I, p. 723.

2. Mortgages—Redemption of Land by Junior Mortgagee—Liability of Senior Mortgagee, His Assignee, or Purchaser at Decretal Sale for Rents and Profits.—Where a junior mortgagee redeems from the senior or his assignee, or from a purchaser at a decretal sale in an action of foreclosure by the senior mortgagee, to which the junior was not made a party, the junior must pay the amount of the senior's debt with interest and costs, less rents and profits of the land from the time the senior, his assignee, or such purchaser took possession thereof, p. 526.

Reaffirmed and explained in Johnson v. Harmon, 19 Iowa 60, holding that a junior mortgagee, not a party to an action of the senior mortgagee to foreclose, may bring his action to foreclose his lien and to redeem, after sale under decree in the senior mortgagee's action; but that redemption must be by paying the amount of the senior mortgagee's debt, and not the amount the mortgaged property brought under the foreclosure sale.

Reaffirmed and explained in Anson v. Anson, 20 Iowa 60, 89 Am. Dec. 514; Spurgin v. Adamson, 62 Iowa 667, 18 N. W. 596, holding that a senior mortgagee, or his assignee, in possession of mortgaged land, either before foreclosure or under a foreclosure sale or deed made thereon, must, upon redemption by a junior incumbrancer, account for rents and profits, and, in a proper case, be credited for im-

provements made by him on the land—The rule applying equally to a purchaser at the decretal sale of foreclosure of the senior: The last case holding further that in an action to redeem by a junior incumbrancer, against a senior mortgagee, or his assignee, or a purchaser at the senior's decretal sale, the plaintiff need not tender the amount of the senior's mortgage debt, interest and costs, when he prays for rents and profits, asks for an accounting, and pleads that he is ready and willing to pay a balance found.

Reaffirmed and extended in Meredith v. Lochrie, 126 Iowa 597, 102 N. W. 502, holding further that a subsequent mortgagee of land whose rights have not been foreclosed, may redeem and demand from a senior mortgagee who is in possession of the land, an accounting for rents and profits, less permanent improvements; but where in an action therefor the amount necessary to redeem is agreed upon and entered in the decree, it is conclusive of the rights of the parties in reference to such items.

Reaffirmed and qualified in Poole, Gilliam & Co. v. Johnson, 62 Iowa 613, 17 N. W. 900, holding that where one who obtains possession of land under a title obtained in a foreclosure action, thereafter erects a building thereon under the good faith belief that he has title, then upon redemption from the mortgage, he need not account for rents of such building and may remove it, if it does not thereby injure the realty, and if he does not remove it, is entitled to its value: That one who obtains possession of real estate under a foreclosure proceeding is entitled to the value of improvements he makes thereon in the good faith belief that he had title, upon redemption from the mortgage.

Cited with approval in Gower v. Winchester, 33 Iowa 307, not in point.

Distinguished and narrowed in Gray v. Nelson, 77 Iowa 68, 41 N. W. 567, holding that before a mortgagee can be required to account for rents and profits, he must be re-imbursed for all costs, expenses and money fairly and in good faith expended and paid by him to obtain possession of the mortgaged premises: Hence, holding that a mortgagee who purchases the mortgagor's equity of redemption and obtains a deed to and possession of the mortgaged land at a price in excess of rents and profits, will not be required to account therefor upon redemption by an attachment creditor of the mortgagor, or in an action involving priorities of liens of such parties.

(Note.—See further, specially on this question, Barret v. Blackmar, 47 Iowa 565; Green v. Turner, 38 Iowa 112; Lavery v. Hall's Adm'r, 19 Iowa 526; Kramer v. Rebman, 9 Iowa 114; Dungan v. Von Phul, 8 Iowa 263; Montgomery v. Chadwick, 7 Iowa 114; Veach v. Schaup, 3 Iowa 194; Bates v. Ruddick, 2 Iowa 423.—Ed.)

Cross reference. See Rule 1 hereof, in connection herewith.

BARNEY v. LITTLE, 15 IOWA 527

1. Conveyance—Record of—Sufficiency of Index Entry—Constructive Notice.—It is not essential to a valid registration of a conveyance and in order to impart constructive notice, that the index entry contain a description of the land: It is sufficient if it points to the record with reasonable certainty, and so as to put an ordinarily prudent man upon inquiry as to the state of the record: And in such case a person is notified of the facts such an inquiry and examination of the record would have disclosed, pp. 535, 536.

Reaffirmed in Thomas v. Kennedy, 24 Iowa 407, 95 Am. Dec. 740; Hodgson, Adm'r v. Lovell, 25 Iowa 98, 95 Am. Dec. 775.

Reaffirmed and extended in Greenwood v. Jenswold, 69 Iowa 54, 28 N. W. 433, holding that where an index entry of a recorded instrument *which can be lawfully recorded* under the statute is sufficient, a person is charged with notice of whatever appears by the record.

Reaffirmed and qualified in Stewart v. Huff, 19 Iowa 560, holding that where the description in an index entry of land conveyed, is so defective as not to put a reasonably cautious man upon inquiry, it does not impart constructive notice.

Cited in Reeves & Co. v. Sebern, 16 Iowa 237, 85 Am. Dec. 513, a case involving *actual notice*.

Cited in Hurley v. Osler, 44 Iowa 647, a case involving *actual notice*: The court holding that actual notice and constructive notice of the existence of an instrument or of any fact, are equally effective.

Cross references. See further, sustaining and explaining the text, annotations and cross references under Bostwick v. Powers (12 Iowa 456), ante. p. 74; Miller v. Bradford (12 Iowa 14), ante. p. 2.

See also in this connection, annotations under Barney v. McCarty (15 Iowa 510), ante. p. 376.

2. Conveyance—Recording of—Index Entry—Constructive Notice—When Commences.—Constructive notice of a recorded conveyance is imparted from the time it is *actually recorded and an index entry thereof is made* as required by statute, p. 535.

Reaffirmed in Barney v. McCarty, 15 Iowa 519, 83 Am. Dec. 427.

Cross reference. See Rule 1 hereof, in this connection.

BRYAN v. CATTEL, AUDITOR, 15 IOWA 538

1. Mandamus—When Lies to Compel Officer to do Duty—Jurisdiction of District Court.—The district court may, at the instance of the party aggrieved, compel an officer by mandamus to perform a duty made imperative by law: But discretionary official acts cannot be so compelled. The rule applies to Executive State Officers as well as to all others. So, mandamus lies to compel the Auditor

of the State to draw his warrant on the state treasurer for salary due a state officer, pp. 541, 544, 547.

Reaffirmed and extended in McGregor, and Sioux City R. R. Co. v. Birdsall, 30 Iowa 257; Brown v. Crego, 32 Iowa 500, 501, holding that mandamus lies to compel a county treasurer to pay over money, collected by tax, to the person entitled thereto.

Reaffirmed and extended in Bradfield v. Wart, 36 Iowa 295, holding further that mandamus lies to compel a board of canvassers to count the votes of an election and to declare and certify as elected the persons receiving the highest number of votes cast for the various offices thereat.

Cross references. See further on this question, annotations under Rules 1-5 of State ex rel. Rice v. County Judge of Marshall County (7 Iowa 454); Rule 1 of Rice v. Smith, county judge, et al (9 Iowa 570), Vol. I, pp. 454 and 630, respectively.

2. **Office and Officer—Legislative Power Over.**—It is within the legislative power to abolish an office, increase or decrease the duties of an incumbent, add to or take from his salary; and it may add to or change the methods in which vacancies may occur, and may make such laws applicable to existing offices and officers, except as such laws are prohibited by the Constitution, p. 553.

Reaffirmed and extended in Shaw v. Marshalltown, 131 Iowa 134, 138, 139, 104 N. W. 1123, 10 L. R. A. (New Series) 825, upholding the constitutionality of Chap. 9, Laws of Thirtieth General Assembly, granting preference in appointment to minor municipal offices to soldiers, sailors and marines from the army and navy of the United States in the late Civil War, who are residents of this state: Holding further that a public office has in it no element of property, and is not an inalienable right of the citizen; nor are the prospective emoluments of an office, property in any sense; as the salary or perquisites thereof may be reduced or otherwise regulated at any time by the Legislature, unless forbidden by the Constitution.

Reaffirmed and extended in State ex rel. Thornburg v. Huegle, 135 Iowa 101, 102, 112 N. W. 235, holding further that an office created by statute may be abolished, the term be increased or diminished, or it may be declared vacant at any time by the Legislature; that it is the province of the Legislature to fix the qualifications to hold a statutory office, with which power courts will not interfere, except to see that the statute is complied with.

Reaffirmed and extended in State ex rel. Kirby, county attorney, et al v. Henderson, mayor, 145 Iowa 663-665, 124 N. W. 770, upholding the constitutionality of Chap. 78, Acts of Thirty-third General Assembly, relative to removal of an officer for malfeasance or misfeasance and for a trial in such cases without the intervention of a jury: Holding further that the right of an incumbent to office is not property; that the Legislature may fix the qualifications to hold an office,

or may specify grounds for removal, and may provide the manner of trial for misfeasance or malfeasance in such office.

Unreported citation, 104 N. W. 1124.

BURLINGTON & MISSOURI RIVER R. R. CO. v. BOESTLER, 15 IOWA 555

1. Contracts—Time of Performance of the Essence and a Condition Precedent—Effect.—Where the time of performance of conditions of a contract is made a condition precedent to the right of recovery thereon, they must be performed within or at the time required, or the contract is unenforceable and ineffective, and no action can be maintained thereon, p. 558.

Reaffirmed in Thompson v. Oliver, 18 Iowa 419.

Reaffirmed and narrowed in Des M. Valley R. R. Co. v. Graff, 27 Iowa 103, 104, 99 Am. Dec. 643, holding that where notes and money for the subscription to stock in a railroad are placed in the hands of a third person to be delivered to the company upon its performing the conditions of its contract by building its road to a certain place within a certain time, the money and notes to be delivered to the company as soon as the trains ran between certain specified points, not later than a time named, that in an action by the company against such third person to compel delivery of such money and notes, the defendant cannot set up lack of performance of conditions precedent in its contract by the company: Such a plea is personal to the subscribers to the stock.

Cited in Jefferson County v. B. & M. Riv. Ry. Co., 66 Iowa 391, 16 N. W. 563, not in point.

Distinguished and explained in Davis & Co. v. Cobban, 39 Iowa 393, a case wherein a stipulation in a contract as to time of performance of acts was held not to be a condition precedent: The court holding that the determination of whether or not a provision in a contract is a condition precedent, is governed by the intention of the parties, to be gathered from the entire language of the instrument; and that it is best in order to manifest the intention of a condition precedent to commence the portion thereof intended as such, with a proviso.

PHARO v. JOHNSON, EX'R, 15 IOWA 560

1. Trial—Province of Court and Jury—Court to Determine and State Issue.—It is the province of the court to determine from the pleadings, and instruct the jury as to what is the issue being tried, p. 561.

Reaffirmed and explained in West v. Moody, 33 Iowa 139, 140, holding that the determination of the facts is for the jury, and that what constitutes the issue as made by the pleadings, is a question for the Court.

Reaffirmed and extended in Fitzgerald v. McCarty, 55 Iowa 704, 8 N. W. 647; Keatley v. I. C. Ry. Co., 94 Iowa 690, 63 N. W. 562,

holding further that it is reversible error for the court to make the pleadings in an action a part of the instructions by reference, and then refer the jury to them for the issues being tried.

(Note.—See further, sustaining, but not citing the text, *Reid v. Mason*, sheriff, 14 Iowa 541.—Ed.)

Cross references. See further on this question, annotations, note and cross references under *Corse Bros. v. Sanford* (14 Iowa 235), ante. p. 233.

2. Pleadings — Issue to be Clearly Joined — Duty of Court — Trial on Confused Pleadings—Effect.—It is the court's duty to require parties to so plead as to state and show from the pleadings the issue or issues joined; but where the pleadings are loose and obscure as to the cause of action and defense, but it appears upon appeal that a fair trial was probably had, and the complaining party was not taken by surprise, the judgment will not be disturbed for such reason, p. 562.

Reaffirmed in *Phoenix v. Lamb*, 29 Iowa 354.

3. Pleadings—Amendment to—When Taken as Part of and Construed with Original.—Where a pleading is filed as an *amendment* and not as an *amended* pleading substituting the original one, the two will be construed together in determining the cause of action or defense, p. 562.

Reaffirmed and explained in *Cooley v. Brown*, 35 Iowa 476, holding that a pleading which is filed as an *amendment* to a former pleading will not be construed as a substitute therefor, but both will constitute one pleading and be construed together.

Reaffirmed and explained in *Kostendader v. Pierce*, 37 Iowa 646, holding that a pleading will not *substitute* a former pleading, when it is evident that it is intended to make the first more specific; and in such case both pleadings will be considered together: This is the rule although the last filed is entitled an "amended" instead of an "amendment to" the first pleading.

Cross references. See further on this question, annotations, notes and cross references under *Bates v. Kemp* (12 Iowa 99), ante. p. 18; *Seevers, Adm'r v. Hamilton* (11 Iowa 66), Vol. I, p. 773.

FRENCH & DAVIS *v.* ROWE & HYDE, 15 IOWA 563

1. Estoppel in Pais—What Constitutes—Estoppel to Plead Usury.—Where a party by his acts and declarations induces another to do an act, he cannot thereafter deny them, or do any act inconsistent therewith in relation to or to the injury of the party he has thereby induced to act. So, where the assignee of a promissory note of a partnership is induced to take it by the representation of a member of the firm that it was all right and would be paid, in an action thereon the partnership cannot plead the defense of usury, such fact being unknown to the assignee at the time he took it, p. 567.

Reaffirmed and extended in Wendlebone v. Parks, 18 Iowa 548, holding further that where one borrows money with which to pay a debt tainted with usury and secured by mortgage, thereafter delivering the usurious note and mortgage to the lender, such last transaction is not usurious, and the note and mortgage will be treated as a new security given to the lender for the amount loaned.

Reaffirmed and extended in White v. Morgan, 42 Iowa 116, 117, holding further that where the owner of property holds another out as its owner, or as having full power of disposition thereof or of its proceeds, and the latter so holds himself out and obtains credit on the strength of such ownership, the owner cannot claim title either to the property or its proceeds as against a person whom he has thereby induced to deal with the person held out as the owner.

Cited in Easley v. Brand, 18 Iowa 136 (dissenting opinion), the majority court opinion not in point.

(Note.—See further on this question, Switz v. Platts, 15 Iowa 298.—Ed.)

Cross reference. See further on estoppel, annotations under Lucas v. Hart (5 Iowa 415), Vol. I, p. 364.

RICE, EX'R V. CITY OF KEOKUK, 15 IOWA 579

1. **Statutes—Proviso in—How Construed.**—A proviso in a statute will generally be considered as not enlarging, but rather restraining, qualifying or explaining the clause to which it refers, p. 583.

Reaffirmed in Corbin v. Beebee, 36 Iowa 342.

(Note.—See further on analogy, Davis & Co. v. Cobban, 39 Iowa 392.—Ed.)

HALL V. SMITH, 15 IOWA 584

(Former Appeal, 10 Iowa 45.)

1. **Accord and Satisfaction—Accord Based Upon New Consideration Without Satisfaction—Effect—Evidence.**—An accord which is based upon a new consideration and accepted as satisfaction of an antecedent debt or contract, extinguishes the latter and takes away the remedy thereon. Such question is one of intention of the parties to be determined from the facts and circumstances of each case, pp. 588, 589.

Reaffirmed and explained in Heffelfinger v. Hummel, 90 Iowa 314, 315, 57 N. W. 874; Fritz v. Fritz, 141 Iowa 728, 118 N. W. 772, holding that when the owners of conflicting and disputed claims against each other, or the parties to a disputed and unliquidated claim in favor of one and against the other, enter into a contract by which the original demand or demands are extinguished, a new contract being made in lieu and in satisfaction thereof, the last contract is based upon a new

and sufficient consideration and the antecedent debts or demands and liability thereon are thereby extinguished.

Reaffirmed and explained in Kerr v. Topping, 109 Iowa 155, 80 N. W. 322, holding that if a new and valid obligation is substituted for an old, the latter is thereby extinguished.

Reaffirmed and explained in Sioux City S. Y. Co. v. Sioux City P. Co., 110 Iowa 405, 81 N. W. 715, holding that whether or not a new agreement was intended as a substitute for and in satisfaction of an old, is one of intention of the parties, to be determined from all the facts and circumstances of the case, if it is not expressly shown by the new one.

Reaffirmed and extended in Merry v. Allen, 39 Iowa 238, holding that a new agreement based upon a new and sufficient consideration, whereby an antecedent contract is rescinded, releases the parties from liability under the latter.

Reaffirmed and qualified in Fagg v. Hambel & Hall, 21 Iowa 143, 85 Am. Dec. 561; Woodward v. Willard, 33 Iowa 549, holding that a new promise to pay a debt, note, or other liability, which is not based upon a new and sufficient consideration, is not an accord and satisfaction thereof, unless it is fully executed.

Reaffirmed and qualified in George v. Ch. Ft. Mad. & Des. M. Ry. Co., 85 Iowa 592, 52 N. W. 513, holding that an accord and satisfaction must be specially pleaded, and the question cannot be raised by motion.

Reaffirmed and narrowed in Ogilvie v. Hallam, 58 Iowa 715, 12 N. W. 730, holding that where a new agreement of accord, based upon a new consideration, is subject to a condition precedent, it does not operate as an accord and satisfaction of the old debt or liability, until performance of the condition.

Cited in Lindt v. Schlitz Brew. Co., 113 Iowa 207, 84 N. W. 1061, not in point.

(Note.—See further specially on this question, Schaben v. Brunning & Son, 74 Iowa 102, 36 N. W. 910; Nelson v. Hagen, 72 Iowa 705, 31 N. W. 875; Richardson & Boynton Co. v. Indep. Dist. of Hampton, 70 Iowa 574, 31 N. W. 871; Jaffray & Co. v. Greenbaum, 64 Iowa 492, 20 N. W. 775.—Ed.)

Cross references. See further on this question, annotations and note under Rule 2 of Hall v. Smith (10 Iowa 45), Vol. I, p. 640. See also, Rule 1 of Levi v. Karrick (13 Iowa 344), ante. p. 160.

MORGAN v. WEBSTER COUNTY, 15 IOWA 595

(Abstract.)

1. Pleadings—Legality of Cause of Action—How Question to be Raised Below—Failure to so Raise—Review on Appeal.—The legality of plaintiff's cause of action must be raised in the trial court

by demurrer to the petition, or to the evidence upon the trial, or in arrest of judgment; and when not so raised, the question will not be considered upon appeal, p. 595.

Cited in Darrance v. Preston, 18 Iowa 404, a case turning upon other questions.

Cited in Heaton v. Fryberger, 38 Iowa 207 (dissenting opinion), the majority opinion not in point.

Cross references. See further on this question, annotations and cross references under Rule 3 of Veach v. Thompson (15 Iowa 380), ante. p. 353; Draper v. Ellis (12 Iowa 316), ante. p. 53; Williams v. Sill & Town (12 Iowa 511), ante. p. 84. See also, in this connection, annotations and cross references under Perkins v. Whittam (14 Iowa 596), ante. p. 292.

NICKING v. NESMITH, 15 IOWA 595

(Abstract.)

1. Appeal—Sufficiency of Record—Review.—Upon an appeal to the Supreme Court the record must show sufficient to make errors relied on for reversal apparent, or the judgment or order appealed from will be affirmed. So, upon an appeal from an order refusing to re-tax costs, the record must show the errors relied upon and sufficient facts sustaining appellant's complaints, or the ruling of the trial court will be affirmed, p. 596.

Distinguished in McGovern v. Keokuk Lum. Co., 61 Iowa 268, 16 N. W. 107, holding that upon an appeal from an order changing venue of an action, that an abstract of the record below setting out the affidavits on which the motion was based, and certified as being "all the papers, affidavits and evidence filed in support of the motion, or used upon the hearing thereof," is sufficient to allow a review thereof upon the appeal.

Cross reference. See further, annotations and cross references under Bennett v. Heyland (15 Iowa 597), *Infra.* p. 388.

PHELPS v. HART, 15 IOWA 596

(Abstract.)

1. New Trial—Verdict Against Evidence—Discretion of Trial Court on Motion—Abuse—Reversal.—The trial court has a large judicial discretion in granting or refusing a motion for a new trial on the ground that the verdict was against the evidence, and his ruling thereon will not be cause for reversal upon appeal, except in case of manifest abuse thereof, p. 596.

Special cross reference. For cases citing the text and many others on the question, see annotations under Rule 2 of Shepherd v. Brenton (15 Iowa 84), ante. p. 308.

STATE v. WAY, 15 IOWA 596

(Abstract.)

1. **Revenue Stamp—Failure of Clerk to Affix to Transcript Upon Appeal—Affixing by Appellant—Effect.**—Where upon an appeal, the clerk failed to affix to the transcript the stamp required by the National Revenue Law in force in 1863, and the appellant or his attorney affixed the stamp, before affirmance for such failure, the defect was thereby cured. The Attorney General may affix the stamp upon an appeal by the State under such conditions, p. 597.

Reaffirmed and extended in Harvey v. Wieland, 115 Iowa 565, 88 N. W. 1078, holding further that under the National Revenue Act of 1898, a stamp might be affixed to a lease, or other instrument, to which it was required, and it thus be rendered admissible in evidence.

BENNETT v. HEYLAND, 15 IOWA 597

(Abstract.)

1. **Appeal—Insufficient Record—Affirmance.**—Upon an appeal from an order overruling a motion to set aside a sale of real estate under an execution, the record must affirmatively show that it contains all the evidence adduced below on the trial of the motion, or the order will be affirmed, p. 597.

Distinguished and narrowed in McGovern v. Keokuk Lum. Co., 61 Iowa 268, 16 N. W. 107, holding that upon an appeal from an order changing venue of an action, that an abstract of the record below setting out the affidavits on which the motion was based, and certified as being "all the papers, affidavits and evidence filed in support of the motion, or used upon the hearing thereof," is sufficient to allow a review thereof upon the appeal.

Cross references. See further on this question, annotations and notes under Rule 2 of Mumma v. McKee (10 Iowa 107); Rule 1 of Potter, et al v. Wooster, et al (10 Iowa 334); Rule 2 of Fletcher v. Burroughs (10 Iowa 557), Vol. I, pp. 652, 697, and 748, respectively.

DUDLEY v. REID, 15 IOWA 597

(Abstract.)

1. **Demurrer—Appeal From Ruling on—Necessity for Exception below.**—Upon an appeal from a ruling on a demurrer, the order thereon will be affirmed, where the record fails to show that the party complaining and appealing excepted to the ruling of the trial court. So, where the defendant appeals from an order sustaining a demurrer to his answer and the record fails to show that he excepted to such ruling below, the order will be affirmed, p. 597.

Reaffirmed in Harmon's Ex'rs v. Levalley, 23 Iowa 599 (abstract).

Reaffirmed and extended in Norton v. Swearingen, 19 Iowa 566, (abstract), holding further that instructions not excepted to below, will not be reviewed upon appeal.

Cross references. See further on this question, annotations, notes and cross references under Cain v. Story (15 Iowa 378), ante. p. 353; Perkins v. Whittam (14 Iowa 596), ante. p. 292; Rule 5 of Bevan v. Hayden, sheriff (13 Iowa 122), ante. p. 127.

DICKERSON & Co. v. DANIELS, 15 IOWA 598

(Abstract.)

1. Principal and Agent—Powers of Agent Which are Not Implied.—Power to an agent to enter land under a military land warrant, does not give him authority to make a sale thereof. Power to an agent to sell land, does not empower him to collect its purchase price, p. 599.

Reaffirmed and extended in Austin v. Thorp, 30 Iowa 378, holding further that power to an agent to collect money is not inferred from his authority to make a loan and receive securities therefor.

GRAHAM v. WOOD, 15 IOWA 600

(Abstract.)

1. Action at Law—Trial by Court—Finding of Law and Facts Not Excepted to—Effect on Appeal.—Where a trial of an action at law is had by the court, who makes a finding of law and facts in writing, and no objection is made or exception taken thereto, the judgment will be affirmed upon appeal, p. 600.

Cited with approval in Brown v. Webster, 16 Iowa 589, holding that an order sustaining a demurrer will not be reviewed upon appeal, when the record does not show that exception thereto was taken below.

Cross references. See further in this connection, annotations under Warner, Adm'r v. Pace (10 Iowa 391), Vol. I, p. 710; Pigman v. Denney (12 Iowa 396), ante. p. 66.

BARNES v. HAYICK, 15 IOWA 602

(Abstract.)

1. Erroneous Judgments and Orders of District Court—Necessity for Motion to Correct Before Appeal.—Errors in the orders, rulings and judgments of the district court which may be corrected upon motion therein, will not be reviewed upon appeal, unless such motion to correct was made below before the appeal was prosecuted, p. 602.

Special cross reference. For cases citing, sustaining, explaining, etc., the text, and many others on the question, see annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66.

BRADY & SKEERY *v.* GILLIS, 15 IOWA 602

(Abstract.)

1. Actions Commenced Under Code of 1851—Proceedings in After Taking Effect of Code of 1860.—Actions commenced before the taking effect of the Code of 1860, are governed by the provisions of the Code of 1851, p. 602.

Special cross reference. For cases citing and distinguishing the text, and others, see annotations under *State v. Innskeep* (12 Iowa 266), ante. p. 44.

MOSIER *v.* HULL, SHERIFF, 15 IOWA 603

(Abstract.)

1. Joint Obligors on Bond—Action Against Any or All.—Under Sec. 2764 of the Code of 1860, an action may be maintained Against any or all of the obligors in a joint bond, p. 603.

Special cross reference. For cases citing the text and others on the question, see annotations under *Sellon & Co. v. Braden, Adm'r* (13 Iowa 365), ante. p. 162.

HUNTINGTON *v.* HOWE, 15 IOWA 606

(Abstract.)

1. New Trial—Verdict Contrary to Evidence—Discretion of Trial Court—Abuse—Reversal.—The trial court has a large judicial discretion in deciding upon a motion for a new trial on the ground that the verdict is contrary to the evidence, and his ruling thereon will not be reversed upon appeal, except in a case where such discretion is manifestly abused, resulting in palpable injustice, p. 606.

Reaffirmed in *Sadler v. Bean*, 38 Iowa 685 (abstract).

(Note.—See further specially, *Lester & Bro. v. Sallack*, 31 Iowa 477; *McAunich v. M. & M. R. R. Co.*, 20 Iowa 338.—Ed.)

Cross reference. See further on this question, annotations and cross references under *Shepherd v. Brenton* (15 Iowa 84), ante. p. 308.

Annotations to Decisions Reported in Volume 16 Iowa.

LAVERTY v. WOODWARD, ADM'R, 16 IOWA 1

1. Action at Law—Appeal—Questions Not Raised Below—Estoppel of Parties by Conduct in Lower Court—Review.—Upon an appeal from a judgment in an action at law, questions not raised in the trial court will not be reviewed: And the parties upon the appeal are bound by the issue made and trial thereon below, and cannot claim anything contrary thereto in the Supreme Court. So, where in an action by the heirs of a decedent against his personal representative for rents and profits of real estate collected by him, the petition is equivocal as to whether he is sued individually or as representative, and the record upon appeal shows that the parties to the action and the trial court regarded the action against him *as representative* and not *individually*, the plaintiffs cannot claim to the contrary upon the appeal, pp. 4, 5.

Reaffirmed and explained in Ross v. Hawkeye Ins. Co., 93 Iowa 225, 61 N. W. 853, 34 L. R. A. 466, holding that in law actions the Supreme Court will not review questions not raised below.

Reaffirmed and extended in Garland v. Wholebau, 20 Iowa 272, holding that where a party to an action at law does not object to the form of the action, or that it was not well brought, in the trial court, he cannot complain thereof upon appeal.

(Note—See further, sustaining and explaining, but not citing the text, Benjamin v. Shea, 83 Iowa 392, 49 N. W. 989; Edwards v. Cosgro, 71 Iowa 296, 32 N. W. 350; Hoyt v. Hoyt, 68 Iowa 703, 28 N. W. 27; Goodnow v. Plumb, 67 Iowa 661, 25 N. W. 870; Iowa Homestead Co. v. Duncombe, 51 Iowa 525, 1 N. W. 725; Lower v. Lower, 46 Iowa 525, and there are many others.—Ed.)

2. Decedent's Estate—Real Estate of—Liability of Personal Representative for Rents and Profits Collected by Him.—A personal representative has no right to collect the rents and profits of a decedent's real estate, and is liable individually to the heirs or their assigns, for any such rents or profits collected by him, p. 5.

Reaffirmed in Dexter v. Hayes, 88 Iowa 495, 55 N. W. 491, holding that unless otherwise provided by statute, or by will, the heirs and not the personal representative, are entitled to the rents and profits of decedent's real estate.

Reaffirmed and narrowed in Crawford v. Ginn, 35 Iowa 549, 550, holding that rents for the lands of decedent accruing before his death, are assets of the estate, recoverable only by the administrator.

Reaffirmed and narrowed in In re Bennock's Estate, 122 Iowa 627, 98 N. W. 481, holding that a widow whose dower is unassigned in real estate of her decedent, husband, cannot sue the administrator for her share of rents collected by him.

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, Toerring v. Lamp, 77 Iowa 488, 42 N. W. 378; Felch v. Finch, 52 Iowa 563, 3 N. W. 570; Huston v. Seeley, 27 Iowa 183.—Ed.)

Cross references. See Rule 3 hereof. See further on this question, annotations under Beezley v. Burgett (15 Iowa 192), ante. p. 323; Gladson, Adm'r v. Whitney (9 Iowa 267), Vol. I, p. 574.

3. Decedent's Estate—Descent of Real Estate.—The heirs of a decedent take his real estate at once (in the absence of a will to the contrary), subject to the payment of his (decedent's) debts where necessary; but subject to this charge, the heirs are entitled to possession, rents and profits, of the real estate from the death of their ancestor, and may, subject thereto, alienate the property; and must pay the taxes thereon, p. 5.

Reaffirmed in Herriott, State Treasurer v. Potter, Adm'r, 115 Iowa 650, 89 N. W. 92.

Reaffirmed and extended in Pitkin, Ex'x v. Peet, 108 Iowa 483, 79 N. W. 273, holding further that (under the Codes of 1873 and 1897) the debts and charges against the estate of a decedent, where no other provision is made by will, are payable from the personal property, if it is sufficient for that purpose: And that this is true where all the personalty is bequeathed by will, unless it be made to appear that it was the testator's intention that the debts should be paid from the real estate: That, under Sec. 2420 of the Code of 1873 and Sec. 3348 of the Code of 1897, debts of an estate are payable before legacies.

JONES v. GALENA & CHICAGO UNION R. R. Co., 16 Iowa 6

1. Railroad Companies—Liability of For Killing or Injuring Stock—Double Damages—When Allowed—Constitutionality of Act of 1862 Concerning.—Chapter 169, Sec. 6, of the Acts of 1862, relative to the absolute liability of a railroad company for damages for killing or injuring stock, where it fails to fence its track, and for double damages upon refusal to pay the value of the stock within thirty days after notice and proof as therein required, is constitutional, pp. 9, 10.

Reaffirmed in Welsh v. C. B. & Q. R. R. Co., 53 Iowa 633, 6 N. W. 13, upholding constitutionality of Sec. 1289 of the Code of 1873, which is Sec. 6 of Chap. 169, Acts of 1862, mentioned in the text.

Reaffirmed and varied in *McAunich v. M. & M. R. R. Co.*, 20 Iowa 344; *Akeson v. Ch. B. & Q. Ry. Co.*, 106 Iowa 56, 75 N. W. 676, holding that Sec. 7 of Chap. 169, Acts of 1862 (Act of text), is constitutional: That a railroad company is liable in damages thereunder for want of ordinary care in one fellow servant, resulting in personal injury to another fellow servant; and that the Act applies to all persons employed by a railroad company whose employment is connected with the operation of a railway train, but not to persons otherwise employed by the company who are not exposed to the hazards of the operation of trains.

Reaffirmed and qualified in *McCool v. Halena & Ch. Un. R. R. Co.*, 17 Iowa 462, 463, holding that a railroad company is only liable for *gross negligence* in killing or injuring cattle which are prohibited from running at large (such as bulls, etc.).

Reaffirmed and qualified in *Russell v. Hanley*, 20 Iowa 221, 89 Am. Dec. 535; *Whitbeck v. D. & P. R. R. Co.*, 21 Iowa 105, holding that if a railroad company fails to fence its road, it is liable absolutely for stock injured or killed by reason of want of such fence, and, under certain circumstances for double the value thereof, unless the injury or killing is occasioned by the willful act of the owner.

Cross references. See Rule 2 hereof. See further, annotations under *Alger v. M. & M. R. R. Co.* (10 Iowa 268), Vol. I, p. 680. See also, in this connection, annotations under *Sullivan v. M. & M. R. R. Co.*, (11 Iowa 421), Vol. I, p. 837.

2. Constitutional Law—Statutes Governing Particular Classes of Individuals or Corporations.—The General Assembly has power to enact a law governing a particular class of individuals or corporations; and such a law is not in violation of Art. 1, Sec. 6 of the Constitution, requiring laws of a general nature to have a uniform operation, pp. 9, 10.

Reaffirmed in *McAunich v. M. & M. R. R. Co.*, 20 Iowa 344.

Reaffirmed and explained in *Gano v. Minn. & St. L. R. R. Co.*, 114 Iowa 726, 87 N. W. 719, 89 Am. St. Rep. 393, 55 L. R. A. 263, holding that the Legislature may, where the public interests, or the administration of Justice requires, or in the exercise of the police power of the state, classify persons, corporations, or associations, and impose duties or liabilities upon them or grant them privileges not conferred upon the entire people: Provided, that all such laws shall not be arbitrary.

(Note.—See further specially on this subject, *Iowa R. R. Land Co. v. Soper*, 39 Iowa 112; *Deppe v. Ch. R. I. & P. R. R. Co.*, 36 Iowa 52.—Ed.)

COOLEY v. BRAYTON, 16 IOWA 10

1. Real Estate—Conflicting Titles—Deraignment of Titles Where Both are Held Under or Through Same Source—Proof Required.—Where in an action for the recovery of real estate involving conflicting titles, both parties claim title under or through a common source or grantor, it is only necessary for the plaintiff to deraign title to the common grantor; in such case he is not required to trace the title of such grantor, pp. 13, 14.

Reaffirmed in Byers v. Rodabaugh, 17 Iowa 60; Brown v. Taber, 103 Iowa 3, 72 N. W. 417.

Reaffirmed and extended in English v. Otis, 125 Iowa 558, 101 N. W. 295, holding further that the rule applies to actions to quiet title to land.

(Note.—See further, sustaining, but not citing the text, Morrison v. Wilkerson, 27 Iowa 374; Conger v. Converse, 9 Iowa 554, and there are others.—Ed.)

2. Executions—Special—Sufficiency of Writ—Immaterial Omission in.—Where a special execution for the sale of land shows the amount of the decree and the amount still due thereon and is otherwise specific and regular, the fact that the clerk fails to fill in the amount in the commanding clause will not invalidate a sale made thereunder, pp. 14, 15.

Reaffirmed and extended in Cunningham v. Felker, 26 Iowa 119, holding further that a variance of fifty cents between the amount of the judgment and the execution, will not invalidate a sale and deed made under the latter.

Reaffirmed and extended in Williams v. Brown, 28 Iowa 249, holding further that a variance between the amount of the judgment and the amount commanded to be made by the execution issued thereon, nor the fact that the names of the parties to the action are not given in the execution, as required by Sec. 3251 of the Code of 1860, (the name of the party recovering the judgment and against whom recovered being stated in the execution), will not affect its validity or prevent an officer from defending under it, in an action of replevin for personal property seized thereunder.

Reaffirmed and extended in Burdick v. Shigley, 30 Iowa 65, holding further that in an action of replevin for personalty seized by a constable under an execution from a justice's court, the execution is sufficient if it conveys to a common understanding, the parties to the action and judgment, the amount of the latter, the amount to be collected, and the venue to be within the state of Iowa: That such writs from such courts are to be construed with liberality.

• *Cited in* Brayton v. Boone, 19 Iowa 506, not in point.

Distinguished and narrowed in Wilson v. Reuter, 29 Iowa 179, holding that where a special execution for a sale of land, exceeds the

relief and rights granted by the decree, parties to the action are not estopped from claiming rights, as against the purchaser at the execution sale, not determined by the decree, although they be inconsistent with the execution: That a purchaser at such execution sale, does not obtain title to the property dating back to that of the lien on which the decree was rendered.

(Note.—See further, sustaining and explaining, but not citing the text, *Dean v. Goddard*, 13 Iowa 292; *Finnegan v. Manchester*, 12 Iowa 521; *Sprott v. Reid*, 3 G. Green 489; *Humphry v. Beesom*, 1 G. Greene 200.—Ed.)

3. Res Adjudicata — What Constitutes — Must be Specially Plead.—*Res adjudicata* applies where the subject-matter of a subsequent action was determined upon its merits in a former action between the same parties: But it must be specially pleaded. *Res adjudicata* applies to parties and privies, pp. 18, 19.

Reaffirmed in *McHenry v. Cooper*, 27 Iowa 147.

Reaffirmed in part in *Van Orman v. Spafford, Clarke & Co.*, 16 Iowa 193, holding that *res adjudicata* must be specially pleaded in the subsequent action.

Reaffirmed and extended in *Wood v. Wood*, 143 Iowa 446, 121 N. W. 1092, holding further that where there is an apparent conflict between two adjudications by the same court between the same parties, the last will prevail.

Cited in *Wood v. Wood*, 136 Iowa 134, 113 N. W. 495, 12 L. R. A. (New Series) 891, not in point, but on a parity.

Cross reference. See further on this question, annotations, note and cross references under *Whitaker v. Johnson County* (12 Iowa 595), ante. p. 102.

4. Lis Pendens—Purchaser of Land Pending Action Concerning.—A purchaser of real estate pending an action concerning the title thereto, or liens thereon, is charged with notice of the proceedings, orders and judgments therein, and is bound thereby, although not made a party, whether his purchase be under an execution on another judgment in another action, or from a party to the pending action, p. 19.

Reaffirmed in *Crum v. Cotting*, 22 Iowa 424; *Comstock v. City of Eagle Grove*, 133 Iowa 602, 111 N. W. 55, holding that a purchaser at a tax sale of land, which is made pending an action to foreclose a mortgage thereon, is charged with notice of and is bound by the proceedings therein.

Reaffirmed in *Blanchard v. Ware*, 37 Iowa 308; *Jackson v. C. M. & A. Ry. Co.*, 64 Iowa 295, 20 N. W. 443, holding that a purchaser of land, or any interest therein, or easement over it, pending an action against his grantor involving the title thereto, is charged with notice of and is bound by all proceedings therein; and is concluded by a decree therein annulling his grantor's title thereto.

Reaffirmed and extended in Standish v. Dow, 21 Iowa 368, 369, holding further that where a mortgage on land recites that it is taken subject to a prior trust deed, that the mortgagee takes subject to the terms and conditions of the latter; and where such trust deed allows foreclosure of the equity of redemption by notice, etc., that a purchaser at a sale under a decree in an action foreclosing the mortgage, where the sale is made after foreclosure under the trust deed as therein provided, takes subject to the rights of the purchaser at the trust deed foreclosure sale.

Distinguished and narrowed in Parsons v. Hoyt, 24 Iowa 157, holding that a purchaser of land pending an action involving title thereto, who purchases from one not a party to the action, and who purchases another title than that involved in the action, is not charged with notice of or bound by the proceedings, or a decree therein.

(Note.—See further specially on this question, Rine v. Wagner, 135 Iowa 626, 113 N. W. 471; Olson v. Leibpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. Rep. 327; McClelland v. Bennett, 106 Iowa 74, 75 N. W. 667; Des M. Ins. Co. v. Lent, 75 Iowa 522, 39 N. W. 826; Severin v. Cole and B. C. R. & M. Ry. Co., 38 Iowa 463; McGregor v. McGregor, 21 Iowa 441; Davis v. Bonar & Kearns, 15 Iowa 171; Ferrier v. Buzick, 6 Iowa 258.—Ed.)

KEATER & SKINNER v. HOCK, MUSSER & Co., 16 Iowa 23

1. Res Adjudicata—What Does and What Does Not Constitute—Judgment on Demurrer.—A judgment on a demurrer is not a bar to a subsequent action between the same parties on the same cause of action, the petition in the last action setting out new and material allegations and stating a good cause of action: But a judgment on a demurrer is a bar to a subsequent action between the same parties and on the same facts, p. 24.

Reaffirmed and explained in Felt v. Turnure, 48 Iowa 402, 403, holding that a judgment on demurrer is a bar to a subsequent action between the same parties upon *substantially* the same facts determined by the demurrer.

Reaffirmed and explained in Woodward v. Jackson, sheriff, 85 Iowa 435, 52 N. W. 359, holding that in order for *res adjudicata* to apply as to a subsequent action, it must appear that the former action was between the same parties or their privies, that the question in issue was the same, and that it was determined upon its merits in the former.

Reaffirmed and extended in Wapello State Sav. Bank v. Colton, and Letts, et al, 143 Iowa 363-365, 122 N. W. 151, holding further that a judgment on a demurrer, or on a motion in the nature of a demurrer, is a bar to a subsequent action based upon *substantially the same facts* as thereon adjudicated.

(Note.—See further, sustaining and explaining, but not citing the text, *Coffin v. Knott*, 2 G. Greene 582, 52 Am. Dec. 537.—Ed.)

Cross references. See further on this question, annotations and notes under Rule 3 of *Cooley v. Brayton* (16 Iowa 10), ante. p. 394; Rule 1 of *Myers v. Johnson County* (14 Iowa 47), ante. p. 203; *Whitaker v. Johnson County* (12 Iowa 595), ante. p. 102.

BRAUGHT v. GRIFFITH AND MCCLEARY, 16 IOWA 26

1. Principal and Surety—Note Against Decedent's Estate—Filing by Payee Within Time Prescribed—Payment by Surety—Subrogation.—Where the payee of a note against a decedent, files it, properly sworn to, in the county court within six months after notice of the appointment of an administrator, sureties thereon who are thereafter compelled by the payee to pay it, are entitled to be subrogated to his rights against the estate, pp. 31-33, 35.

Reaffirmed, extended and explained in *Searing v. Berry*, 58 Iowa 23, 11 N. W. 709, holding further that a surety upon payment of the debt is, in equity, subrogated to all the rights of the creditor, and may so enforce all liens, priorities, and means of compelling payment possessed by the creditor: And if the debt be reduced to judgment the surety is entitled to an assignment thereof, and may enforce all rights thereby given by an action in equity.

Cross reference. See further in this connection, *Johnson v. Bel-den*, below.

Reaffirmed and extended in *Hodson v. Tibbetts*, 16 Iowa 104, holding further that a purchaser under a sheriff's sale of land under a judgment in an attachment action and to whom the judgment, claim sued on, and all other claims connected therewith are assigned, is entitled to be subrogated to all the rights of the attachment plaintiff, with the privilege of prosecuting such action for his own use and benefit, as against any persons claiming an interest in the land adverse thereto, although such sheriff's sale be invalid.

Reaffirmed and extended in *Massie v. Mann*, 17 Iowa 135, 137, holding further that a purchaser of mortgaged realty who assumes the debt, or covenants to pay it, is, as between him and his vendor (mortgagor) a principal, and upon such vendor paying the debt, he is entitled to be subrogated to all the rights of the mortgagee.

Reaffirmed and extended in *City of Keokuk v. Love*, 31 Iowa 123, holding further that the equity of sureties to subrogation extends, not only to the rights of the creditor, whose debt they pay, against the principal, but to all the rights of the creditor respecting the debt which they pay: Hence, holding that the sureties of a city treasurer who pay to the city the amount of money collected by the treasurer, are entitled to subrogation to the rights of the city against the money collected which is on deposit in a bank.

Reaffirmed, extended and qualified in Johnson v. Belden, 49 Iowa 302, 303, holding further that the lien of a judgment survives for the security of a surety who pays it; but such surety must seek relief in equity, as on an implied promise, within five years after he satisfies it, or, his rights will be barred by the Statute of Limitation (under the Code of 1873): And this is the rule although such surety takes an assignment of such judgment at the time he pays it.

Cross reference. See further, and compare, Searing v. Berry, above.

Cited with approval in James, et al v. Day & Close, 37 Iowa 167. 168, holding that the right of a surety to subrogation to the rights of a creditor of his principal, arises only when he (the surety), pays or extinguishes the debt of the creditor; Hence, holding that where a purchaser of mortgaged property assumes the debt, or covenants to pay it, that the mortgagee may sue him at law for interest due on a note so secured without foreclosing the mortgage; that in such case the mortgagee may sue both the vendor (mortgagor) and the purchaser, or either, at law for the debt and interest, or, may proceed in equity to foreclose the mortgage, unless the mortgagee has, by a valid agreement, released the vendor (mortgagor) as principal.

Cited in Bockholt v. Kraft, 78 Iowa 666, 43 N. W. 540 (dissenting opinion), the majority court holding that the right of a surety to subrogation is subject to and qualified by Sec. 1993 of the Code of 1873, requiring all other property on which a lien is given to secure a debt to be first exhausted before the homestead be sold to satisfy it: That where a surety (a wife) mortgages her real estate along with the homestead of her husband to secure a debt of her husband, she cannot upon paying the debt subject the homestead for her reimbursement.

Cited in Atlee v. Bullard, 123 Iowa 281, 98 N. W. 891, not in point.

Cross reference. See other rules hereof.

2. Decedent's Estate—Filing Claim Against—Nature of Proceeding.—By filing (in the county court) a note, verified as required by statute, against the estate of a decedent within six months after notice of the appointment of an administrator, a creditor institutes proceedings to establish his claim, p. 31.

Reaffirmed and extended in Smith, Murphy & Co. v. Shawhan, Adm'r, 37 Iowa 534, 535, holding further that an order of the county court approving and ordering a claim against a decedent to be paid, is not a "judgment" within the meaning of the Statute of Limitation: That the stating, verifying and filing of a claim against a decedent is the commencement of an action thereon.

3. Decedent's Estate—Filing of Claim Against—Withdrawal to Sue Sureties on—Effect.—Where a creditor of a decedent files his

note in the county court within six months after notice of the appointment of an administrator, he does not waive or abandon his claim or rights thereunder, by thereafter withdrawing the note for the purpose of suing others liable thereon, pp. 31, 32.

Reaffirmed and extended in Clough v. Ide, Adm'r, 107 Iowa 671, 78 N. W. 698, holding further that withdrawal of a claim filed in the probate court, for the purpose of preparing and filing a petition for its allowance, is not a dismissal, or abandonment thereof: That withdrawal of such a claim for a temporary purpose does not constitute dismissal, or abandonment.

Cited in Logan v. Hall, 19 Iowa 495, not in point.

STATE v. SHUPE, 16 IOWA 36, 85 Am. Dec. 485

1. Note Payable in Specific Property — How Discharged — Waiver of Duties of Maker by Payee.—In order for the maker of a promissory note which is payable in specific property to discharge himself from the obligation, it is necessary for him to pay or tender, or properly set apart the property at the time and place specified in the note: But demand of payment by the payee therein, after maturity, waives a previous breach by the maker and enables him to then do such act or acts and thereby be discharged, p. 38.

Reaffirmed and extended in Lazier v. Horan, 55 Iowa 80, 81, 7 N. W. 460, 39 Am. Rep. 167, holding that when the maker of a promissory note payable in personal property to be delivered at a specified time and place, makes a tender of the specific articles and sets them apart at the time and place stipulated, and the creditor is not there to receive, or refuses to accept the property, the debt is thereby discharged and the title of the property passes to the creditor: Holding further that where a note payable in money is payable at a certain time and at a certain bank, that the maker's depositing the amount of the note and interest in such bank at maturity *for the payee* and to pay the note, the note not being there at such time, it is thereby paid and he (the maker) is discharged.

(Note.—See further specially on this question, *Cash v. Hinkle*, 36 Iowa 623; *Myers v. Byington*, 34 Iowa 205; *Council Bluffs Iron Works v. Cuppey*, 41 Iowa 104; *Crabtree v. Messersmith*, 19 Iowa 179; *Hambel v. Tower*, 14 Iowa 530; *Spafford v. Stutsman*, 9 Iowa 131; *Tarbell v. Stevens & Co.*, 7 Iowa 163; *Williams v. Triplett*, 3 Iowa 518; *Phillips v. Cooley*, 2 G. Greene 456; *Games v. Mannig*, 2 G. Greene 251.—Ed.)

Cross reference. See further, annotations under *Hambel v. Tower* (14 Iowa 530), ante. p. 280.

2. Perjury—What Constitutes—Materiality of False Statement to Issue—Extent Necessary.—In order to constitute perjury it is not necessary that the statement falsely and corruptly sworn to be

material to the main issue in an action, it being sufficient if it relate to a collateral issue. So, a false, corrupt and material statement by a party in an affidavit for a continuance, is perjury, p. 40.

Reaffirmed and explained in State v. Aikens, 32 Iowa 404, 405, holding that in order to constitute the crime of perjury (under Sec. 4271 of the Code of 1860) the accused must have willfully, falsely and corruptly sworn or affirmed something material to an issue being tried; that on an indictment for perjury *the materiality* of the statement so made must be proved like any other ingredient of the crime, and cannot be left to be inferred by the court or the jury: It is not perjury to swear willfully, falsely and corruptly to a matter utterly irrelevant to the issue joined in the action wherein the testimony is given.

Reaffirmed and extended in State v. Brown, 128 Iowa 31, 32, 102 N. W. 802, holding further (as does the present case in argument) that in order to constitute perjury (under Code of 1897) it is not necessary that matter sworn to be material to the main issue in the case; that if it be in any way conducive to prove the point in issue, or is a guide to the court or jury, although it be circumstantial, it constitutes the crime: Matter circumstantially material is the subject of Perjury: Holding further that on the trial of an indictment for perjury, the question of the materiality of the false testimony, is one of law for the court.

CUMMINGS v. LONG, 16 IOWA 41, 85 Am. Dec. 522

1. Homestead Exempt From Judgment Lien—Rights of Debtor Concerning.—Homestead is exempt from the lien of or sale under a judgment, and the owner thereof may at any time incumber, or convey it, free from all claims of his creditors, p. 42.

Reaffirmed in Thomas v. McDonald, 102 Iowa 568, 71 N. W. 572.

Unreported citation, 120 N. W. 946.

Cross reference. See further on this question, annotations, note and cross reference under Rule 2 of Lamb v. Shays (14 Iowa 567), ante. p. 285.

2. Judgment Docket and Record Book—Sufficiency of as Constructive Notice as to Lien on Land—Index Required.—Under Secs. 144, 145 of the Code of 1851, a judgment entered in the record book and carried forward into the judgment docket under the title of A. B. v. C. D. et al, without an index referring to each of the parties named as defendants, would not operate as constructive notice to third persons, as to who were included therein as such defendants, pp. 43, 44.

Reaffirmed and extended in Sterling Mfg. Co. v. Early, 69 Iowa 97, 28 N. W. 459, holding further (under the Code of 1873) that third persons are not charged with constructive notice of a judgment unless it is correctly indexed.

Reaffirmed and extended in Aetna L. Ins. Co. v. Hesser, 77 Iowa 386, 42 N. W. 327, 14 Am. St. Rep. 297, 4 L. R. A. 122, holding further (under the Code of 1873) that when a judgment is not indexed, it does not impart constructive notice.

Reaffirmed and narrowed in State Sav. Bank of Mo. Valley v. Shinn, sheriff, et al, 130 Iowa 367, 368, 106 N. W. 921, 114 Am. St. Rep. 424, holding that a judgment is a lien on land as between the parties to the action and as to subsequent purchasers or incumbrancers with *actual notice*, although it be not indexed or be improperly so done.

Cited with approval in Reeves & Co. v. Sebern, 16 Iowa 237, 85 Am. Dec. 513, a case turning upon actual notice of a pledge at the time of the levy of an attachment.

Cited with approval in Barney v. McCarty, 15 Iowa 522, the case turning upon the sufficiency of an index entry to a recorded conveyance, and other matters intimately connected with the question of the text.

Cited in Foreman v. Higham, 35 Iowa 386, not in point.

Cited in McGinnis v. Edgell, 39 Iowa 423, not in point, but upon analogy.

Distinguished and narrowed in Dickinson v. Crowell, 120 Iowa 256, 257, 94 N. W. 495, holding that a written instrument, or decree, granting a mere easement over land, is not required to be recorded and indexed: Holding, also, that a party is chargeable with notice of facts which he should have ascertained as a reasonably cautious man, when facts known to him would have put the latter order of man upon inquiry.

Cross reference. See further in this connection, annotations, notes and cross references under Barney v. Little (15 Iowa 527) ante. p. 381.

BRAYTON v. DELAWARE COUNTY, 16 IOWA 44

1. Appeals From Justice's Court—Appeal Bond and Certificate of Justice—Revenue Stamp.—Upon an appeal from a judgment in a justice's court, the appeal bond and the certificate of the justice are part of the record on appeal, and no stamps are required to be affixed thereto (under National Revenue Law in force June 12, 1864), pp. 45, 46.

Impliedly overruled in Hughes v. Strickler, 19 Iowa 415, under the National Revenue Law of June 30, 1864.

2. Actions—Plea of Tender—Effect—Verdict Inconsistent With.—The defendant's plea of tender admits the plaintiff's cause of action to the extent of the amount tendered; and in such case a verdict against plaintiff is inconsistent with such plea, and will be set aside upon motion, p. 47.

Reaffirmed and extended in Burton v. Hintrager, 18 Iowa 352, holding further that where the owner of land sold for taxes, tenders

the amount of taxes paid by him, together with interest and penalty to the tax purchaser, such tender is a waiver of objection as to the amount due and to any irregularity in assessment or the sale, as to the amount tendered and admitted to be due.

Reaffirmed and extended in Fisher v. Moore, 19 Iowa 86, holding further that where plaintiff recovers less than the amount tendered and kept good by the defendant, and makes no objection to his judgment therefor, that it is his duty to collect his judgment and costs from the amount in the hands of the clerk (it exceeding the judgment and costs) and an execution on such a judgment will be enjoined upon complaint of the defendant.

Reaffirmed and extended in Phelps v. Kathron, 30 Iowa 231, holding further that where a verdict is for less than the amount tendered by the defendant, and the court refuses to grant plaintiff a new trial, the judgment thereon will be reversed upon appeal.

Reaffirmed and extended in Wright v. Howell, 35 Iowa 294, holding further that where in an action involving the amount of improvements on and rents of land, the plaintiff tenders a certain amount as due by him, that a report of the commissioner of a less amount due by plaintiff and a judgment rendered by the court thereon, is erroneous; That such judgment in such case must be against plaintiff for the amount tendered.

Reaffirmed and extended in Wilson v. Ch. M. & St. P. Ry. Co., 68 Iowa 674, 27 N. W. 916, holding further that where defendant pleads and tenders an amount due the plaintiff, he cannot thereafter move in arrest of judgment of a verdict in the action, as the latter motion denies plaintiff's right to recover any amount, and is inconsistent with the plea of tender.

Reaffirmed and qualified in Sheriff v. Hull, 37 Iowa 178, holding that where the verdict against defendant is for less than the amount tendered and kept good by him, and the court thereupon enters judgment thereon and orders (as is allowed by Sec. 3138 of the Code of 1860) that the amount tendered and paid into court be paid to plaintiff, that such latter order cures the defect in the verdict and judgment.

(Note.—See further sustaining and explaining, but not citing, the text, Taylor v. Ch. St. P. & K. C. Ry. Co., 76 Iowa 753, 40 N. W. 84; Shugart & Lininger v. Pattee, 37 Iowa 422; Guengerich v. Smith, 36 Iowa 587; Barker v. Brink, 5 Iowa 481; Freeman v. Fleming, 5 Iowa 460; Frink & Co. v. Coe, 4 G. Greene 555, 61 Am. Dec. 134; Johnson v. Twiggs, 4 G. Greene 97.—Ed.)

BARRETT v. GARRAGAN, 16 IOWA 47

1. **Judgment—Requisites and Sufficiency of.**—If the time, place, parties and matter adjudicated be clearly stated and shown by a judgment, it is sufficient, in whatever form it may be stated, p. 49

Reaffirmed in Church v. Crossman, 41 Iowa 374, 375.

Reaffirmed and extended in Williams v. Brown, 28 Iowa 248, 249, holding further that a variance between the amount of the judgment and the amount commanded to be made by the execution issued thereon, nor the fact that the names of the parties to the action are not given in the execution, as required by Sec. 3251 of the Code of 1860, (the name of the party recovering the judgment and against whom recovered being stated in the execution) will not affect its validity or prevent an officer from defending under it, in an action of replevin for personal property seized thereunder.

Reaffirmed and extended in Lavalley v. Badgley, 33 Iowa 156, holding further a judgment in a justice's court to be sufficient which reads as follows, to wit: "After examination of witnesses and allegations of the plaintiff and defendant, it was considered to render to plaintiff, M. L. peaceable possession of one black muley steer, value \$35, and one yearling steer of the value of \$10, together with \$5 damages for wrongfully detaining said steers from the plaintiff, and costs taxed against the defendant at \$5.50."

Reaffirmed and varied in Coffey v. Gamble, 117 Iowa 549, 550, 91 N. W. 814, holding that where a party has knowledge that an order of injunction has been granted against him, he is bound by it from the time he receives such knowledge, although the formal entry of the order may not at that time have been made, nor the writ issued and served.

PIKE v. KING, 16 IOWA 49

I. Contracts in Violation of Statute or Public Policy, Void.—

A contract made in violation of a statute or founded upon an unlawful act in subversion of the policy of the state, whether it be *malum prohibitum* or *malum in se*, is void, and cannot be enforced by action, p. 52.

Reaffirmed in Nelson v. Harrison County et al, 126 Iowa 445, 102 N. W. 200.

Reaffirmed, explained and qualified in Toovey v. Ayhart, 136 Iowa 697, 114 N. W. 182, holding that the rule is applicable only where the transaction is prohibited as to both of the parties thereto: That if the intention of a statute is to prevent one person from doing that which is prejudicial to another, only the person forbidden to do the act is thereby guilty of a violation of law, and the other may assert his rights under the transaction, notwithstanding the prohibition.

Reaffirmed and extended in Boardman & Brown v. Thompson, 25 Iowa 504, 505, holding further that a contract between an attorney and his client whereby the former is to institute an action, to advance money for court costs, etc., and to receive payment therefor, out of the amount recovered, together with a certain per cent. of the recovery for his services, all to be paid out of the amount recovered, the action not to be settled without the attorney's consent, is champertous and void.

Reaffirmed and extended in Allison et al v. Hess, 28 Iowa 390, holding further that a conveyance based upon an agreement to compound a felony, is void.

Reaffirmed and extended in Gilman & Cowdrey v. D. V. R. Co., 40 Iowa 203, 204, holding further that a contract to pay higher fees to an officer than those fixed by statute is void; and that where, by such contract, it is uncertain whether the fees will be greater or less than those allowed by statute, the contract is void.

Reaffirmed and extended in Dillon & Palmer v. Allen, 46 Iowa 300, 301, 26 Am. Rep. 145, holding further that (in an action for services rendered in threshing grain) a contract in violation of Sec. 4064 of the Code of 1873 (requiring certain parts of threshing machines to be boxed) is void.

Reaffirmed and extended in McIntosh, Adm'r v. Wilson, sheriff, 81 Iowa 343, 46 N. W. 1004, holding further that one who transfers property to another to be held and treated by the latter as its ostensible owner, loses the right to reclaim it by law, and such property is subject to process in favor of the creditors of the transferee, ——— Where the transfer is made to accomplish a purpose prohibited by law.

Reaffirmed and qualified in Muscatin County v. Carpenter, 33 Iowa 43, 44, holding that although money of a county which has been regularly appropriated, be illegally paid by the board of supervisors, clerk and treasurer thereof, such fact is no defense to an action on the bond of the person to whom it is paid.

Reaffirmed and narrowed in Watrous & Snouffer v. Blair, 32 Iowa 61, 62, holding that while Sec. 1027 of the Code of 1860, prescribes a penalty against any owner of city or town lots who shall dispose of or offer them for sale until a plat thereof is duly acknowledged and recorded, and a contract for the sale of such lots may therefore be void against such owner, such a contract is not void as against the purchaser thereof. ——— And see Pangborn v. Westlake, 36 Iowa 548, 550 (reaffirming and further narrowing the text) holding that the vendor (owner of such lots) may, in such case, maintain an action on purchase money notes given therefor.

Distinguished and narrowed in Dist. Township of Pleasant Valley v. Calvin, 59 Iowa 190, 191, 13 N. W. 81, holding that where a statute forbids a public officer to lend money in his hands in a fiducial capacity, and such officer in violation of law lends such money, taking a note therefor, that in an action on the note, the borrower cannot plead the prohibitive statute in avoidance of his liability.

(Note.—See further qualifying and narrowing, but not citing, the text, Benton County Sav. Bank v. Boddicker, 105 Iowa 548, 75 N. W. 632, 67 Am. St. Rep. 310, 45 L. R. A. 321; Pennypacker v. Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Mills County Nat'l Bank v. Perry, 72 Iowa 15, 33 N. W. 341, 2 St. Rep. 228; Tootle Hosea & Co. v. Taylor, 64 Iowa 629, 21 N. W. 115.—Ed.)

Cross references. See Rule 2 hereof. See further, sustaining and explaining the text, annotations, note and cross reference under *Reynolds v. Nichols & Co.* (12 Iowa 398) ante. p. 67.

2. Contract Made on Sunday—When Void—Quantum Meruit, Etc.—Under Sec. 4392 of the Code of 1860, a contract entered into on Sunday is void *ab initio*, unless it is made by parties excepted from such section; and a party to such a void contract cannot recover upon a *quantum meruit* in relation to the subject-matter thereof, or, in any action where it is necessary to bring in the illegal transaction to aid in establishing his case, pp. 52, 53.

Reaffirmed in *Kinney v. McDermot*, 55 Iowa 675, 676, 8 N. W. 657, 39 Am. Rep. 191; *Gunderson v. Richardson*, 56 Iowa 58, 8 N. W. 685, 41 Am. Rep. 81; *Kelley v. Cosgrove*, 83 Iowa 231, 232, 48 N. W. 980, 17 L. R. A. 779.

Reaffirmed and extended in *Sayre v. Wheeler*, 32 Iowa 561, holding further that in an action on a promissory note, executed and delivered on Sunday, if the plaintiff claims any benefit from the proviso in the statute, mentioned in the text, in favor of those who conscientiously observe the seventh day of the week as the Sabbath, he must so prove his case.

Reaffirmed and extended in *Clough v. Goggins*, 40 Iowa 326, holding further that the court will take judicial notice that a note sued on is dated on Sunday; and that, therefore, the question of the invalidity of such a note sued on, may be raised by demurrer.

Reaffirmed and extended in *Sayre v. Wheeler*, 31 Iowa 114, holding further that a note executed on Sunday in another state, is void and unenforceable here, in the absence of proof that the law is different in the former state.

Distinguished and narrowed in *Johns v. Bailey*, 45 Iowa 244, 245, holding that a note executed and delivered on Sunday, but bearing a secular day date, is good in the hands of a good faith holder, for value, and without notice of such facts.

IN RE TRENCHARD, 16 IOWA 53

1. Criminal Prosecution—When Costs Taxed Against Prosecuting Witness.—Whereupon the calling of a criminal prosecution in a justice's court, the prosecuting witness who filed the information, fails to appear and it is dismissed, upon an appeal to the district court, the costs may (under Secs. 5086 and 5100 of the Code of 1860) be taxed against the prosecuting witnesses, if the latter court is satisfied that the prosecution was malicious and without probable cause, pp. 54, 55.

Distinguished and narrowed in *State v. Hodgson*, 79 Iowa 464, 465, 44 N. W. 708, holding that where there is a conviction upon the trial of a criminal prosecution in a justice's court, and upon appeal the

accused is acquitted, the costs cannot be taxed against the prosecuting witness: That one conviction in a criminal prosecution sufficiently justifies the prosecuting witness, so as to prevent taxation of costs against him.

ANDERSON *v.* EASTON & SON, 16 IOWA 56

1. Actions in Equity—Appeal—Trial De Novo—When Not so Tried.—Upon an appeal in a chancery action (tried below by evidence in writing according to the first method provided by Secs. 2999 and 3000 of the Code of 1860) where the record fails to show that it contains *all* the evidence adduced below, a trial *de novo* upon the facts will not be had, p. 58.

Reaffirmed in Van Orman *v.* Spafford, Clarke & Co., 16 Iowa 193, 194; Kellogg *v.* Kelsey, 16 Iowa 389, 390; Gray, Phelps & Co. *v.* Montgomery, 17 Iowa 66, 67; Prosser *v.* Davis, 18 Iowa 369, 370; Moon *v.* Moon, 19 Iowa 133; Wetherell *v.* Goodrich, 22 Iowa 594.

Reaffirmed and extended in State *v.* Orwig, 27 Iowa 532, holding further that in order to have a trial *de novo* upon the evidence upon an appeal of a decree in a chancery action, the record thereon must contain all of the pleadings and all of the evidence filed and introduced below.

Cross reference. See further, sustaining the text, annotations and cross references under Rule 2 of Cook *v.* Woodbury County, (13 Iowa 21) ante. p. III.

MATHER *v.* BUTLER COUNTY, 16 IOWA 59

(Later Appeal, 28 Iowa 253)

1. Pleadings — Amendments — Amended Petition Containing Additional Counts—When Not New Cause of Action.—Where a petition is based upon a written contract, an amended petition based upon an account, but which is based upon the same transaction, is not a new cause of action, p. 61.

Reaffirmed and extended in Sachra *v.* Town of Manilla, 120 Iowa 565, 95 N. W. 191, holding further that where an amended petition does not set out a new cause of action, it relates to the date of the filing of the original petition, and, for the purposes of the statute of limitation, is regarded as part thereof.

2. Pleadings—Amendments—When Allowed.—Amendments to pleadings are allowed at all stages of a cause of action, within the judicial discretion of the court, upon proper terms, and in furtherance of justice, p. 62.

Reaffirmed in Dixon *v.* Dixon, 19 Iowa 514.

Reaffirmed and explained in State *ex rel.* Floyd *v.* Mayor of Keokuk, 18 Iowa 389, holding that the right to amend applies to mandamus

proceedings, and that a return therein may, by leave of court, be amended at any stage of the proceedings: Holding further, however, that the right to amend is not absolute, but is within the sound judicial discretion of the trial court, his ruling thereon being ground for reversal on appeal, only in case of an abuse of such discretion.

Cross references. See further on this question, annotations under *Williams v. Miller* (10 Iowa 344); *Seevers, Adm'r v. Hamilton* (11 Iowa 66), Vol. I, pp. 701 and 773, respectively.

LYONS *v.* THOMPSON, 16 IOWA 62

1. Appeal—Bill of Exceptions—Certainty Required.—A writing or any other evidence upon which a reversal is sought in an action at law, should be copied at length in the bill of exceptions; but in any case it (the writing or other evidence) must be identified with care and certainty therein, or it will not be considered upon appeal, pp. 64, 65.

Reaffirmed in *Van Orman v. Spafford, Clarke & Co.*, 16 Iowa 191.

Reaffirmed and explained in *B. Gas Light Co. v. Green, Thomas & Co.*, 21 Iowa 336, 337, holding that a bill of exceptions certified as containing the substance of the evidence adduced below, is insufficient for a review of any question involving a matter of evidence.

Cross reference. See further on this question, annotations, note and cross references under *State v. Lyon* (10 Iowa 340), Vol. I, p. 700.

2. Trial—Instructions—Exceptions to Those Given—Certainty Required—Review Upon Appeal.—General exceptions to the instructions or to the charge of the court, given to the jury, when some of them or some part thereof, are or is correct, will not authorize a review of specific errors therein upon appeal, p. 66.

Reaffirmed in *Shephard v. Brenton*, 20 Iowa 43.

Special cross reference. For other cases citing and sustaining the text and many more on the question, see annotations under Rule 5 of *Davenport Gas Light & Coke Co. v. City of Davenport* (13 Iowa 229), ante. p. 146.

3. Statute of Frauds—Oral Promise to Answer for Debt, Default, or Miscarriage of Another—When Not Within.—A verbal promise to answer for the debt, default or miscarriage of another is not within the Statute of Frauds (Sec. 4010 of the Code of 1860) when, in an action thereon, it is proved by the defendant (person sought to be charged), pp. 66, 67.

Reaffirmed and extended in *Smith v. Phelps*, 32 Iowa 539, holding further that a verbal executory contract for the sale of land is not within the Statute of Frauds when, in an action thereon, it is proved by the party against whom it is sought to be enforced.

(Note.—See further, sustaining and extending, but not citing, the text, *Hobbs v. Brayton*, 24 Iowa 596; *Anderson v. Simpson*, 21 Iowa 399; *Mahana v. Blunt*, 20 Iowa 142; *Auter v. Miller*, 18 Iowa 405.—Ed.)

STREET v. BEAL AND HYATT, 16 IOWA 68, 85 Am. Dec. 504.

1. Mortgage of Land—Redemption From—Mortgagee to Be Paid Entire Debt, etc.—The purchaser of a portion of mortgaged real estate can only redeem from the mortgagee by paying his entire debt: And this is the rule where redemption is made either before or after foreclosure.

But where such purchaser so redeems, he is entitled to be subrogated to the rights of the mortgagee, in order to obtain contribution from the owner of the residue of the land and others interested therein, p. 70.

Reaffirmed in Knowles v. Rablin and Corwith, 20 Iowa 104; Douglass v. Bishop, 27 Iowa 216.

Reaffirmed and extended in Massie v. Wilson, 16 Iowa 396, 397, holding further that the rule is applicable to a judgment lien on land, upon redemption by a subsequent purchaser, or incumbrancer.

Reaffirmed and extended in Spurgin v. Adamson, 62 Iowa 665, 18 N. W. 295, holding further that a purchaser or a junior mortgagee or judgment creditor may redeem the land, as provided in the text, from a senior mortgagee, or judgment creditor.

Distinguished and narrowed in Dukes v. Turner, 44 Iowa 579, holding that where a mortgagee of several lots of land becomes a purchaser at a sale under foreclosure for his debt, and thereafter conveys some of them, then in an action to redeem by a purchaser from the mortgagor of one of the lots not sold by the mortgagee, plaintiff need only pay the proportionate value that his lot bears to the entire number.

Cross reference. See further, annotations and cross references under Heimstreet v. Winnie (10 Iowa 430), Vol. I, p. 723.

2. Mortgage on Land—Action to Foreclose — Parties — Subsequent Purchasers and Junior Incumbrancers.—In an action by a senior mortgagee to foreclose a mortgage on land, subsequent purchasers and junior incumbrancers are proper, but not indispensable, parties, p. 70.

Reaffirmed and extended in Shields v. Keys, 24 Iowa 307, holding further that the rule is equally applicable to an action to enforce a mechanic's or materialman's lien.

Special cross reference. For other cases sustaining the text, and many more on the subject, see annotations under Heimstreet v. Winnie (10 Iowa 430), Vol. I, p. 723.

MANNING & CALDWELL v. PERKINS, 16 IOWA 71.

1. Evidence—Written Instruments—Action on—Proof of Signature—When Not Required.—In an action on a written instrument (in this case an indorsement of a promissory note) proof of the genuineness of the signature thereto is not required, where it is not specifically denied, p. 74.

Reaffirmed in Savery v. Browning, 18 Iowa 248.

DAVENPORT SAVINGS FUND ASS'N v. NORTH AMERICAN FIRE INS. CO.,
16 IOWA 74

1. Trial—Special and General Verdict—Special Inconsistent With General Verdict—Practice—Judgment.—Where a special verdict is inconsistent with a general verdict rendered, the latter will be disregarded, and judgment be entered upon the former. Where the special verdict is vague, but seemingly inconsistent with the general, the court should grant a new trial, pp. 75, 76, 79.

Reaffirmed and explained in Lamb v. First Presbyterian Society of Marshalltown, 20 Iowa 130, holding that in order (under Sec. 3080 of the Code of 1860) to justify a court in rendering a judgment upon a special finding of facts, against the general verdict, such finding of facts must be inconsistent with the general verdict, and when taken together with the facts admitted in the pleadings, must be sufficient to establish the right to recover.

2. Pleadings—Answer—What Allegations in Are Denied Without Reply—Evidence Under.—An answer setting up new matter in confession and avoidance of plaintiff's cause of action, but not constituting a counterclaim, set-off or cross-demand, is (under Sec. 2917 of the Code of 1860), to be taken as denied without a reply being filed: In such case the plaintiff may prove facts tending to avoid the effect of the defense set out in the answer, although they are not specially pleaded by him, p. 77.

Reaffirmed in Clark v. Cress, 20 Iowa 54; Ayers v. Home Ins. Co., 21 Iowa 189; Corbin v. Beebee, 36 Iowa 340.

Reaffirmed and explained in Barger v. Farris & Wilmer, 34 Iowa 230, 231; Gwyer v. Figgins, 37 Iowa 520, holding that unless an answer contains a set-off, counterclaim, cross petition or cross-demand, no reply thereto is necessary; that all other affirmative allegations in an answer are denied by operation of law: And when a reply is filed when not required, it does not change the issue or shift the burden of proof, and the case stands as if it had not been filed.

(Note.—See further, sustaining, but not citing, the text, Carleton v. Byington, 24 Iowa 172; Noble v. Steamboat Northern Illinois, 23 Iowa 109; Smith v. Milburn, 17 Iowa 30.—Ed.)

3. Principal and Agent—Unauthorized Acts of Agent—Ratification—How Done—Full Knowledge—Authorized Acts of Agent, Binding on Principal.—Ratification of unauthorized acts of an agent must be done by the principal with full knowledge of all the facts, or it is insufficient to bind him. Authorized acts of an agent are not rendered invalid by reason of his doing certain unauthorized acts in connection therewith, and the principal is bound by the former, pp. 78, 79.

Reaffirmed in Cottrell v. Wheeler & Moffit, 89 Iowa 755 (abstract) 57 N. W. 434.

Reaffirmed and extended in Roberts v. Rumley, 58 Iowa 307, 308, 12 N. W. 326, holding further that the acts of a special agent in excess of his authority, are void, unless ratified by the principal, by acceptance of benefits thereof or otherwise, with full knowledge of all the facts.

Reaffirmed and extended in Deering & Co. v. Grundy County Nat'l Bank, 81 Iowa 225, 46 N. W. 1118; Heuser v. Sherman, 89 Iowa 361, 56 N. W. 527, 48 Am. St. Rep. 390, holding further that the retention by the principal of the consideration of an unauthorized contract made by his special agent, after full knowledge of the facts, constitutes ratification.

4. Ratification of Act of Person Not an Agent—How Done.—

When, without authority, one assumes to act for another, the latter wishing to avail himself thereof must adopt or ratify the entire transaction, p. 79.

Reaffirmed and extended in Eadie, Guilford & Co. v. Ashbaugh, 44 Iowa 521, 522 (cited in dissenting opinion, 524), holding further that acceptance of and suing upon notes which are the consideration for a contract made by a person without authority, constitutes ratification of the entire contract and its burdens by the accepting principal.

5. Appeal—Review of Questions of Law—Necessity of Exception Below.—Errors involving questions of law which were not excepted to below, will not be reviewed by the Supreme Court, p. 80.

Reaffirmed in Eason v. Gester, 31 Iowa 475, 476.

Cross references. See further, sustaining the text, annotations under Elder v. Littler, Adm'r (15 Iowa 65), ante. p. 304; Rule 1 of Davenport v. Cummings (15 Iowa 219), ante. p. 327.

MAHASKA COUNTY v. INGALLS, EX'R, 16 IOWA 81

(Case arising out of same facts, 14 Iowa 170.)

1. Appeal—Presumption of Regularity and Legality of Proceedings and Rulings Below—Imperfect Record Upon Appeal.—

Upon an appeal to the Supreme Court every presumption will be indulged in favor of the proceedings and rulings of the trial court; and error must affirmatively appear from the record. So, where upon appeal from the decision of the trial court overruling a motion "for judgment in pursuance of the order of the court in vacation," the order referred to is not made part of the record, such ruling will not be reviewed, p. 83.

Erroneously cited in Coakley v. McCarty, 34 Iowa 107, not in point.

Cross reference. See further, sustaining and explaining, but not citing, the text, annotations, notes and cross references under Boker v. Chapline (12 Iowa 204), ante. p. 33.

2. Evidence—Declarations Against Interest of Deceased Person as Affecting Third Persons—Requisites to Competency.—Declarations concerning the subject-matter of a civil action between third persons are receivable in evidence therein when the declarant is dead, they were against his pecuniary interest at the time that they were made, were of a fact or facts in relation to which the declarant was immediately and personally cognizant, and it further satisfactorily appears by proof, that the declarant had no probable motive to speak falsely, pp. 95, 96.

Reaffirmed in Moehn v. Moehn, 105 Iowa 714, 715, 75 N. W. 523; Wright v. Reed, 118 Iowa 336, 92 N. W. 62; Drefahl v. Rabe, 132 Iowa 570, 107 N. W. 182.

Reaffirmed doubtfully in Ellis v. Newell, 120 Iowa 74, 94 N. W. 464.

Reaffirmed in Middleton v. Middleton, 31 Iowa 153, a case however, wherein a declaration of a dead person, against his interest and otherwise competent as provided in the text, was held admissible as against a person claiming through him.

Reaffirmed in Scott County v. Fluke, et al, 34 Iowa 321, 322, applying the rule as to the declarations of a county treasurer admitting defalcation of public funds, in an action against his sureties after his death.

Reaffirmed, varied and narrowed in State v. Wooderd, 20 Iowa 550, 551, holding further that under Sec. 4805 of the Code of 1860, the rule is equally applicable in criminal cases; but that in order to make a book entry competent against a third person, which is made as in the text provided, it must further appear that it was made at or near the time of the transaction entered (as provided by Sec. 3998 of the Code of 1860): * * * * The court applying the rule as narrowed to a book entry made by a person who was dead and which was offered against the defendant upon a trial for forgery.

Reaffirmed and narrowed in Westcott v. Westcott, 75 Iowa 629, 630, 35 N. W. 650, holding that declarations consisting of mere opinions or intentions, although rendered competent as provided by the text, will not overcome proof of other positive declarations and acts of the deceased person, inconsistent with the former.

Cited in State v. Knight, 19 Iowa 101, on a question of the admissibility of conversations and admissions of one conspirator against his co-conspirators, where they were made after the commission of the offense: The court holding (as does the present case in argument) that the question of whether or not such evidence is competent, depends upon the circumstances of the case.

Cited in State v. Cruise, 19 Iowa 318, not in point.

3. Officers—Liability of Sureties on Official Bond—Prior Misappropriation by Principal—Where an official bond of a public officer is not retrospective in character, the sureties thereon are liable for the

misappropriation by their principal of public moneys in his hands at the time of its execution and subsequently thereto, but not for prior misappropriations or delinquencies of such officer, pp. 85, 86.

Reaffirmed in Bessinger v. Dickerson, 20 Iowa 261; Warren County v. Ward, 21 Iowa 87, 88; Thompson v. Dickerson, 22 Iowa 362; Indep. Sch. Dist. of Montezuma v. McDonald, 39 Iowa 566-568.

Reaffirmed and qualified in Boone County v. Jones, 54 Iowa 707-709, 2 N. W. 993, 37 Am. Rep. 229, holding, however, that sureties can make no defense that could not be made by the principal, the measure of his liability being also theirs; and any act of the principal which estops him from setting up a claim personal to himself, estops his sureties equally: Holding further that a county treasurer and the sureties on his official bond, are concluded as to the amount due the county by such officer, by his settlements as provided by law in the absence of proof of mistake therein.

Cross references. See further in this connection, annotations and cross references under Rule 1 of Latham v. Brown, (16 Iowa 118), *Infra*, p. 414; Charles v. Haskins (14 Iowa 471), *ante*. p. 269.

HODSON v. TIBBETTS, 16 IOWA 97

1. Attachment Action—Service of Original Notice by Publication—Failure to Make Proof Required by Statute Before Judgment by Default—Effect—Collateral Attack.—Where, in an attachment action (under Sec. 1826 of the Code of 1851) service of original notice is had by publication only and no appearance is entered, and no proof is made before entry of a judgment by default, that a copy of the petition and notice was directed to the defendant through the post office at his usual place of residence in sufficient time for his appearance, or that his residence is unknown to the plaintiff, or his attorney, or business agent, and could not with reasonable diligence be ascertained, such default judgment and proceedings thereunder are void, and will be set aside in an action by a subsequent purchaser from the defendant (debtor) of the attached property, pp. 100, 101.

Reaffirmed and extended in Abell v. Cross, 17 Iowa 174, holding further that recitals in a decree in reference to the requirements of the statute as to service of notice by publication having been complied with, are insufficient, and that a decree entered without other proof thereof, is void.

Reaffirmed and extended in Newman v. Bowers, 72 Iowa 467, 34 N. W. 213, an action *in rem* wherein the petition was in the name of *Levi Rike*, and notice of publication and other proceedings were in the name of *Levi Pike*, the court holding the decree therein to be void.

Reaffirmed and varied in Clark v. Little, 41 Iowa 501, holding that where a judgment entered on a defective return is sought to be enforced in another action, that the defense that the defendant was

never legally served with notice and that the court rendering the judgment had no jurisdiction, is available.

Cited with approval in Cooper v. Smith, 25 Iowa 270, holding that where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant, based on a publication of the pendency of the suit, will be void, and may be impeached collaterally or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a direct attack of a judgment.

Distinguished in Prince v. Griffin, 16 Iowa 554, on a question of acceptance of service of original notice by attorneys, the record not showing their want of authority.

Cross references. See further on this question, annotations and notes under Rule 1 of Tunis v. Withrow (10 Iowa 305); Weil v. Lowenthal (10 Iowa 575), Vol. I, pp. 688 and 751, respectively.

WILSON v. MILLER AND BEESON, 16 IOWA 111

1. Actions in Equity—Practice—Relief Granted When Issue Made.—When an answer is filed in an action in equity, the plaintiff may (under Sec. 3133 of the Code of 1860) have any relief consistent with the case made by the petition, and embraced within the issue, p. 115.

Reaffirmed in Hines v. Horner, 86 Iowa 597, 53 N. W. 318, under Sec. 2855 of the Code of 1873.

Reaffirmed in Hogueland v. Arts, 113 Iowa 639, 85 N. W. 819, under the Code of 1897.

Reaffirmed and qualified in Marder, Luse & Co. v. Wright, 70 Iowa 45, 29 N. W. 800, holding, however, that where (under Secs. 2665 and 2855 of the Code of 1873) an issue is made in an equitable action, the plaintiff is not entitled to an entirely different judgment from that prayed for in the petition: That where plaintiff pleads matter in his reply material only to the cause of action alleged in the petition, such allegations will be disregarded in granting relief.

Cited in Hickey v. Davidson, 129 Iowa 405 (dissenting opinion), 105 N. W. 685, the majority court opinion not in point.

(Note.—See further, sustaining, but not citing, the text, Rees, Gabriel & Co. v. Shepherdson, 95 Iowa 431, 64 N. W. 286; Iler v. Griswold, 83 Iowa 442, 49 N. W. 1023; Hoskins v. Rowe, 61 Iowa 180, 16 N. W. 78; Laverty v. Sexton & Son, 41 Iowa 435.—Ed.)

2. Real Estate—Purchaser of—Actual Notice of Adverse Equitable Title—What Sufficient.—In order to charge a purchaser of real estate with actual notice of an adverse outstanding equitable title thereto, such notice must be brought home to him; and must at least be such

as to alarm him, and put him upon such inquiry, which, if prosecuted, would lead to a discovery thereof: Rumors and suspicions of the existence of such equitable title, is not sufficient, nor do general assertions made by strangers to the title and resting on hearsay, constitute such notice, p. 115.

Reaffirmed in Bonnell v. Allerton, 51 Iowa 170 (Petition on Rehearing); Aultman & T. Mach. Co. v. Kennedy, 114 Iowa 451, 87 N. W. 438, 89 Am. St. Rep. 373.

Reaffirmed and extended in Allen v. McCalla, 25 Iowa 482, 96 Am. Dec. 56, holding further that the rule is equally applicable to actual notice to a purchaser or a mortgagee of personal property.

Reaffirmed and qualified in Weare & Allison v. Williams, 85 Iowa 261, 52 N. W. 331; Lewis v. Arbuckle, 85 Iowa 343, 52 N. W. 240, 16 L. R. A. 677, holding that in order to charge a subsequent *bona fide* purchaser, or mortgagee, with notice of a prior unrecorded conveyance by reason of knowledge of facts such as would put a reasonably prudent man upon inquiry, the proof thereof must be clear and decisive.

Cross references. See further, sustaining and explaining, but not citing, the text, annotations, note and cross references under English v. Waples (13 Iowa 57); ante. p. 118. See also, in this connection, annotations and note under Rule 2 of Suiter v. Turner (10 Iowa 517), Vol. I, p. 739.

LATHAM v. BROWN, 16 IOWA 118.

1. Officers — Justice of the Peace — Liability of Sureties on Bond.—Where a justice of the peace receives notes for collection and, upon the expiration of his office, refuses to turn them over to his successor, or to the owner, the sureties on his official bond are liable in damages in an action by the owner thereof, pp. 119, 120.

Reaffirmed and extended in Morgan v. Long, 29 Iowa 436, holding further that the sureties on the bond of a district court clerk are liable thereon for money received by him in satisfaction of a judgment and deposited in a bank that becomes insolvent: And holding further that in all cases when a bond is given for the security of the public generally or of particular individuals, that action may be brought thereon by any person intended to be thereby secured.

Reaffirmed and qualified in Bessinger v. Dickerson, 20 Iowa 261, holding further that the sureties on the official bond of a justice of the peace are liable in damages for his conversion of notes placed in his hands for collection, where such conversion happens before the execution of a new bond by such officer.

Cross references. See further on this question, annotations under Rule 3 of Mahaska County v. Ingalls (16 Iowa 81), ante. p. 410; Strunk v. Ocheltree (11 Iowa 158), Vol. I, p. 793.

2. Action Against Sureties on Bond of Justice of the Peace for Conversion of Notes by Him—Measure of Damages—Matter in

Mitigation.—In an action against the sureties on the bond of a justice of the peace on account of the conversion of notes by him, placed in his hands for collection, the measure of damages is, *prima facie*, the face value of the notes: But in such case, the defendants may show the insolvency of the makers, payment to the plaintiff in whole or in part, or other facts directly tending to reduce the face value thereof, pp. 120, 121.

Reaffirmed and extended in Sadler v. Bean, 37 Iowa 441, holding further that the rule is equally applicable in an action for damages for failure to deliver to plaintiff, accounts purchased by him of the defendant.

Reaffirmed and extended in Pelley v. Walker, 79 Iowa 147, 44 N. W. 348; Sickles v. Dallas Center Bank, 81 Iowa 413, 46 N. W. 1091; Dean v. Nichols & Shepard Co., 95 Iowa 97, 63 N. W. 584; Casey v. Ballou Banking Co., 98 Iowa 112, 67 N. W. 100, holding further that the rule is applicable in an action for damages for conversion of commercial paper, or of any chose in action.

Reaffirmed and varied in Urbinga v. Farmers' Sav. Bank, 108 Iowa 223, 78 N. W. 840, holding further that where one agrees to purchase certain described notes, at certain dates, the face amount thereof being stated in the agreement, but no amount to be paid therefor being therein stated, that in an action for damages by the seller for the buyer refusing to accept them, the measure of damages is the face value of such notes, in the absence of proof by the defendant to the contrary.

ALGER v. MERRITT, 16 IOWA 121

1. New Trial—Newly Discovered, Cumulative Evidence, Not Ground for—What is Not.—A new trial will not be granted because of newly discovered evidence which is cumulative of that introduced upon the trial; but newly discovered evidence which has a distinct bearing upon the issue, though intimately connected with part of the evidence offered on the trial, is not cumulative and is a ground for a new trial, pp. 126, 127.

Reaffirmed and explained in Stineman v. Beath, 36 Iowa 78; Hambel v. Williams, 37 Iowa 229, holding that newly discovered evidence is not cumulative if it has, in any degree, an independent and distinct bearing upon the issue in the action wherein the new trial is sought.

Reaffirmed and narrowed in German v. Maquoketa Sav. Bank, 38 Iowa 369, 370; Wayt v. B. C. R. & M. R. Co., 45 Iowa 220; Boggess v. Read, 83 Iowa 550, 551, 50 N. W. 44, holding the newly discovered evidence is not cumulative and is a ground for a new trial, if it be unlike and distinct from any adduced on the trial, although it may tend to establish the issue therein tried.

Distinguished in Mehan v. C. R. I. & P. R. Co., 55 Iowa 308, 7 N. W. 614, a case wherein evidence sought to be made the basis of a

motion for a new trial was discovered before the trial was concluded—The court holding that it could not be made a ground for new trial as newly discovered evidence.

2. New Trial Granted by Trial Court for Newly Discovered Evidence—Discretion of Trial Court—Abuse of—Reversal Upon Appeal.—Where a new trial is granted by the trial court upon newly discovered evidence, such motion being resisted upon the grounds that the evidence is cumulative and that the party moving for the new trial did not use proper diligence to discover it, such ruling will not be reversed upon appeal, unless it is manifest that the trial court abused his discretion, that such evidence was clearly cumulative, or the moving party clearly failed to exercise due diligence to discover it, and that injustice results from such trial court's ruling, p. 127.

Reaffirmed in Richards v. Nuckolls, 19 Iowa 556, a case wherein the trial court's ruling refusing a new trial on the ground of newly discovered evidence was affirmed, the record upon the appeal showing that the party moving therefor failed to exercise diligence to discover it.

Reaffirmed and extended in Mather v. Butler County, 33 Iowa 253; Stuckslager v. McKee, 40 Iowa 213, holding further that a new trial will not be granted on the ground of newly discovered evidence, unless the party moving therefor shall show to the trial court that he has been diligent in his efforts to obtain it before the trial.

Reaffirmed and varied in Burlington Gas Light Co. v. Green, Thomas & Co., 21 Iowa 337, holding that the trial court's ruling upon a motion for a new trial based upon the ground that the verdict was against the weight of the evidence, will not be ground for reversal upon appeal, unless it is manifest that the trial court abused his discretion resulting in injustice; and a stronger case thereof must be made out upon an appeal from an order granting, than from one refusing a new trial.

Cited in Robb v. McDonald, 29 Iowa 332, on the general question of applications for new trial and how tried, the case not in point.

Special cross reference. For other cases citing the text and many more on the question, see annotations under Newell v. Sanford (10 Iowa 396), Vol. I, p. 712.

Cross reference. See further, annotations under Shepherd v. Brenton (15 Iowa 84) ante. p. 308.

3. Trial—Evidence—Party Taken by Surprise—Failure to Introduce Attorney Not Want of Diligence to Discover Testimony.—Where a party is taken by surprise by testimony introduced by his adversary, his failure to introduce his attorney to prove facts tending to rebut such testimony, does not prevent his making such surprise a cause for alleging newly discovered evidence on such fact or facts as a ground for a motion for a new trial, nor does it show a want of diligence, pp. 128, 129.

Cited in Ross and Hardy v. Ross, 140 Iowa 54, 117 N. W. 1106, holding that an attorney is a competent witness for his client; but the fact of his being attorney for him, goes to his credibility as a witness.

CRATON v. WRIGHT, 16 IOWA 133

1. Occupying Claimant of Real Estate—Compensation for Improvements—Half-Breed Tract of Land—Color of Title—What Constitutes.—Where after a decree partitioning a half-breed tract of land to certain parties, a person continues to occupy a portion thereof under color of title, and in the good faith belief that such decree was fraudulent and void, and resists such decree, he is (under Sec. 2264 of the Code of 1860) entitled to compensation for improvements thereon made and erected, after the entry of such decree. Under Sec. 2269 of the Code of 1860, a person has color of title who has occupied a tract of land by himself, or by those under whom he claims, for the period of five years, pp. 137, 138.

Reaffirmed and explained in Read v. Howe and Ensign, 49 Iowa 66, 67, holding that an occupying claimant of real estate under color of title, who, under the good faith and honest belief that he has a good title, makes improvements thereon, is entitled to compensation therefor.

Reaffirmed and narrowed in Snell v. Mehan, 80 Iowa 55, 56, 45 N. W. 399, holding that a person who makes improvements upon land, with full knowledge that another is the owner thereof, is entitled to no compensation therefor; such improvements in such case becomes the property of the land owner.

(Note.—See further, sustaining, explaining and qualifying, but not citing, the text, Lunquest v. Ten Eyck, 40 Iowa 213; Parsons v. Moses, 16 Iowa 440.—Ed.)

Cross reference. See further, annotations under Rule 1 of Parsons v. Moses (16 Iowa 440) *Infra.* p. 454.

2. Occupying Claimant of Land—Compensation for Improvements, Assignable.—The right of an occupying claimant of land, who holds under color of title; to compensation for improvements made thereon under the good faith belief that he holds a good title, is assignable, and the assignee thereof has the same rights and remedies as his assignor, pp. 138, 139.

Reaffirmed and extended in Parsons v. Moses, 16 Iowa 442, 443, holding that a good faith occupying claimant of land under color of title, is entitled to compensation for improvements made by his vendor, as well as for those made by himself, and, also, to improvements made by his tenants on such land.

Cross reference. See Rule 1 hereof, and cross reference there found.

TICONIC BANK v. HARVEY, 16 IOWA 141

1. Chancery Causes—Trial by First Method of Code of 1860—Appeal—Review.—Upon an appeal from a decree in a chancery action tried according to the first method prescribed by Sec. 2999 of the Code of 1860 (all the evidence in writing), the appeal will be tried on both the law and the facts as apparent of record, p. 143.

Reaffirmed in Hackworth, Gd'n v. Zollars, 30 Iowa 436.

Reaffirmed and extended in Kellogg v. Kelsey, 16 Iowa 388, holding further that in order to have a trial *de novo* on the evidence upon an appeal from a decree in a chancery cause tried according to the first method prescribed by Sec. 2999 of the Code of 1860 (all the evidence in writing), all the evidence upon which the chancellor acted must be produced, certified by the district court clerk, and made part of the record upon the appeal.

2. Chancery Cause Tried by Evidence Entirely in Writing—Appeal—Record on—How Evidence to be Certified.—Upon an appeal from a decree in an equitable action tried according to the first method prescribed by Sec. 2999 of the Code of 1860 (all the evidence in writing), no bill of exceptions embodying the evidence is necessary; but such evidence is to be transmitted to the Supreme Court, together with a certificate of the clerk of the district court that it is all transmitted; and such certificate is conclusive of the facts recited therein, until it is properly attacked by motion to supply omitted evidence, or to strike improperly included evidence, which attack must be made before final submission of the cause upon the appeal, p. 143.

Reaffirmed and extended in Hackworth, Gd'n v. Zollars, 30 Iowa 436, holding further that upon an appeal from a decree in a chancery action tried as set out in the text, no assignment of errors is necessary.

Special cross reference. For other cases citing the text, and more on the question, see annotations under *Anderson v. Easton & Son* (16 Iowa 56), ante. p. 406.

3. Equitable Cause Tried by Evidence in Writing—Improper Evidence Received—When Harmless Error.—Where an equitable action is tried according to the first method prescribed by Sec. 2999 of the Code of 1860, the fact that the chancellor receives improper or incompetent evidence upon such trial will not be ground for reversal, where the decree rendered therein is sustained by other sufficient and competent evidence, pp. 143, 144.

Reaffirmed and extended in McCrary v. Deming, 38 Iowa 532, holding further that the rule is equally applicable in an action at law tried by a jury.

Cross reference. See further, annotations under Rule 1 of Greither v. Alexander (15 Iowa 470), ante. p. 365.

4. Husband and Wife—Wife's Right in Equity to Hold Real Estate—Extent of.—In equity a wife may take and hold real estate

to her separate use, independent of her husband and free from subjection to the satisfaction of his debts: But this rule does not apply where she acquires the property by the use of her husband's means, or those which the law recognizes as his, to the prejudice of his creditors, p. 144.

Reaffirmed in Hamilton v. Lightner, 53 Iowa 473, 5 N. W. 606.

Reaffirmed and extended in Presnall v. Herbert, 34 Iowa 543, holding further that personal property of a wife under the control of her husband at the time he contracts a debt, is subject to be taken under execution, or attachment, therefor, although the notice prescribed by Secs. 2499-2503 of the Code of 1860, may be given by the wife before the issuance of the writ.

Reaffirmed and qualified in Mitchell & Sons v. Sawyer and Wife, 21 Iowa 583, holding that where a wife has separate property, she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of her husband.

Reaffirmed and qualified in Shields v. Keys, Adm'r, 24 Iowa 311, 313, holding that a wife may (under the Code of 1860) acquire real estate relying upon receiving and paying therefor with money received from her son, such property not being subject to the satisfaction of her husband's debts.

Reaffirmed and qualified in King & Co. v. Wells, 106 Iowa 651, 652, 77 N. W. 339, holding that land acquired by a wife by her labor and management, although her husband aids with his labor in purchasing it, is not subject to subsequent debts of her husband, there being no fraudulent intent on the part of husband and wife to hinder, delay or defeat creditors at the time such real estate was acquired.

Cross references. See further on this question, annotations, notes and cross references under Rule 4 of *Suiter v. Turner* (10 Iowa 517), Vol. I, p. 739; *Duncan v. Roselle* (15 Iowa 501), ante. p. 372.

BURNAP v. COOK, 16 IOWA 149, 85 Am. Dec. 507

1. Homestead—Conveyance or Mortgage of—Necessity of Joinder and Concurrence of Husband and Wife—Effect of Failure.—A conveyance, or mortgage of homestead which is not signed and concurred in by both husband and wife is void *ab initio*, p. 153.

Special cross reference. For cases citing the text, and many more on the question, see annotations and cross references under Rule 1 of *Larson v. Reynolds & Packard* (13 Iowa 579), ante. p. 190.

2. Homestead—Vendor's Lien for Purchase Money.—Homestead is subject to the lien of the vendor thereof for his unpaid purchase money, p. 153.

Special cross reference. For cases citing the text, and many more on the question, see annotations under Rule 2 of *Christ v. Dyer* (14 Iowa 438), ante. p. 263.

3. Mortgage on Homestead—Action to Foreclose—Failure to Make Wife Party—Conclusiveness of Decree.—Where the wife is not made a party to an action to foreclose a mortgage on homestead, she is not affected or concluded by the decree or other proceedings therein, p. 158.

Special cross reference. For cases citing the text, and others on the question, see annotations under Rule 2 of *Larson v. Reynolds & Packard* (13 Iowa 579), ante. p. 190.

LINN v. DAY, ADM'R, 16 IOWA 158

1. Decedent's Estate—Action Against Personal Representative to Correct Settlement Between Plaintiff and Decedent.—An action in chancery may be maintained against a personal representative to correct errors in a settlement between the plaintiff and the representative's decedent, without the plaintiff first proving and filing his claim in the county court, p. 162.

Special cross reference. For cases citing the text, and others, see annotations under Rule 1 of *Woodward, Adm'r v. Lavery* (14 Iowa 381), ante. p. 250.

ALLEN v. PEGRAM, 16 IOWA 163

1. Statutes Repeal by Implication.—The repeal of a statute by implication is not favored; and where a former and a subsequent statute on the same subject are not palpably inconsistent, they will both be given effect, p. 168.

Special cross reference. For cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of *Baker & Griffin v. Steamboat Milwaukee* (14 Iowa 214), ante. p. 229.

2. Principal and Agent — Person Acting as Agent When No Principal Exists — Individual Liability — Officer of unauthorized Bank.—Where one contracts as an agent when no principal in fact exists, he is personally liable thereon. So, where the president of a bank which has no legal existence, signs, issues and puts in circulation, notes of such bank, he is personally liable for their redemption: And the president and cashier of such a bank are personally liable on a contract or a deed executed by them in the name of such a bank, pp. 170, 171.

Reaffirmed, explained and qualified in *Thilmany v. Iowa Paper Bag Co. and Daggett*, 108 Iowa 360-362, 79 N. W. 262, 263, 75 Am. St. Rep. 259, holding that where one enters into a legal contract for another, in excess of authority conferred, or without authority from his principal, or when the principal does not exist, and the person with whom he contracts does not know such fact or facts or have such

knowledge as would put him upon inquiry in relation thereto, and contracts in the good faith belief that the assuming agent has the authority, etc., the latter is personally bound.

Cited in Oliver v. Townsend, 16 Iowa 432, not in point.

3. Banks and Banking—Bank Stock is Personalty—Sale of—Implied Warranty.—Bank stock is a chose in possession, personal property; and upon its sale the seller, in the absence of provisions in the contract or circumstances showing a contrary intention, is presumed to warrant its title, and that it is legally what it purports to be; but is not presumed to warrant its quality or value, p. 173.

Reaffirmed and varied in Watson v. Chesire, 18 Iowa 206-209, 87 Am. Dec. 382; Waller et al, Ex'rs v. Staples, et al, Adm'rs, 107 Iowa 741, 77 N. W. 571, holding that one who indorses a negotiable instrument *without recourse* when the instrument is unenforceable because of fraud, want of consideration, or its being forged, or for other inherent infirmity, is liable for the consideration paid therefor, to the purchaser or indorsee thereof, who takes without notice thereof.

Reaffirmed and varied in Nelson v. Hamilton County, 102 Iowa 232, 71 N. W. 207; Harrison v. Palo Alto County, 104 Iowa 389, 73 N. W. 873, holding that the grantor in a quit-claim deed to land, is not in the absence of fraud, liable for defects in or failure of title thereto, or for the consideration paid therefor: There being no covenants or warranty of title in such instrument.

Reaffirmed and varied in Waller et al, Ex'rs v. Staples et al, Adm'rs., 107 Iowa 741, 742, 77 N. W. 571, holding that where one transfers a note without recourse, which is secured by a chattel mortgage, such transfer carries the mortgage with it, and there is in such case an implied warranty on the part of the transferrer that such mortgage is genuine and enforceable.

4. Contracts—Rescission—When Party Rescinding Must Place the Other in Statu Quo.—Where a party to a contract is entitled to a rescission thereof, and the contract is not severable or apportionable, then he must, in order to maintain an action therefor, with reasonable diligence, place or offer to place the other party thereto in *statu quo* by tendering back everything which he has received therefrom, p. 174.

Reaffirmed and qualified in Dillie v. White, 132 Iowa 354, 109 N. W. 919, 10 L. R. A. (New Series) 510, holding that where a party seeks to rescind a contract in relation to something which is absolutely valueless, he is not compelled to tender it back; but that if such thing is of any value whatever, he must do so.

Reaffirmed and narrowed in White v. Miller, 132 Iowa 147, 109 N. W. 466, 8 L. R. A. (New Series) 727, holding that parties to a contract may provide for a special remedy in case of a breach of warranty.

Cross reference. See further on this question, annotations and

cross references under Rule 2 of *Moore v. Bare* (11 Iowa 198), Vol. I, p. 802.

5. Trial—Instructions—When Court May Refuse to Instruct Upon Cause of Action or Defense.—If essential or integral elements of a cause of action or of a defense, are entirely without proof to sustain them, the trial court should refuse to submit it to the jury in his instructions, pp. 174, 175.

Reaffirmed in *Murphy v. C. R. I. & P. R. Co.*, 45 Iowa 664.

Reaffirmed, explained and qualified in *Muldowney v. Ill. Cent. R. Co.*, 32 Iowa 178, holding that where there is no evidence, or where essential or integral elements of a cause of action or defense, are entirely without proof, the trial court may properly give a peremptory instruction, or direct the jury as to the kind of verdict to be rendered; but where there is evidence tending in any degree to establish the cause of action or defense, the trial court must not take the case from the jury or pronounce an opinion as to the sufficiency or weight of the evidence, except in cases where the proof is documentary: That it is the peculiar province of the jury to decide question of fact, the weight and sufficiency of evidence, and the credibility of witnesses, and instructions must be confined to rules of law only.

Reaffirmed and extended in *Second Nat'l Bank of Louisville v. Curren*, 36 Iowa 558, holding further that where facts are conclusively shown and there are none controverting them, the court may direct the jury as to the verdict to be thereon rendered.

Cross reference. See further on this question, annotations under Rules 3 and 4 of *Potter, et al v. Wooster, et al* (10 Iowa 334), Vol. I, p. 697.

ROSIERZ v. VAN DAM, 16 IOWA 175

1. Action of Right to Recover Real Estate—Equitable Defense.—Under Sec. 2880 of the Code of 1860, an equitable defense may be interposed in an action of right to recover possession of real estate, pp. 178, 181.

Reaffirmed in *Van Orman v. Spafford, Clarke & Co.*, 16 Iowa 189, 190; *Kramer v. Conger*, 16 Iowa 436; *Shawhan v. Long*, 26 Iowa 491, 96 Am. Dec. 164.

Reaffirmed and extended in *Byers v. Rodabaugh*, 17 Iowa 59, holding further that upon an equitable defense being interposed in an action of right for the recovery of real estate, that unless it is such as is triable by the second method of Sec. 2999 of the Code of 1860 (by oral evidence), or such a trial is consented to by the parties, or the court wishes to "inform his conscience" by referring the equitable issue to a jury, the equitable issue should be first tried, and thereafter the issue at law be tried, if found necessary.

Reaffirmed and extended in *Penny v. Cook*, 19 Iowa 541, holding further that where the defendant in an action at law for the recovery of

real estate interposes an equitable defense, it is to be considered by the court as if it were averred by him in a petition in chancery.

Reaffirmed, extended and qualified in Palmer v. Palmer, 90 Iowa 22, 23, 57 N. W. 647, holding further that under the Code of 1873, an equitable defense may be interposed in an action at law for the recovery of both real and personal property, but that a counterclaim cannot therein be pleaded.

Cited with approval in Knight, receiver v. Watters and Pratt, 18 Iowa 345, the case turning upon other questions.

Cross reference. See further, annotations under Rule 1 of Van Orman v. Spafford et al (16 Iowa 186), *Infra*. p. 425.

2. Deed Absolute on Face But in Fact a Mortgage—Rights Under.—Where a party borrows money and as a consideration therefor, executes a deed to land, and the grantee (lender) at the same time executes a bond to re-convey the title upon the grantor paying the notes evidencing the borrowed money at their maturity, the grantor to retain possession of the land, enjoy the rents and profits and pay the taxes until the last note is due, such two instruments constitute a mortgage, and the parties thereto have the same rights as parties to a mortgage, p. 179.

Reaffirmed and qualified in Bigler v. Jack, 114 Iowa 675, 676, 87 N. W. 703, holding that parties may make a contract selling land with a reservation to the vendor to repurchase within a given time at an agreed price; that such a contract is a conditional sale, and not a mortgage, and the rights of the vendor are limited by the terms thereof: That the question of whether or not a contract for the sale of land is a conditional sale, or is a deed with a defeasance constituting a mortgage, is one of fact and of intention, to be determined from the language of the contract and the circumstances surrounding the transaction.

BROCKMAN v. BERRYHILL, 16 IOWA 183

1. Pleadings — Amendments — When Allowed — Judicial Discretion.—The court may at any time and in furtherance of justice and in the exercise of a sound judicial discretion, allow a party to amend his pleading: But the right to amend is not absolute, p. 184.

Reaffirmed in Dixon v. Dixon, 19 Iowa 514.

Reaffirmed and explained in Miller v. Perry & Townsend, 38 Iowa 303, 304, holding that although the right to amend is not absolute, still amendments are always allowable in furtherance of justice, within a sound judicial discretion, and it is reversible error for the trial court to refuse to allow an amendment, where it operates as a denial of justice to a party.

Reaffirmed and extended in Fulmer v. Fulmer, 22 Iowa 232; Hays v. Turner, 23 Iowa 217; Bates v. Bates, 27 Iowa 112, 113, 1 Am. Rep. 260; Randall v. Christianson, 84 Iowa 503, 51 N. W. 253; Emerson &

Co. v. Converse, 106 Iowa 331, 76 N. W. 705, holding further that the ruling of the trial court will not be cause for reversal, unless it appears on appeal that such court's judicial discretion was abused to the prejudice of the substantial rights of the appellant.

Reaffirmed and extended in Robinson v. Erickson, 25 Iowa 86, holding further that after a pleading, which is a repetition of a former pleading, is filed by leave of court, it may be stricken on motion.

Reaffirmed and extended in Allen v. Bidwell, 35 Iowa 88, holding further that an amended answer which is improperly filed, may be stricken on motion; and that no notice of a motion to strike is necessary.

Cross reference. See further on this question, annotations and cross references under Rule 2 of Mayer v. Woodbury and Strahm (14 Iowa 57), ante. p. 205.

2. New Trial—Verdict Against Weight of Evidence—Evidence Conflicting—Refusal of Trial Court to Grant New Trial—Affirmance.—Where the evidence on a trial was conflicting, and the trial court refuses to grant a new trial on the ground that the verdict was against the weight of the evidence, such ruling will be affirmed upon appeal, p. 183.

Reaffirmed in Brown v. Jefferson County, 16 Iowa 347; Cole v. Cole, 23 Iowa 439; Schrimper v. Heilman, 24 Iowa 506; Snyder v. Eldridge, 31 Iowa 130.

Reaffirmed and varied in Burlington Gas Light Co. v. Green, Thomas & Co., 21 Iowa 337, holding that upon an appeal from an order granting a new trial because the verdict was against the weight of the evidence, a stronger case of abuse of discretion of the trial court and injustice resulting to the party complaining, must be made to appear, than upon an appeal from an order refusing to grant a new trial for such cause.

Reaffirmed and narrowed in McGinn v. Butler, 31 Iowa 164, holding further that where the evidence is conflicting upon the trial of an action at law, the finding of the court, or the verdict of a jury, will not be disturbed upon appeal because against the weight of the evidence, unless such fact is manifest.

Reaffirmed and narrowed in Hubbell & Bro. v. Ream, 31 Iowa 296, holding that where the evidence is conflicting on the trial of an action, that an order overruling a motion for a new trial on the ground that the verdict is against the weight of the evidence, will not be disturbed upon appeal, except in case of a clear abuse of the trial court's discretion.

Cited in Callanan v. Shaw, 24 Iowa 446, not in point.

Cross references. See further on this question, annotations and cross references under Rule 2 of McKay v. Thorington (15 Iowa 25), ante. p. 298; Whitney v. Blunt (15 Iowa 283), ante. p. 343.

3. Judgment on Verdict—Court May Require Judgment Entered For Less Than—When.—In order to avoid a new trial being granted, the trial court may, in the exercise of a sound judicial discretion, require the successful party to accept a judgment for a sum less than the verdict: If, in such case, the judgment for the less sum be not accepted, the court may grant the new trial, p. 185.

Reaffirmed in Noel v. D. B. & Miss. R. R. Co., 44 Iowa 294; Van Winter v. Henry County, 61 Iowa 692, 17 N. W. 97; Hudson v. Applegate & Co., 87 Iowa 609, 54 N. W. 463; Flickinger v. Omaha B. & T. Ry. Co., 98 Iowa 361, 67 N. W. 373; Smith v. Ellyson, 137 Iowa 395, 396, 115 N. W. 42.

VAN ORMAN v. SPAFFORD, CLARKE & CO., 16 IOWA 186

(Later Appeal, 20 Iowa 215.)

1. Action for Recovery of Real Estate—Equitable Defense.—In an action at law for the recovery of real estate, an equitable defense may be interposed, pp. 187, 188.

Special cross reference. For cases citing the text and others on the question, see annotations under Rosierz v. Van Dam (16 Iowa 175), ante. p. 422.

2. Action at Law—Equitable Defense Interposed—How Tried.—When an equitable defense is interposed in an action for the recovery of real estate it should, in the absence of an agreement to the contrary, be first tried as an action in chancery by all the evidence thereon being reduced to writing, and upon the determination thereof, the legal issue if necessary and any issue thereunder remains, be tried by a jury, p. 190.

Reaffirmed in Van Orman v. Merrill, 27 Iowa 479; Morris v. Merritt & Co., 52 Iowa 502, 3 N. W. 509.

Cited in Richmond v. Dub. & Sioux City R. R. Co., 33 Iowa 490, 491, holding that where an action is improperly brought in equity when it should have been brought at law, unless the defendant makes a motion to transfer to the law docket at the time of filing his answer (under Sec. 2619 of the Code of 1860), the right to jury trial therein is waived, along with the error as to the kind of proceeding adopted.

Cross references. See Rule 1 hereof and cross reference there found. See other rules hereof.

3. Equitable Defense in Law Action—De Novo Trial on Appeal.—Where an equitable defense in an action at law is tried by all the evidence being reduced to writing, upon an appeal to the Supreme Court from a decree therein, it will be tried *de novo* upon the law and the facts apparent of record, p. 190.

Reaffirmed in Van Orman v. Merrill, 27 Iowa 481-483.

Special cross reference. For cases citing the text and many others,

see annotations under *Garner v. Pomroy* (11 Iowa 149), Vol. I, p. 791.

Cross reference. See further, annotations and cross references under Rule 2 of *Cook v. Woodbury County* (13 Iowa 21), ante. p. 111.

4. Equitable Defense in Law Action—Appeal From Decree—Trial De Novo—When Not Allowed—Insufficient Record.—Upon an appeal in a chancery action, or from a decree on an equitable defense in an action at law, tried below by evidence in writing (according to the first method provided by Secs. 2999 and 3000 of the Code of 1860), where the record fails to show that it contains *all* the evidence adduced below, a trial *de novo* upon the facts will not be had, pp. 193, 194.

Reaffirmed in *Winslow, Harris & Co. v. Turner*, 20 Iowa 295.

Special cross reference. For other cases citing the text and more on the question, see annotations under *Anderson v. Easton & Son* (16 Iowa 56), ante. p. 406.

5. Action at Law—Equitable Issue in—Separate Trial of Law and Equitable Issues—Appeal From Judgment on Law Issue—Bill of Exceptions—Review.—Where in an action at law an equitable defense is interposed, and a separate trial of the law and equitable issues had, upon an appeal from the judgment upon the issue of law, the Supreme Court will not consider evidence not embodied in, or preserved by a bill of exceptions, p. 191.

Reaffirmed and explained in *Burlington Gas Light Co. v. Green, Thomas & Co.*, 21 Iowa 336, 337, holding that a bill of exceptions upon appeal from a judgment in an action at law, will not be considered when certified as containing the substance of the evidence upon the trial.

Cited with approval in *Van Orman v. Merrill*, 27 Iowa 483.

Cross references. See further, sustaining, but not citing, the text, annotations under *State v. Lyon* (10 Iowa 340); Rule 2 of *Mumma v. McKee* (10 Iowa 107), Vol. 1, pp. 652 and 700, respectively.

6. Pleadings — Res Adjudicata must be Specially Pleaded.—Where a former adjudication is sought to bar a subsequent action, it must be specially pleaded, p. 193.

Reaffirmed and extended in *Wood v. Wood*, 143 Iowa 446, 121 N. W. 1092, holding further that where there is an apparent conflict between two adjudications by the same court between the same parties, the last will prevail.

Distinguished and narrowed in *Carleton v. Byington*, 24 175, holding that evidence of a former adjudication of a defense set out in an answer may be introduced without a reply specially pleading *res adjudicata*, where the answer does not contain a counterclaim, set-off, or cross-bill, as no reply is required where one of these is not pleaded as a defense.

Cross reference. See further on this question, Rule 3 of *Cooley v. Brayton* (16 Iowa 10), ante. p. 394.

BURTIS v. COOK & SARGENT, 16 IOWA 194

1. Judgment is a Chose in Action—Assignment of—Rights of Assignee—Set-Off of Mutual Judgments.—A judgment is a chose in action and is assignable, but the assignee takes it subject to all set-offs and equities existing against it in the hands of his assignor and before notice to the judgment debtor of the assignment: Hence, a judgment debtor may set off a judgment he has against such assignor as against the assignee of the assigned judgment, p. 203.

Reaffirmed in Ballinger v. Tarbell, 16 Iowa 494, 495, 85 Am. Dec. 527; Benson v. Haywood, 86 Iowa 112, 53 N. W. 86, 23 L. R. A. 335.

Reaffirmed in Cottle v. Cole & Cole, 20 Iowa 483; Chapman v. Coats, 26 Iowa 292; Hawley v. Hunt, 27 Iowa 314, 1 Am. Rep. 273; Preston v. Turner, 36 Iowa 672; Dist. Township of Newton v. White, 42 Iowa 614; Indep. Sch. Dist. of Rock Rapids v. Schreiner, 46 Iowa 176; Fred Miller Brew. Co. v. Hansen et al, 104 Iowa 310, 311, 73 N. W. 828, holding that the assignee of a judgment succeeds to the rights, remedies and liabilities of his assignor, irrespective of the consideration for such assignment.

Reaffirmed and explained in De Laval Separator Co. v. Sharpless, 134 Iowa 30, 31, 111 N. W. 439, holding that a judgment is a chose in action, and its assignee takes subject to legal and equitable defenses in favor of the judgment debtor against the assignor (judgment creditor).

Reaffirmed and extended in Ballinger v. Tarbell, 16 Iowa 494, 85 Am. Dec. 527, holding further that the defendant may set-off against the plaintiff's claim, a prior judgment obtained by him against the plaintiff and another.

Reaffirmed and extended in Hurst v. Trussell, 21 Iowa 504, 506, 507, holding further that the right to set off mutual judgments exists against the lien of an attorney for an attorney's fee, where the judgment sought to be set-off existed before the attorney gave notice of his lien, (under Sec. 2708 of the Code of 1860)—But see Benson v. Haywood, 86 Iowa 112, 53 N. W. 87, 23 L. R. A. 335 (reaffirming the text), holding further that the right to set off mutual judgments is unaffected by the right of an attorney (under Sec. 215 of the Code of 1873), to a lien for attorney's fee.

Reaffirmed and extended in Thompson v. Hurley, Adm'r, 19 Iowa 334, 335, holding further that the fact that the plaintiff failed to comply with an agreement which was the consideration of a judgment, may be set up as a defense to a proceeding by *scire facias* to revive it, as against the plaintiff or his assignee; especially where the latter took with notice of the facts.

Reaffirmed and extended in Fairfield v. McNany, 37 Iowa 77, 78, holding further that a defendant need not set up legal or equitable defenses he may have against a demand sued on, but may suffer judgment on the latter and bring an independent action on the former: That

when a defendant has a legal or equitable defense to an action, which exceeds plaintiff's demand, and suffers judgment therein, he cannot be compelled as garnishee to pay the judgment to a creditor of the judgment creditor.

Reaffirmed and qualified in Osborn v. Cloud, 23 Iowa 108, 109, 92 Am. Dec. 413, holding that a judgment cannot be levied upon and sold under an execution: That a creditor of a judgment creditor may subject the latter's judgment to the satisfaction of his (the former's) debt, by garnishment, but not by execution.

Reaffirmed and qualified in Raymond v. Whitehouse, 119 Iowa 137-139, 93 N. W. 294, 295, holding that where a mortgagee releases his conveyance of record, he cannot thereafter by an action in equity, cancel such release and re-establish the mortgage, thereby affecting the rights of a person who acted on the faith of such release: Applying the rule in favor of the assignee of a subsequent mortgage which was reduced to judgment.

Reaffirmed and narrowed in Crosby v. Tanner, 40 Iowa 136-138, holding that a valid agreement between a mortgagor and mortgagee whereby the mortgagor agrees to cancel the mortgage, is not available against a subsequent *bona fide* assignee of the mortgage, and note thereby secured, without notice of the agreement, it not appearing of record.

Cited with approval in Harshey v. Blackmarr, 20 Iowa 186, 89 Am. Dec. 520, involving the rights of a purchaser at a decretal sale under a void judgment.

(Note.—See further specially, Gray v. McCallister, 50 Iowa 497; Hurst v. Sheets and Trussell, 14 Iowa 322.—Ed.)

NIXON v. SPENCER, 16 IOWA 214

1. Infancy — Contract for Personal Services of Infant — Payment to Infant—Estoppel of Parent or Guardian—Emancipation of Minor.—Where a contract for a minor's personal services is made directly with him, with the knowledge of his parent or guardian, who makes no objection thereto, payment for such services may (under Sec. 2542 of the Code of 1860) be made to the minor, and the parent, or guardian cannot thereafter recover therefor, pp. 215, 216.

Reaffirmed and extended in Walcott v. Rickey, 22 Iowa 173, holding further that where a father allows a minor child to work for himself, money earned and property thereby acquired by the latter is not, in the absence of an actual intent to defraud, subject to the satisfaction of the father's debts.

Cross reference.

"Emancipation of minor child by parents"—See further, annotations under Everett v. Sherfey (1 Iowa 356), Vol. I, p. 187.

NASON *v.* WOODWARD, 16 IOWA 216

1. Real Estate—Contracts for Sale of—Voluntary Rescission of Entire Contract—Statu quo.—Where parties to a contract for the sale of land voluntarily agree to a rescission of the entire contract, the law implies an agreement and promise on the part of the vendor to return to the purchaser the part of the purchase money paid, and he may sue therefor; but an agreement in such case, to cancel the title bond and unpaid purchase money notes, does not, without more, imply such an agreement, and the purchaser cannot in such last case recover the purchase money paid, pp. 220, 221.

Reaffirmed, extended and explained in Downey *v.* Riggs, 102 Iowa 92, 70 N. W. 1092, holding that a purchaser can recover money paid upon a contract for the purchase of land, when the contract is rescinded by mutual consent of the parties; or, when the vendor cannot or will not perform his part of the contract; or, when the vendor has been guilty of fraud; or, when by the contract the purchaser has the right to rescind by a stipulated time, or by doing a certain act, and he so elects; or, where the contract is to be performed and completed by a certain time, and both parties are in default at such time: But a purchaser under such a contract, cannot recover money paid, when he fails or refuses to comply with the contract, in the absence of a provision in the contract therefor.

2. Evidence—Circumstances Contrary to Positive Proof, Inadmissible—When—Rebuttal.—Circumstances tending to show that it is improbable that a party would have made an alleged agreement is inadmissible in rebuttal, when the party offering it alone testifies to the agreement and its circumstances, and his testimony is not denied, p. 221.

Cited in State *v.* Parish, 22 Iowa 289, the court holding that rebuttal testimony is to be received to disprove evidence introduced in chief; that evidence in chief may be introduced after the case has closed in chief, by leave of court, and in the exercise of the court's judicial discretion, subject to reversal for abuse thereof.

3. Trial—Instructions—Refusal of Instruction Already Covered by One Given.—The trial court may properly refuse to give an instruction offered, when it is already substantially covered by one given, p. 219.

Reaffirmed in Robinson *v.* Ill. Cent. R. R. Co., 30 Iowa 404, 405; Todd *v.* Branner, 30 Iowa 441, 442.

Cross reference. See further, note under Rule 3 of State *v.* Hockenberry and Brandt (11 Iowa 269), Vol. I, p. 814.

GREFF *v.* BLAKE, 16 IOWA 222.

1. Justice's Court—Pleading in—Nicety in.—The niceties of technical pleading are not required in a justice's court, even where such pleadings are therein reduced to writing, p. 223.

Reaffirmed, explained and extended in Glidden v. Higbee, 31 Iowa 381; West v. Moody, 33 Iowa 138, 139; Fauble v. Stewart, 35 Iowa 380; Finch v. Central R. R. of Iowa, 42 Iowa 306, all holding that great liberality in the matter of pleadings, and in the introduction of evidence thereon, is allowed in a justice's court.

CAMP v. WILSON, 16 IOWA 225

1. **Pleadings—Petition—Several Causes of Action in Separate Counts.**—Plaintiff may (under Secs. 2934, 2935 of the Code of 1860), set out in separate counts of his petition several causes of action growing out of the transaction made the basis of his action, and then state that he claims to recover upon only one, p. 227.

Reaffirmed and explained in Watson v. Bell, 37 Iowa 641, 642, holding that where the plaintiff pleads the same cause of action in separate counts of his petition, and fails to state that he only asks recovery upon one, and only recovers upon one of the counts, he shall pay the costs of the whole trial.

PARKER v. PIERCE, 16 IOWA 227

1. **Trust in Land Contrary to Absolute Deed or Legal Title—Parol Evidence—Sufficiency of.**—Where it is sought to establish a trust to land by parol evidence and in favor of a party and contrary to a deed which is absolute on its face, or the legal title, the proof should be clear, satisfactory and conclusive, and not made up of loose and random conversations, p. 231.

Cited in Lewis v. Arbuckle, 85 Iowa 343, 52 N. W. 240, 16 L. R. A. 677, not in point.

Special cross reference. For other cases citing the text and many more on the question, see annotations under Rule 2 of Cooper v. Skeel (14 Iowa 578), ante. p. 288.

2. **Judgment Lien on Land—Prior Unrecorded Conveyances and Equities.**—A judgment lien on land is inferior to a prior unrecorded conveyance, or equities thereto or therein, p. 232.

Reaffirmed in Sigworth v. Meriam, 66 Iowa 480, 24 N. W. 5.

Reaffirmed and explained in Churchill v. Morse, 23 Iowa 231, 232, 92 Am. Dec. 422, holding that a judgment is a lien only on the interest of the judgment debtor in land at the time of its rendition.

Reaffirmed, explained and extended in Chapman v. Coats, 26 Iowa 291, holding that the lien of a judgment, whether owned by the judgment creditor or sold by him to another, before a sale under such judgment, is inferior to a prior, unrecorded mortgage which if recorded before such decretal sale will be notice to a purchaser thereat.

Reaffirmed and extended in Hultz v. Zollars, 39 Iowa 593, holding further that a judgment is not a lien upon an equitable interest in real estate of the judgment debtor, and is not such a lien as will affect a *bona fide* purchaser without notice.

Reaffirmed and qualified in Butterfield v. Walsh, 21 Iowa 99, 89 Am. Dec. 557, holding that where the execution plaintiff becomes purchaser at a sale thereunder, without actual notice of an equity existing in favor of a third person to the land sold, and there is nothing in the way of possession or otherwise to put the plaintiff upon inquiry as to such equity, he is a subsequent purchaser and has the superior right to that of the holder of the equity.

Reaffirmed and qualified in Gower v. Doheney, 33 Iowa 39; Butterfield v. Walsh, 36 Iowa 536, 537, holding that a judgment creditor who purchases land at a sheriff's sale under his judgment, is entitled to the protection of any other innocent purchaser without notice of prior equities or unrecorded conveyances, both at law and in equity, unless there are very strong equities against him.

Cited in Vannice v. Bergen, 16 Iowa 565, 85 Am. Dec. 531, holding that the purchase of the equity of redemption by the mortgagee will not extinguish the mortgage, when it is the intention of the parties to keep it alive, or if this is to the interest of the mortgagee and it can be done without prejudice to the mortgagor or to the rights of third persons: Holding further that where a mortgagee of a recorded mortgage is induced by fraud of the mortgagor to purchase the equity of redemption and the mortgage is not released of record, the mortgage will be revived in equity, as against the mortgagor and subsequent purchasers, or mortgagees of the property, and judgment creditors of the mortgagor.

Cross reference. See further on this question, annotations and cross references under Welton v. Tizzard (15 Iowa 495), ante. p. 371.

3. Execution Sale of Land—Rights of Purchaser—Prior Unrecorded Conveyance or Equity.—Whether a purchaser at an execution sale of land takes it charged with equities and secret trusts existing against the judgment debtor and not known to the purchaser at the time of the sale, is not decided, p. 232.

Cited in Churchill v. Morse, 23 Iowa 233, 92 Am. Dec. 422, not in point.

Special cross reference. For cases citing the text and many others, see annotations under Rule 3 of Blaney v. Hanks (14 Iowa 400), ante. p. 254.

Cross reference. See Rule 2 hereof and cross reference there found.

REEVES & CO. v. SEBERN, SHERIFF, 16 IOWA 234, 85 AM. DEC. 513

1. Executions—Lien of, Prior to Levy—Personal Property and Chattels.—An execution is not a lien upon goods, chattels, or other personal property until actual levy thereon, p. 237.

Reaffirmed and extended in Ware v. Delahaye & Purdy, 95 Iowa 680, 681, 64 N. W. 644, holding further that the doctrine of *lis pendens* is inapplicable to personal property.

Cited with approval in Lathrop v. Brown, 23 Iowa 48, not in point.

STATE *v.* GREEN AND MANN, 16 IOWA 239

1. Criminal Law — Former Jeopardy — Former Conviction or Acquittal Procured by Fraud of Accused—Effect.—Where an accused person procures his acquittal or conviction in a prosecution in a justice's court by fraud or collusion, the State may appeal to the district court and have a trial *de novo*, or may treat it as a nullity and commence a new prosecution. In either case a plea of former jeopardy is not available, p. 243.

Cited with approval in State *v.* Tait & Tait, 22 Iowa 142, holding the right of appeal from a judgment in a justice's court in a criminal prosecution to apply equally to and for the benefit of the State; that in such case the trial is to be *de novo*; and that an acceptance and receipt for the fine imposed in a justice's court, does not bar the State of the right of appeal.

WARNIBOLD *v.* SCHLICHTING, 16 IOWA 243

1. Note or Contract Payable in Gold Coin—Payment in United States Treasury Notes — Act of Congress of February 25, 1862 — Constitutionality.—A note or other contract made payable in "U. S. Gold," or gold coin, may, under the Act of Congress of February 25, 1862, be paid in United States treasury notes, although the contract or note was executed before the taking effect of such Act.

A tender of such treasury notes in payment of such a note or contract is valid, pp. 245, 246.

Reaffirmed in Troutman *v.* Gowing, 16 Iowa 415, 416.

Reaffirmed and extended in Hintrager *v.* Bates, 18 Iowa 175, 176, holding further that redemption from a sale of land for taxes made before the taking effect of the Act of the text, may be made in United States treasury notes—Upholding constitutionality of the act.

(Note.—The date of the Act of Congress mentioned is given as July 18, 1862 in this last case.—Ed.)

Reaffirmed and extended in Wilson *v.* Tiblecock, 23 Iowa 332; Richmond *v.* D. & S. C. R. R. Co., 33 Iowa 503, and further directly upholding the constitutionality of the Act mentioned in the text.

(Note.—The date of the Act of Congress is given as July 16, 1862, in these last cases.—Ed.)

Reaffirmed and extended in Richmond *v.* D. & S. C. R. R. Co., 33 Iowa 503, holding further that a judgment may be paid in currency which is made a legal tender by Act of Congress.

Cited in Curtis *v.* O'Brien and Sears, 20 Iowa 378, 89 Am. Dec. 543.

BARTON *v.* HOLMES, 16 IOWA 252

1. Slander—Construction of Language Published.—In an action of slander the words alleged to be slanderous should be construed in

the sense in which the person to whom they were published understood them, p. 254.

Reaffirmed in McCaleb v. Smith, 22 Iowa 245.

Cross reference. See Rule 2 hereof.

2. Slander—Meaning of Words—When Witness to Whom Published May Testify as to How He Understood Them.—In an action of slander where there exists a doubt as to the sense in which the alleged slanderous words were understood, a witness to whom they were published may testify thereto, pp. 257, 258.

Reaffirmed and explained in McLaughlin v. Bascom, 38 Iowa 661; Arnold v. Lutz, 141 Iowa 598, 120 N. W. 121, holding that in an action of slander where the words spoken are ambiguous, they are to be construed in the sense the hearers understood them, and such fact may be proved by such persons and is an ultimate fact to be determined by the jury.

Reaffirmed and qualified in Hess v. Fockler, 25 Iowa 11, 12, holding that although it is true that words (claimed to be slanderous) shall be construed in the sense in which the hearers understood them, yet this may be determined by the jury from the words themselves and the facts and circumstances attending the speaking of them.

Distinguished and narrowed in Anderson v. Hart, 68 Iowa 402, 27 N. W. 290, holding that when a libelous publication does not on its face, or by way of innuendo or otherwise, refer to a certain person, evidence as to whom the persons to whom it was published understood was referred to, is incompetent.

Cross reference. See further, annotations under Rule 1 of De Moss v. Haycock (15 Iowa 149), ante. p. 316

3. Trial—Misconduct of Jury—Quotient Verdict as Ground for New Trial—What is Not.—Where upon their retirement, the jury agree that each juror mark down the sum he is willing to allow, and that the aggregate amount thereof shall be divided by twelve, the resulting sum to constitute the amount of the verdict, such a verdict will be set aside and a new trial be granted: But in order for this rule to be applicable, the jury must agree to be bound by the result of the calculation; and such an agreement and calculation made by the jury for the purpose of "ascertaining the amount of the verdict, *in case it was adopted*" is not a ground for a new trial, or for reversal upon appeal, p. 259.

Reaffirmed in Vance v. Kirfman, 20 Iowa 14; Hamilton v. Des Moines Val. R. R. Co., 36 Iowa 35; Deppe v. C. R. I. & P. R. R. Co., 38 Iowa 597; Peterman v. Jones, sheriff, 94 Iowa 597, 63 N. W. 340; Hoover v. Town of Mapleton, 110 Iowa 574, 81 N. W. 777.

Reaffirmed and qualified in Fuller v. Ch. & N. W. R. R. Co., 31 Iowa 213, 214, holding that where a verdict of a jury is severable, and the jury regularly determined part of its amount, but improperly and

as in the text, determined the residue thereof, such fact will not be cause for reversal upon appeal, if the successful party will thereon remit the part of the verdict improperly determined.

Cited in Wright v. Ill. & Miss. Tel. Co., 20 Iowa 204; Cowles, Adm'x. v. Ch. R. I. & P. R. R. Co., 32 Iowa 518, the court fully discussing the question of misconduct of jurors as ground for, and when their affidavits are admissible in support of a motion for a new trial.

(Note.—See further specially on this question, Light v. Ch. M. & St. P. Ry. Co., 93 Iowa 83, 61 N. W. 380; Sullens v. Ch. R. I. & P. Ry. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501; Perry v. Cottingham, 63 Iowa 41, 18 N. W. 680.—Ed.)

Cross reference. See further on this question, annotations and cross references under Rule 2 of Denton v. Lewis (15 Iowa 301), ante. p. 345.

RINDSKOFF BROS. & CO. v. LYMAN, SHERIFF, 16 IOWA 260

1. Action at Law—Trial—Appeal—Necessity for Motion For New Trial, Etc., Before Appeal.—Upon an appeal from a judgment in an action at law, tried by a jury, errors of law of the trial court, although excepted to at the time made, will not be reviewed, unless they are made the basis of a motion for new trial before the appeal is prosecuted, pp. 262, 263, 268.

Reaffirmed in Beardsley v. Bridgman, 17 Iowa 297.

Reaffirmed and varied in Shaw, Johnson, Wood & Co. v. Standring, 17 Iowa 585 (abstract), holding that when in an action at law, a jury is waived and a trial is had by the court, and no finding of the facts is made by the court, and no motion for new trial presents the ground that the judgment is contrary to the evidence, it will not be reviewed upon appeal, unless the finding of the trial court on the evidence be presented as a matter of law.

Impliedly overruled in Presnall v. Herbert, 34 Iowa 540, holding that (under Chap. 49, Acts of 1866) errors of law occurring upon a jury trial and excepted to at the time they were made by the party complaining, may be reviewed upon appeal to the Supreme Court, although not made grounds for a motion for a new trial below; and that the rule applies to errors of the trial court in admitting or excluding evidence, and in giving or refusing instructions.

Cross reference. See further on this question, annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66.

2. Executions—Sales of Mortgaged Personalty Under—When Allowed.—Where a mortgagor of personalty is in possession and has the *right to possession thereof for a definite period*, his interest prior to the expiration of such period, is subject to levy and sale under execution, p. 269.

Special cross reference. For cases citing, explaining, qualifying etc., the text and many more on the question, see annotations under

Torbert v. Hayden, sheriff (11 Iowa 435), and Campbell v. Leonard (11 Iowa 489), Vol. I, pp. 839 and 848, respectively.

LANGWORTHY v. CITY OF DUBUQUE, 16 IOWA 271

1. **Cities and Towns—Power of Legislature Concerning—Creation of or Extension of Boundary by.**—The legislature may create a city or town, and, subject to the exception in Rule 2 hereof, may extend its boundary or territory, without the consent, in either case, of the persons thereby affected, p. 273.

Reaffirmed in Fulton v. City of Davenport, 17 Iowa 407; City of Burlington v. Leebrick, 43 Iowa 259.

Cross reference. See Rule 2 hereof.

2. **Cities and Towns—Extension of Territory or Boundary by Legislature—What Lands Exempt From Municipal Taxation.**—Although the legislature may extend the boundary or territory of a city or town, it cannot thereby subject to municipal taxation lands within the extended limits which do not receive benefits thereby. So, in such case, agricultural or farming, or mining lands not used by the owners as part of the city or town and receiving none of its benefits, are not subject to municipal taxation; and the collection of such a tax may be enjoined, p. 274.

Reaffirmed in Buell v. Ball, marshal, 20 Iowa 288; Davis v. City of Dubuque, 20 Iowa 459; Deeds v. Sanborn, marshal, 22 Iowa 217.

Reaffirmed and explained in Fulton v. City of Davenport, 17 Iowa 407, 409, 411.

Special cross reference. For other cases citing, explaining, qualifying, etc., the text and many more on the question, see annotations and note under Langworthy v. City of Dubuque (13 Iowa 86), ante. p. 121.

Cross reference. See further on this question, annotations under Morford v. Unger (8 Iowa 82), Vol. I, p. 495.

ALLISON v. BARRETT, 16 IOWA 278

1. **Pleadings — Petition — Amendment to Conform to Proof—When Refusal to Allow, Not Reversible Error.**—When, upon the close of the testimony, the plaintiff asks leave to amend his petition to conform to the proof, which the court refuses to allow, but the court in his instructions to the jury treats the offered amendment as immaterial, and gives the plaintiff the benefit of all the facts thereby set up, such ruling and refusal by the court, if error, is not prejudicial and is no cause for reversal, p. 279.

Reaffirmed in Dixon v. Dixon, 19 Iowa 514, holding that when an amendment is offered in a civil action which is not in furtherance of justice, or which is not necessary in order to enable a party to secure his rights, the court may properly refuse to allow it to be filed.

Cross reference. See further specially on the question of amendments, annotations under *Seevers, Adm'r v. Hamilton* (11 Iowa 66), Vol. 1, p. 773.

2. Negotiable Promissory Note—Assignment of—What is—Directions to Agent to Deliver to Assignee and Promise by Maker to Pay—Effect.—Where a negotiable promissory note is sold and the seller orders his agent having its possession, to deliver it to the buyer, and thereafter the maker promises the latter to pay it, such transaction amounts to an assignment, although the transfer is not indorsed on the note; and the purchaser or assignee may maintain an action on such paper in his own name, p. 282.

Reaffirmed in Allison & Crane v. King, 25 Iowa 59.

Reaffirmed and extended in Warnock v. Richardson, 50 Iowa 451, holding further that the holder of a negotiable instrument may maintain an action thereon, though it has not been indorsed to him, by showing that he is the owner under an assignment made otherwise than by indorsement.

3. Promissory Note—Sale of Under Execution—Rights of Purchaser at.—A levy and sale of a promissory note passes to the purchaser thereat, only whatever interest or title the judgment debtor had in it at the time of the levy, p. 283.

Reaffirmed and explained in Thomas v. Hillhouse, 17 Iowa 72; *Sansee v. Wilson*, 17 Iowa 583 (abstract), holding that when, in the absence of any fraud, the execution defendants have sold their interest in the property before seizure under process, although notice of such sale is not brought home to the execution plaintiffs or their officer until after such seizure, the rights acquired under the sale are paramount to those acquired under the process.

Reaffirmed and extended in Stephenson v. Walden, 24 Iowa 86, holding further that an attachment creditor, by levy thereof, acquires a lien only upon the *interest of* the attachment debtor in the property levied on at the time of the levy.

Reaffirmed and qualified in Allison & Crane v. King, 21 Iowa 303, 304, holding that where a prior purchaser of a note obtained by a verbal transfer from a debtor, afterwards sold under execution and bought by another, seeks to set aside the execution, or decretal sale, he must allege and prove that the execution, or decretal purchaser took with notice of the prior transfer.

Reaffirmed and qualified in Prather & Parr v. Parker, 24 Iowa 27, 28; *Boothby & Co. v. Brown*, 40 Iowa 106, holding that where personal property included in a prior, unrecorded bill of sale, is levied on by the sheriff under an attachment of a creditor of the vendor, neither the sheriff nor the attaching creditor knowing of the sale at the time of levy, and the property being in the possession of the vendor (debtor), then the attachment is prior to the claim of the vendees in the bill of sale.

Cross reference. See further, annotations under *McGavran v. Haupt* (9 Iowa 83), Vol. I, p. 547.

BUELL v. BUCKINGHAM & Co., 16 IOWA 284, 85 Am. Dec. 516

1. Trusts—Purchase of Trust Property by Trustee, Voidable—Evidence Required to Set Aside.—The purchase of the trust property by a trustee from his *cestui que trust* is, in equity, voidable and not void at the election of the latter. When the *cestui que trust* sues in equity to set aside such a purchase, the transaction will be scrutinized closely, and will be set aside upon proof of fraud, or even upon a very slight showing of bad faith, or of advantage having been taken of the complainant, pp. 287, 293.

Reaffirmed in *Fryer v. Harker*, 142 Iowa 714-716, 121 N. W. 529.

Reaffirmed and extended in *State v. Engle*, 111 Iowa 251, 82 N. W. 764, holding further that the *cestui que trust* must place the trustee in *statu quo*, before he can set aside the purchase of trust property by the trustee.

Cited with approval in *Doyle v. Burns*, 123 Iowa 512, 99 N. W. 204, not in point, but upon analogy.

Cross reference. See further on this question, annotations under *MacGregor v. Gardner* (14 Iowa 326), ante. p. 245.

2. Private Corporations — Meeting of Directors — Majority of Quorum May Bind Company.—At a meeting of the board of directors of a private corporation, a majority of a quorum may bind the corporation, although a bare quorum be present, p. 288.

Reaffirmed, explained and extended in *Thurston v. Huston*, mayor, et al, 123 Iowa 160, 98 N. W. 638, holding further that in the absence of statutory or a charter restriction, a majority of a quorum may adopt or pass any resolution or order by a city council or other collective body exercising legislative, judicial or administrative functions.

Reaffirmed in *Clark v. American Coal Co.*, 86 Iowa 445, 449, 53 N. W. 291, 293, 17 L. R. A. 557, holding further that where the majority of a quorum of the directors of a private corporation, at a legally called meeting, vote a salary for one member for his services as general manager, such act is binding on the company, although such director and general manager voted on such question, it being shown that his vote could not have changed the result.

Cross references. See Rule 3 hereof. See also, on this question, *Rushville Co. v. Rushville*, 16 Am. St. Rep. 388, 6 L. R. A. 315; *Attorney General v. Shepard*, 13 Am. St. Rep. 576; *Heiskell v. Mayor*, 57 Am. Rep. 308; *Launtz v. People*, 55 Am. Rep. 405.

3. Private Corporations—Sale of Its Property to President by Majority of Bare Quorum.—Where at a legally held meeting of the board of directors of a private corporation whose charter provides that the president and two members of the board shall constitute a

quorum for the transaction of business, the two members present vote and sell corporate property to the president—the president not voting—the act and sale is valid, pp. 288, 289.

Cited in Stetson v. Northern Inv. Co., 104 Iowa 397, 73 N. W. 871, a case turning on other questions.

4. Insolvent Debtor—Sale or Mortgage to Secure a Creditor—When Valid—Private Corporations.—An insolvent debtor, whether an individual or a private corporation may, in good faith, make a sale, transfer or mortgage of all his, or its, property to secure a creditor; and such a transaction will not be treated as an assignment for the benefit of all such debtor's creditors. The fact that such sale, etc., is so made by an insolvent private corporation to secure a stockholder or an officer thereof, does not affect the rule, p. 296.

Reaffirmed in Lampson & Powers v. Arnold, 19 Iowa 486, 487; Garrett, trustee v. Burlington Plow Co., 70 Iowa 701, 702, 29 N. W. 398, 59 L. R. A. 461; Warfield, Howell & Co. v. Marshall County Canning Co., et al, 72 Iowa 670, 34 N. W. 469, 2 Am. St. Rep. 263; Rollins v. Shaver Wagon & Carriage Co., 80 Iowa 390, 45 N. W. 1040, 20 Am. St. Rep. 427; First Nat'l Bank v. Garretson, 107 Iowa 200, 201, 77 N. W. 857.

Special cross reference. For other cases citing the text and many more on the question, see annotations under Rule 3 of *Fromme v. Jones* (13 Iowa 474), ante. p. 176.

5. Private Corporations—Power of Board of Directors to Sell Real Estate.—A corporation whose charter allows it "to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals," gives its board of directors power to sell all of its corporate property. The power in such charter to "make contracts" is broad enough for such purpose, p. 289.

Reaffirmed, explained and extended in Traer v. Lucas Prospecting Co., 124 Iowa 112, 113, 116, 119, 99 N. W. 293, holding that a *solvent* private corporation may only sell or dispose of its property for the purposes for which it was organized and as authorized by its charter: But an *insolvent* private corporation, or one in failing circumstances, may sell, transfer or mortgage its property, although not expressly so authorized by its charter.

Reaffirmed and extended in Price v. Holcomb, 89 Iowa 137, 56 N. W. 411, holding further (as does the present case in argument) that a sale of all of its corporate property by a corporation so empowered, does not operate as a dissolution.

NEWFIELD v. BLAWN, 16 IOWA 297

1. Limitation of Actions — Petition Showing Action Barred—Additional Allegations Curing.—Where the petition shows that a cause of action is barred by the statute of limitation, but further al-

leges matter making the statute inapplicable, it is good on demurrer, pp. 298, 299.

Reaffirmed in Babcock v. Meek, 45 Iowa 138.

Cited with approval in Jones v. Brunskill, 18 Iowa 131, 132, not in point.

Cited in Howells v. Patton, 26 Iowa 543 (dissenting opinion), the majority Court opinion not in point, but upon a parity.

NASH v. GIBSON, EX'R, 16 IOWA 305

1. Evidence—Action in Which Personal Representative is a Party—Transactions With Decedent.—In an action in which a personal representative is a party, the party adverse to him may (under Sec. 3980 of the Code of 1860) testify as to facts, which, from their nature, he alone would be likely to know, p. 306.

Reaffirmed in Cummins v. Hull's Adm'r, 35 Iowa 254.

2. Promissory Note—When Lapse of Time Raises no Presumption of Payment or Injustice of.—A lapse of five years from the maturity of a promissory note before commencement of a proceeding for its enforcement, does not, of itself, raise a presumption that the note has been paid, or of the non-existence of the original debt, p. 307.

Reaffirmed and extended in Schulte v. Coulthurst, 94 Iowa 421, 62 N. W. 771, holding further that no presumption of the payment of a negotiable promissory note arises, until the running of the full period of the statute of limitation.

ALLEN v. MOER, ADM'R, 16 IOWA 307

1. Decedent's Estate—Claims to be Filed Within Year and a Half After Appointment of Administrator and Notice of—Debt Secured by Mortgage.—Section 2405 of the Code of 1860, requiring claims against the estate of a decedent of the fourth class to be filed in the county court within a year and a half after the appointment of an administrator and notice thereof, does not apply to a debt secured by mortgage; and such statute and failure to comply therewith by a mortgagee of a decedent, is no defense to an action for its foreclosure, p. 309.

Reaffirmed in In re Assignment of Windhorst, 107 Iowa 62, 77 N. W. 515.

Reaffirmed and extended in Moores v. Ellsworth, 22 Iowa 300, 301, holding further that a mortgage lien is not extinguished until the debt is paid; and the fact that a mortgage creditor, or lien holder, presents his claim against a decedent (mortgagor) and has it approved and allowed, does not bar his right to sue in equity and foreclose the lien.

Reaffirmed and extended in Baldwin v. Tuttle, 23 Iowa 71, 72; Davis v. Shawhan, 34 Iowa 94, holding further that the section of the

text, does not apply to a judgment against a decedent rendered before his death, and failure to comply therewith, does not bar an action to enforce a lien given by the judgment.

Reaffirmed and extended in Black v. Black, 40 Iowa 89, holding further that one having a lien upon land of a decedent, given by title bond, may enforce his lien against the land without proving his claim, or, may waive his lien and come in as a general creditor of the estate—And to the same effect is, Merchants' Nat'l Bank of Greene v. Soesbe, 138 Iowa 360, 116 N. W. 125 (reaffirming the text), applying the rule as to a mortgage, against a decedent, of personal property.

DIXON v. GRAHAM, 16 IOWA 310

1. Action at Law—New Trial Granted in Equity—When.—A court of equity may decree a new trial in an action at law on the ground of newly discovered evidence or other cause, where the court of law has ceased to have power so to do, and under such circumstances (as to materiality and newness of testimony, diligence to discover, etc.) as would have authorized the latter to grant it, p. 312.

Reaffirmed in Kinsell v. Feldman, 28 Iowa 499.

Reaffirmed and extended in Cottle v. Cole & Cole, 20 Iowa 485, holding further that the rule applies to a foreign judgment at law sued on in this state: That in such case, the defendant's remedy is by appeal to the Supreme Court of the state wherein the judgment is rendered, or by action in equity there, to set it aside.

Cited in Uehlein v. Burk, 119 Iowa 745, 746, 94 N. W. 244, holding that where a person seeks in an equitable action to set aside a void judgment *in rem*, he must allege and prove some special equity entitling him to the relief.

Cited in Tucker v. Stewart, Adm'r, 121 Iowa 716, 97 N. W. 149, a case involving an action in equity to set aside a judgment at law for fraud.

Unreported citation, 86 N. W. 372.

Cross reference. See further, annotations under Hoskins v. Hat-tenback and Charles (14 Iowa 314), ante. p. 243.

STATE v. BROWN, 16 IOWA 314

1. Criminal Law—Bail—Liability of Sureties on Bail Bond—Forfeiture.—The sureties on a bail bond or a recognizance in a criminal case must have the accused at all times present in court to answer the charge, until he is discharged by the court or surrendered by them; and such a bond or recognizance may, without notice to accused or his sureties, be forfeited at any time during the pendency of the prosecution, upon breach thereof, unless accused has been surrendered or discharged, p. 318.

Reaffirmed in State v. Stewart, 74 Iowa 341, 37 N. W. 402; State v. Baldwin, 78 Iowa 738, 36 N. W. 909; State v. Benzion, 79 Iowa 471, 44 N. W. 710.

Reaffirmed and explained in State v. Ryan, 23 Iowa 408; State v. Merrihew, 47 Iowa 119, 29 Am. Rep. 464, holding that where a bail is made for accused to appear at a particular term of court, and the prosecution is continued to the next term, the accused stands on his bond without special order therefor.

Reaffirmed and extended in State v. Tieman, 39 Iowa 477, holding that where a surety on a bail bond desires to surrender the accused and be released, he must pursue the statute therefor, and an order must be thereupon made by the court releasing him.

Reaffirmed and extended in Lucas County v. Wilson, 61 Iowa 142, 16 N. W. 60, holding further that a change of venue does not affect the liability of sureties on a bail bond.

Reaffirmed and extended in State v. Zimmerman, 112 Iowa 6, 7, 83 N. W. 720, holding further that whenever the court orders accused into the custody of the sheriff, the sureties on the bail are thereby discharged.

PILMER v. BRANCH OF STATE BANK AT DES MOINES, 16 IOWA 321
(Later Appeal, 19 Iowa 112.)

1. Evidence—Depositions—Dedimus—Names of Witnesses to be Given in Notice.—When depositions are to be taken by virtue of a *dedimus*, the names of the proposed witnesses shall be given, p. 324.

Reaffirmed and explained in Strayer v. Wilson, 54 Iowa 566, 7 N. W. 7, holding that before a commission may issue to take depositions upon interrogatories, the adverse party must be served with reasonable notice thereof, which notice shall set out the names of the proposed witnesses; that the depositions of witnesses not named in the notice taken under the commission, cannot be read on the trial, if proper objection is made.

Cross reference. See Rule 2 hereof.

2. Evidence—Depositions—Waiver of Objection to For Insufficient Notice.—Objections to a deposition taken upon insufficient or defective notice is waived, if no exceptions thereto are filed before the commencement of the trial, p. 325.

Reaffirmed in Ostenson v. Severson, 126 Iowa 197, 198, 101 N. W. 790.

3. Written Contracts—Construction of Language in—Custom or Usage—Intention of Parties.—Language in a written contract is to be understood in its plain, ordinary and popular sense, unless it has generally, in respect to the subject-matter, or by known usage of trade, or the like, acquired a peculiar and distinct sense. The intention of parties to a written contract is to be determined from the language used, pp. 326, 327.

Reaffirmed in Franklin v. Twogood, 18 Iowa 520; Steyer v. Dwyer, 31 Iowa 21, 22; S. L. Refrigerator & W. G. Co. v. Vinton Washing Mach. Co., 79 Iowa 243, 44 N. W. 371, 18 Am. St. Rep. 366.

Reaffirmed and extended in Haddock v. Woods, 46 Iowa 435, 436; Amer. Em. Co. v. Clark, 47 Iowa 672, holding further that an instrument payable in "current funds," is negotiable when supported by proof of a custom showing that such term meant "money"; and in such case parol evidence is admissible to prove that the parties understood the term to mean *money*.

Reaffirmed and extended in Goode v. C. R. I. & P. Ry. Co., 92 Iowa 373, 374, 60 N. W. 631, holding further that parties to a contract are *conclusively* presumed to have known and dealt in relation to a *general* custom, which fixes the terms of their contract; unless the contract expressly negatives this fact.

Reaffirmed and qualified in Willmering v. McGaughey, 30 Iowa 209, 210, 6 Am. Rep. 673, holding that where words in a written contract or instrument show that they are not used in a technical sense, and there is no uncertainty, or ambiguity as to their meaning, they are to be given their ordinary construction; and evidence of a custom or particular meaning to the contrary is inadmissible, in such case.

Cited with approval in Huse v. Hamblin, 29 Iowa 505, 4 Am. Rep. 244, the case turning on other questions.

Cross reference. See further on this question, annotations under Rule 2 of Rindskoff Bros. v. Barrett (14 Iowa 101), ante. p. 211.

4. Written Contracts—Evidence of Contemporaneous Agreements Inadmissible to Vary, When.—Evidence of contemporaneous or prior verbal agreements are, in the absence of fraud, inadmissible to show the intention of parties to a written contract, p. 327.

Reaffirmed in First Nat'l Bank of Cedar Rapids v. Hurford & Bro., 29 Iowa 584; Atherton v. Dearmond, 33 Iowa 355.

Reaffirmed and qualified in Foley, Adm'r v. Hamilton, 89 Iowa 690, 57 N. W. 440, holding that equity will reform a written instrument so as to give it the effect intended by the parties, when, by reason of fraud, accident or mistake, it fails to show such intention.

Cited with approval in Craven v. Winter, 38 Iowa 479, holding that in construing a contract the court will consider and weigh all its parts; and will arrive at the intention of the parties thereto by looking at the language employed, the object thereof, and all the circumstances attending it.

Cross references. See further on this question, annotations under Field v. Schricher (14 Iowa 119) ante. p. 214; Gelpcke, et al v. Blake (15 Iowa 387), ante. p. 355.

MYERS v. MCHUGH, 16 Iowa 335

1. Attorneys at Law—Lien of—Priority of Attachment.—An attorney has (under Sec. 2708 of the Code of 1860), a lien on money due his client, and in the hands of the adverse party in an action or proceeding in which he is employed, from the time of giving of notice thereof to the adverse party; and such lien is superior to an attachment

or garnishment against his client, served after the giving of the notice, pp. 337, 338.

Reaffirmed in Smith & Baylies v. C. R. I. & P. R. R. Co., 56 Iowa 724, 727, 10 N. W. 245, 247, holding that an attorney may have a lien on money or a liability due his client by the party adverse in the action in which he is employed, whether the debt or liability arises *ex contractu* or *ex delicto*.

2. Money Voluntarily Paid for Another—Recovery For—When Not Allowed.—Money voluntarily paid by a party for another and without the latter's knowledge or consent, cannot be recovered, pp. 338, 339.

Reaffirmed in Montgomery v. Gibbs, 40 Iowa 658.

BROWN v. JEFFERSON COUNTY, 16 IOWA 339

1. Public Road or Highway—Evidence of.—Parol evidence is admissible to prove that a road was used and traveled by the public as a public road or highway; that it was recognized by the county authorities as an established road; that the county built a bridge as part thereof; and such facts sufficiently establish the existence of such public road or highway, pp. 342, 343.

Reaffirmed and extended in Mosier v. Vincent, 34 Iowa 479, 480; Baldwin v. Herbst, 54 Iowa 169, 6 N. W. 257, holding further that a public road or highway may be proved to be such by the record establishing it, or by the written dedication made by the owner of the land, or by prescription.

(Note.—See further on this question, State v. Schilb, 47 Iowa 611; Kelsey v. Furman, 36 Iowa 614; State v. Tucker, 36 Iowa 485; Daniels v. Ch. & N. W. R. R. Co., 35 Iowa 129; Houghan v. Harvey, 33 Iowa 203; State v. Crow, 30 Iowa 258; Manderschid v. City of Dubuque, 29 Iowa 73; Wilson v. Sexon, 27 Iowa 15; Ewell v. Greenwood, 26 Iowa 377; Onstott v. Murray, 22 Iowa 457; Keyes & Crawford v. Tait, 19 Iowa 123, and there are others.—Ed.)

2. Bridges—Liability of County for Damages Resulting From Negligently Failing to Build, Maintain and Repair—Defense.—It is the duty of the county, under the statute, to build, maintain and repair bridges, when the expenditure necessary therefor is large; and where in such a case a county negligently fails to so repair, etc., it is liable in damages for injuries resulting therefrom.

The fact that the county placed a notice of the defective condition of a bridge thereon and a barricade over the entrance thereto, is no defense to an action for personal injury by reason thereof, when such notice and barricade were removed by some one before such injury, pp. 344, 345.

Reaffirmed in Kendall v. Lucas County, 26 Iowa 397, 398.

Cited with approval in Wheeler v. City of Fort Dodge, 131 Iowa

575, 108 N. W. 1060, 9 L. R. A. 146, on the question of the liability of a city for defective streets, and obstructions therein.

Partially overruled as to last paragraph in Weirs v. Jones County, 80 Iowa 353, 354, 45 N. W. 883, holding that where a county places a barricade or obstruction to a bridge which is defective or out of repair, and it is afterwards removed, it is not liable for personal injuries thereafter occurring, unless it has notice of the removal thereof, or, in the exercise of reasonable diligence, should have known it in time to have prevented the accident.

Special cross reference. For other cases citing the text and many more on the question, see annotations under Wilson & Gustin v. Jefferson County (13 Iowa 181), ante. p. 134.

3. Evidence—Jury to Determine Credibility of Witnesses.—In all cases the credibility of witnesses is a question for the jury to determine: And the rule applies with equal force upon a trial where a party to the action who testifies, is contradicted by a witness not a party, p. 346.

Reaffirmed in Callanan v. Shaw, 24 Iowa 446, 447.

Reaffirmed and extended in Clear v. Reasor, 29 Iowa 329, holding further that where there is conflicting evidence, its weight and credibility is for the jury to determine; and a verdict rendered in such a case will not be reversed upon appeal because against the weight of the evidence.

4. Trial—Instructions—General Exceptions to Those Given—When Not Sufficient for Review Upon Appeal.—Where a party excepts generally to all the instructions given, and all are not erroneous, specific errors therein will not be reviewed upon appeal, p. 343.

Special cross reference. For cases citing the text and many more on the question, see annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

5. Negligence—Personal Injury—Excessive Damages—Reversal for, When.—A verdict for damages for personal injuries occasioned by negligence, will not be reversed upon appeal as excessive, unless it is clearly and flagrantly so, p. 347.

Cited in Sherman v. Western Stage Co., 24 Iowa 544, upon the question of when limitation begins to run; but the case reaffirms the rule, allowing *remittitur* in the Supreme Court.

Special cross reference. For other cases citing the text and more on the question, see annotations under Rule 3 of Russ v. Steamboat War Eagle (14 Iowa 363), ante. p. 247.

CITY OF DAVENPORT v. MISSISSIPPI & MISSOURI R. R. Co., 16 Iowa 348

1. Cities and Towns—Municipal Taxation — Railroads — Rolling Stock.—Under the Code of 1860 and Chap. 173, Laws of 1862, rolling stock of a railroad company is not subject to taxation for

municipal purposes by a city or town, pp. 353, 355.

Reaffirmed in Dubuque & Sioux City R. R. Co. v. City of Dubuque, 17 Iowa 123, 124.

Cited in Dunlieth & Dub. Bridge Co. v. City of Dubuque, 32 Iowa 431; City of Davenport v. C. R. I. & P. R. R. Co., 38 Iowa 649, note, (dissenting opinion, 432) the court holding that a city authorized by charter to levy and collect taxes upon "all taxable property" within its limits may tax the depot grounds, tracks and other real estate of a railroad company therein.

Cited in Iowa Homestead Land Co. v. Webster County, 21 Iowa 224, 225, not in point, but involving a construction of the laws of the text as to taxation of real estate of a railroad company.

Cited in Neilson, Benton & O'Donnel v. Iowa Eastern R. R. Co., 51 Iowa 188, 1 N. W. 437, 33 L. R. A. 124, not in point.

Overruled in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 76, 84, 87 (cited with approval in concurring opinion, 89, 90), holding that the rolling stock of a railroad company is subject to municipal taxation in the city wherein it has its chief place of business in this state.

Cross reference. See further on this question, annotations and cross references under Stockdale v. Treasurer of Webster County (12 Iowa 536), ante. p. 93.

EX PARTE STRAHL, 16 IOWA 369

1. Officer and Officer—Right to, Not Determined by Habeas Corpus—De Facto Officer.—Where a person holds an office and assumes to act as such officer under color of title thereto and after having been declared elected, filed a bond and entered upon the discharge of his duties, his right thereto can only be tested in a direct proceeding therefor, in the nature of *quo warranto*, and cannot be questioned under *habeas corpus*, pp. 370, 371, 378.

Reaffirmed and explained in Herkimer v. Keeler, 109 Iowa 683, 81 N. W. 179, holding that in order to constitute a person a *de facto* officer, he must act as such officer under color or claim of right: That mere election to an office, without qualifying or acting as such under claim of right, does not constitute such elected person a *de facto* officer.

Reaffirmed and extended in Allen v. Armstrong, 16 Iowa 515; Cochran v. McCleary, 22 Iowa 84; State v. Bates, 23 Iowa 99, holding further that acts of a *de facto* officer are as valid as those of one *de jure*.

Reaffirmed and narrowed in Town of Decorah v. Bullis, 25 Iowa 18, holding that the acts of a usurper to an office are invalid: That there cannot be a *de facto* officer unless the office he so holds is created by law: All offices must be *de jure*.

(Note.—See further specially, Keeney v. Leas and Lyon, 14 Iowa 464.—Ed.)

2. Elections—Municipal—Contest of—How.—A contest of a municipal election must be instituted and conducted as required by law, p. 371.

Reaffirmed and qualified in State ex rel. Veile v. Funck, 17 Iowa 368, 369; Cochran v. McCleary, 22 Iowa 83, 84, holding *quo warranto* is the remedy to test the right to office.

Unreported citation, 126 N. W. 1039.

CARL v. KNOTT, 16 IOWA 379

1. Res Adjudicata—When Plea Applicable and When Not.—When the matter involved in a subsequent action was included in the issue joined between the same parties in a former action and which was determined upon its merits, a plea of former adjudication is a bar to the subsequent action: But when the decree in the former action affirmatively shows that the matter involved in the last action was not adjudicated, then the plea of former adjudication is ineffectual in the later action, pp. 382, 383.

Reaffirmed in Bettys v. C. M. & St. P. R. R. Co., 43 Iowa 604; Burke v. Dillin and Witt, 92 Iowa 564, 61 N. W. 372.

Reaffirmed and explained in Hogle v. Smith, Adm'r, 136 Iowa 37, 113 N. W. 557, holding further that where a vendee under a contract for a sale of land and in possession thereof, sues his vendor for specific performance, who attacks the contract and claims rents and profits against the vendee for the use thereof, that a judgment therein dismissing the vendee's bill and not disposing of the cross-bill for rents and profits, is a bar to an action by the vendor therefor.

Reaffirmed and extended in Merrill v. Tobin, 82 Iowa 533, 48 N. W. 1045, holding further that parties are concluded by a final judgment as to all matters shown by the pleadings and such judgment.

Reaffirmed and extended in Reynolds v. Lyon County, 121 Iowa 741, 742, 96 N. W. 1099, holding further that the estoppel of a former judgment in an action between the same parties to a subsequent action, extends and covers the point which was actually litigated and determined by the former verdict or finding, although it may not have been pleaded or have been technically in issue.

Cited in 147 Iowa 92, 125 N. W. 865.

Cross reference. See further on this question, annotations under Whitaker v. Johnson County (12 Iowa 595), ante. p. 102.

2. Partnership — Debts of Members — Assets of Firm — How Computed as Between Parties.—In the absence of an express agreement to the contrary, the debt of one partner in excess of that of his co-partner is, as between the parties, to be considered part of the assets of the firm, and not the entire amount of the larger debt, p. 384.

Reaffirmed in Murdock v. Mehlhop, 26 Iowa 215; Cox v. Russell, 44 Iowa 563.

ADAIR v. WRIGHT, 16 IOWA 385

1. Mortgaged Real Estate—When Appointment of Receiver Not Proper.—Where a receiver is appointed to take charge of mortgaged real estate which is not going to waste or in need of repairs, a motion to vacate such order is proper and should be sustained, p. 387.

Cited in Callanan & Ingham v. Shaw, 19 Iowa 183, holding that an appeal lies to the Supreme Court from an order of a district court appointing or refusing to appoint a receiver.

KELLOGG v. KELSEY, 16 IOWA 388

1. Appeal in Chancery Cause — Trial De Novo—When.—In order to have a trial *de novo* in the Supreme Court upon appeal from a decree in a chancery cause tried below according to the first method provided by Sec. 2999 of the Code of 1860 (all evidence in writing), the appellant must bring all the pleadings and evidence filed and adduced below, before the appellate court, p. 389.

Reaffirmed in State v. Orwig, 27 Iowa 531.

Reaffirmed and qualified in Winslow, Harris & Co. v. Turner, 20 Iowa 295, holding that where objection to a trial *de novo* on an appeal in a chancery action (on the ground that the pleadings and the evidence are not part of the record) is made on the hearing, and after appellant's argument is filed and in the absence of his counsel, the appellate court should affirm without prejudice to the right of appellant to prosecute another appeal.

Cross references. See further on this question, annotations and cross references under Rule 2 of Blake v. Blake (13 Iowa 40), ante, p. 115; Rule 2 of Cook v. Woodbury County (13 Iowa 21), ante, p. 111.

MASSIE v. WILSON, 16 IOWA 390

1. Judgment Lien on Land—Rights of Judgment Creditor and of Subsequent Purchasers and Mortgagees.—If a judgment creditor attempts to enforce his judgment by levying upon land which the judgment debtor has subsequently sold, or mortgaged, equity will, upon the application by such subsequent purchaser, or mortgagee, direct the judgment to be satisfied from lands of the judgment debtor not sold or mortgaged, and if they are insufficient for such purpose, then such subsequently sold or mortgaged lands are subject to the satisfaction of the residue.

When a subsequent purchaser or incumbrancer seeks to redeem from a sale of the land under a prior judgment or mortgage, he must pay the entire debt of the prior judgment or mortgage creditor: If, after such a sale, such land is sold or mortgaged by the judgment debtor (or mortgagor) to two or more persons, the one redeeming may require ratable contribution from the other purchasers or incumbrancers, according to the values of their separate interests, pp. 393-395.

Reaffirmed in Knowles v. Rablin and Corwith, 20 Iowa 104; Barney v. Myers, 28 Iowa 478; Dilger v. Palmer, 60 Iowa 128, 10 N. W. 768; Spurgin v. Adamson, 62 Iowa 665, 18 N. W. 295; Mickley v. Tomlinson, 79 Iowa 388, 44 N. W. 684.

Reaffirmed and extended in Witt v. Rice, 90 Iowa 456, 57 N. W. 952, holding further that when mortgaged property is alienated it must bear its share of the mortgage debt *pro rata* according to its value, and without regard to improvements subsequently placed thereon.

Cited in Richards v. Cowles et al, 105 Iowa 740, 75 N. W. 650, on the doctrine of marshaling assets.

(Note.—See further on this question, Huff v. Farwell, 67 Iowa 298, 25 N. W. 252; Tufts v. Stanley, 42 Iowa 628; Taylor v. Short's Adm'r, 27 Iowa 361; McWilliams v. Myers, 10 Iowa 325; Bates v. Ruddick, 2 Iowa 423.—Ed.)

2. Pleadings in Chancery—Relief Under.—In an action in chancery, relief not claimed in the pleadings, or warranted by the issue, cannot be decreed, p. 394.

Reaffirmed and qualified in McCrillis v. Harrison County, 63 Iowa 593, 19 N. W. 679, holding that a decree granting relief which is not claimed in the pleadings or warranted by the issue, is conclusive upon collateral attack: Such a decree is only irregular and must be reversed or modified upon motion, appeal, or direct attack.

HARVEY v. SPAULDING, 16 IOWA 397, 85 Am. Dec. 526

1. Judgment Lien on Land—Redemption by Subsequent Purchaser of Judgment Debtor.—Where land is sold by a judgment debtor after a judgment has attached as a lien thereon the purchaser thereof (under Secs. 3332, 3342 and 3358 of the Code of 1860), may redeem from a sale thereof under such judgment, within one year from the day of sale: And where the judgment debtor so sells with covenants against incumbrances and of warranty he, also, may redeem from such judgment sale within such time, pp. 398, 399.

Reaffirmed and extended in Thayer v. Coldren, 57 Iowa 113-115, 10 N. W. 302, holding further that one who purchases land of a judgment debtor which is incumbered by a judgment, may redeem from a sale thereunder within the statutory period allowed for redemption from such sales (Code of 1873), although the judgment debtor (defendant) may have appealed from such judgment under which the sale was made: That a deed made by the sheriff in such case to such land, is void.

Reaffirmed and qualified in Co-operative Sav. & L. Ass'n v. Kent, 108 Iowa 149, 150, 78 N. W. 912, holding that where a junior incumbrancer, or purchaser fails to redeem within the statutory period from a sale under a decree in an action to foreclose a superior lien on land, he thereby loses his lien or right to redeem as against the purchaser of the equity of redemption from such senior foreclosure sale.

CROSBY v. ELKADER LODGE, No. 72, 16 IOWA 399

1. Judgment Lien on Land—To What Interest it Attaches—Sale of.—A judgment is a lien upon the equitable interest of the judgment debtor in land, which interest may be sold under execution thereon, p. 405.

Special cross reference. For cases citing the text and others on the question, see annotations under Rules 1 and 2 of Cook & Sargent v. Dillon (9 Iowa 407), Vol. I, p. 598.

2. Judgment Lien on Land—Redemption From Sale Under by Judgment Debtor or His Grantee—Re-sale, When.—A purchaser of land from a judgment debtor, takes it subject to all liens and incumbrances thereon. So, where a judgment debtor or his grantee redeems land which has been sold in part satisfaction of a subsisting judgment, the property at once becomes liable to satisfy the unpaid balance of the execution on the judgment from the moment of the redemption, p. 405.

Reaffirmed in Stein v. Chambliss & Banford, 18 Iowa 475, 476, 87 Am. Dec. 411.

Reaffirmed in part in Peckenbaugh v. Cook, 61 Iowa 478, 479, 16 N. W. 531, holding that a judgment debtor may redeem from a sale of land under a judgment by paying the amount of the bid, with interest and costs; but upon such redemption, the land is subject to re-sale for any unpaid balance, if any, of the judgment, to which extent the lien again attaches.

Reaffirmed and extended in Hayes v. Thode, 18 Iowa 54, 55, holding further that where an execution creditor buys land at the sale thereunder, a junior incumbrancer, not a party to the action in which the judgment is rendered, may redeem from the sheriff's sale, by paying the amount of the purchase price, with ten per cent. interest and costs.

Reaffirmed in part and extended in Moody v. Funk, 82 Iowa 3, 4, 47 N. W. 1009, 31 Am. St. Rep. 455, holding further that where the grantee of a judgment or execution debtor who acquires his interest after the right of a junior lien holder to redeem from a sale of land thereunder is barred by lapse of time, he may redeem therefrom without removing the bar.

Reaffirmed in part and extended in People's Sav. Bank v. McCarthy, 119 Iowa 588, 93 N. W. 584, holding that a subsequent judgment creditor, or an assignee thereof may redeem from a sale under a prior judgment at any time before the expiration of the period of redemption and execution of the sheriff's deed thereunder.

Reaffirmed in part and qualified in German Bank v. Iowa Iron Works, 123 Iowa 519, 99 N. W. 175, holding that where plaintiff becomes a purchaser of land at an execution or decretal sale, which sold for less than his judgment, and thereafter takes a warranty deed from the judgment or execution debtor therefor, and without additional consideration, the lien upon the land for the balance of the judgment and

all other equities of the parties are thereby merged in the fee simple title.

Partially overruled in Clayton v. Ellis, 50 Iowa 593, 595, holding that the lien of the judgment as to the unsatisfied balance on the real estate sold is, as to all persons and in all cases, divested by the sale: That the judgment debtor may sell his redemption and his purchaser may redeem by paying the amount of the bid, interest and costs: But if redemption of the whole or of any parcel of land sold under execution or decree is made by the debtor, the judgment to the extent of the balance thereon, will constitute a lien on the premises in his hands, and it may again be sold on execution based on the judgment.

(Note.—See further, specially on this question, Harms v. Palmer, 73 Iowa 446, 35 N. W. 515, 5 Am. St. Rep. 691; Campbell v. Maginnis, Ex'x, 70 Iowa 589, 31 N. W. 946; Todd v. Davey, 60 Iowa 532, 15 N. W. 421; Haydon, Wilson & Allen v. Smith, 58 Iowa 285, 12 N. W. 290; Escher v. Simmons, 54 Iowa 269, 6 N. W. 274.—Ed.)

Cross reference. See further, Rule 2 of Curtis v. Millard & Co. (14 Iowa 128), ante. p. 215.

STATE v. LEATHERS, 16 IOWA 406

1. **Criminal Prosecutions—When Costs Are and Are Not Taxed Against Prosecuting Witness—Bond to Keep Peace.**—The failure of the prosecuting witness to appear and further prosecute a defendant who has been required, at his instance, to execute a bond to keep the peace, does not authorize the court to tax costs against the witness; but in such case the costs accrued should be taxed against the defendant. It is only where, in such a case, there is a trial and the prosecution fails, that the court may, if satisfied that the prosecution was malicious and without probable cause, tax the costs against the prosecuting witness, pp. 406, 407.

Reaffirmed in State v. Holliday, 22 Iowa 398, 399.

RICHARDSON v. BARRICK, 16 IOWA 407

1. **Contracts—Construction in Equity.**—A court of equity will construe a contract according to its true character, regardless of the language or technicalities in which it is clothed, p. 410.

Reaffirmed in Green v. Turner, 38 Iowa 115.

Cross reference. See Rule 2 hereof.

2. **Deed or Contract Relating to Land Made to Secure Loan, a Mortgage—Redemption.**—Any deed or contract to or in relation to land which is made to secure a loan of money is, in equity, a mortgage; and the redemption right attaches to it in favor of the debtor, p. 410.

Reaffirmed in Crawford v. Taylor, Richards & Burden, 42 Iowa 263.

Reaffirmed, explained and extended in Green v. Turner, 38 Iowa 115, holding that parol evidence is admissible to prove that a deed absolute on its face was intended as a security for debt: That where a transaction in relation to land is presented by writings as a conditional sale or contract for re-purchase, still the true intention of the parties may be shown by parol, and from all the facts and circumstances surrounding the transaction.

Reaffirmed and extended in Key v. McCleary, 25 Iowa 193, holding further that parol evidence is admissible to prove that a deed, or other contract to or in relation to land, which is absolute on its face, was intended to secure a loan, and is, in fact, a mortgage.

(Note.—See further, sustaining and explaining, but not citing, the text, Wilson v. Patrick, 34 Iowa 362; Hughes and Dial v. Sheaff, 19 Iowa 335; Trucks v. Lindsey, 18 Iowa 504.—Ed.)

3. Contracts Upon Inadequate Consideration—Relief in Equity.—A court of equity will not specifically enforce a contract based upon an inadequate consideration made under such circumstances as affords indubitable indications of imposition and undue advantage; but such a contract will be enforced in equity to the amount due thereon, pp. 413, 414.

Cited in Cowin v. Toole, 31 Iowa 517, on the question of relief in equity for fraud, and the manner of pleading it.

Cited in Fockler v. Beach, 32 Iowa 188, as to the computation of interest upon an amount due upon a trust deed.

Cited in Davies v. Beadle, 37 Iowa 397, not in point, but upon analogy.

TROUTMAN v. GOWING, 16 IOWA 415

1. Note Payable in Gold Coin, Payable in Legal Tender.—A note or other contract made payable in "U. S. Gold," or gold coin, may, under the Act of Congress of February 25, 1862, be paid in United States treasury notes, although the contract or note was executed before the taking effect of such Act.

A tender of such treasury notes in payment of such a note or contract is valid, pp. 415, 416.

Special cross reference. For cases citing the text and others on the question, see annotations under Warnibold v. Schlichting (16 Iowa 243), ante. p. 432.

2. Title Bond by Husband—Non-joinder of Wife—Rights and Remedies of Purchaser.—Where a wife refuses to sign a title bond for a conveyance of land made by her husband, the purchaser may, in equity, have specific performance of the contract as against the husband, and retain the value of the wife's contingent interest out of the purchase price, without interest until the death of the wife; or, he may elect to sue the husband for damages for breach of contract, p. 416.

Reaffirmed in Leach v. Forney, 21 Iowa 273, 89 Am. Dec. 574; Zebley v. Sears, 38 Iowa 509; Bradford v. Smith, 123 Iowa 47, 98 N. W. 379; Noecker v. Wallingford, 133 Iowa 611, 111 N. W. 39, applying the rule in all cases where one consort fails to join in a deed, or contract for a sale of land of the other.

Cited in Herold v. Meyers, 20 Iowa 378, 89 Am. Dec. 543, not in point.

(Note.—See further, sustaining and explaining, but not citing, the text, Venator v. Swenson, 100 Iowa 295, 60 N. W. 522; Hession v. Linastruth, 96 Iowa 483, 65 N. W. 399; Presser v. Hildenbrand, 23 Iowa 483.—Ed.)

WHITING v. EICHELBERGER, 16 IOWA 422

1. Vendor and Purchaser—Vendor's Lien—Rights of Assignee.

—A contract of sale need not be in the form of a mortgage in order to give the vendor or his assignee a lien on the property sold: Such a lien will be given a vendor or his assignee in equity, whenever it appears from such contract that it was the intention of the parties, p. 427.

Reaffirmed and extended in Frick v. Fritz, 115 Iowa 440, 441, 88 N. W. 962, 91 Am. St. Rep. 165, holding that *inter alia*, no particular form of words or formality is necessary to make an instrument a mortgage, nor is it necessary that a mortgage be in writing in order to bind the parties thereto: Holding further that in such cases parol evidence is admissible to identify and further describe the mortgaged property.

2. Debtor and Creditor — Several Debts — Application of Payments.

—Where a debtor owes his creditor two or more debts, he can, upon making a payment, direct to what debt it is to be applied; but if the debtor fails so to do, the creditor may apply the payment as a credit on any one he desires: If both parties fail to make such application, the law will do so according to the legal justice applicable, p. 430.

Reaffirmed in Fargo & Bill v. Buell, 21 Iowa 293, 294; Blair Town Lot & L. Co. v. Hillis, 76 Iowa 249, 41 N. W. 7; First Nat'l Bank of Stewart v. Hollingsworth, 78 Iowa 578, 43 N. W. 537, 6 L. R. A. 92; Keairnes v. Durst, 110 Iowa 122, 81 N. W. 241.

Reaffirmed and extended in Cain v. Vogt, 138 Iowa 634, 635, 116 N. W. 787, holding further that the fact that a creditor holds several debts, some secured and some unsecured, does not affect the rule: That where a debtor makes a payment to a creditor to whom he owes a secured and an unsecured debt, and neither party makes application thereof, the law will apply it as a credit on the unsecured debt.

(Note.—See further, sustaining and explaining, but not citing, the text, Bishop, Rec'r, v. Hart and Wetherill, 114 Iowa 96, 86 N. W. 218; Illsly v. Grayson, 105 Iowa 685, 75 N. W. 518.—Ed.)

OLIVER v. TOWNSEND, 16 IOWA 430

1. Appeal—Presumption as to Proceedings Before Referee.—Upon an appeal the presumption is that the proceedings before a referee are correct, p. 431.

Reaffirmed in Edwards & Beardsley v. Cottrell & Babcock, 43 Iowa 203.

2. Replevin Action Against Administrator—Bond to Him Individually—Action on.—Where in a replevin action involving the possession of personal property of a decedent, the bond is executed to the administrator *individually*, he may sue thereon either individually or in his representative capacity, pp. 432, 433.

Reaffirmed and extended in Carleton v. Byington, 17 Iowa 579 (abstract), holding that where a note is payable to a person describing him *as executor*, but does not show that it is made for a debt due the decedent's estate, the executor may sue thereon either individually or as representative.

Reaffirmed and extended in Grimmell, Ex'x, v. Warner, 21 Iowa 13, holding further that a personal representative who is bequeathed certain notes, may sue thereon either individually or as representative.

KRAMER v. CONGER, 16 IOWA 434

1. Ejectment—Equitable Defense May be Interposed in.—In an action at law for the recovery of real property, the defendant may interpose all defenses which he may have, both legal and equitable, p. 436.

Reaffirmed in Byers v. Rodabaugh, 17 Iowa 59; Shawhan v. Long, 26 Iowa 491, 96 Am. Dec. 164; Van Orman v. Merrill, 27 Iowa 478; Phillips v. Blair, 38 Iowa 657.

Reaffirmed, extended and qualified in Palmer v. Palmer, 90 Iowa 22, 57 N. W. 647, holding further that under the Code of 1873, an equitable defense may be interposed in an action at law for the recovery of either real or personal property, but that a counterclaim cannot therein be pleaded.

2. Action at Law—Equitable Defense in—Trial and Procedure.—Where an equitable defense is set up in an action at law (in this case an action for the recovery of real estate), the equitable issue should be tried as other equitable proceedings, and if it be found insufficient, the legal issue, if any remain, should be tried by a jury, unless the jury be waived. If, in such case, the equitable defense be found sufficient, the court may, in a proper case, grant complete relief, p. 437.

Reaffirmed in Van Orman v. Merrill, 27 Iowa 479; Hackett v. High, 28 Iowa 540; Corbin v. Pollock, 28 Iowa 596; Morris v. Merritt & Co., 52 Iowa 502, 3 N. W. 509.

Reaffirmed and qualified in Byers v. Rodabaugh, 17 Iowa 59, holding that upon an equitable defense being interposed in an action of

right for the recovery of real estate, that unless it is such as is triable by the second method of Sec. 2999 of the Code of 1860 (by oral evidence), or such a trial is consented to by the parties, or the court wishes to "inform his conscience" by referring the equitable issue to a jury, the equitable issue should be first tried, and thereafter the issue at law be tried, if found necessary.

Reaffirmed and qualified in Corbin v. Woodbine, 33 Iowa 299, 300, holding that where an equitable issue is interposed in an action at law (in this case for the recovery of real estate) and is triable according to the second method provided by Sec. 2999 of the Code of 1860 (oral evidence) and is *by consent* tried by the court, that upon appeal, it will be reviewed as an ordinary action.

Unreported citation, 17 N. W. 885.

Cross references. See further on this question, annotations under Rule 1 of Rosierz v. Van Dam (16 Iowa 175), ante. p. 422; Van Orman v. Spafford, et al (16 Iowa 186), ante. p. 425.

3. Husband and Wife—Wife's Separate Property or Contract—Action by Wife.—Under Sec. 2771 of the Code of 1860, a wife may sue or be sued alone on a matter involving or in relation to her separate property, or founded upon her own contract, p. 438.

Reaffirmed and extended in Jones v. Jones, 19 Iowa 242, 243, holding further that a wife may maintain replevin against her husband for her personal property, where they have separated through his fault.

PORTER v. SHARPE, 16 IOWA 438

1. Evidence—Death of Party to Action—Substitution of Administrator—Competency of Adverse Party.—Under Sec. 2982 of the Code of 1860, a party is not allowed to testify in an action wherein an executor is a party, to facts transpiring during the life-time of a decedent: And where, pending an action, plaintiff (or defendant) dies and the cause is revived in the name of the administrator, the defendant (or plaintiff) cannot thereafter therein testify as to facts transpiring during the life of the decedent party, p. 439.

Cited in Shafer v. Dean, 29 Iowa 145, holding that the wife of a party may testify as to facts transpiring during the life-time of a decedent, where the adverse party is an executor.

PARSONS v. MOSES, 16 IOWA 440

1. Lands—Occupying Claimant—Possession Necessary—Possession by Tenant.—In order to constitute one an occupying claimant of land, it is not necessary that he occupy or have possession in person; possession or occupancy by tenant is sufficient, pp. 441, 442.

Reaffirmed in Keas v. Burns, 23 Iowa 236, holding that in order for a party to recover for improvements on lands under the occupying

claimant law, the possession under and during which they were made, must be adverse to the holder of the paramount title.

Reaffirmed and qualified in Welles v. Newsom, 76 Iowa 83, 84, 40 N. W. 107, holding that (under Code of 1873) in order to constitute one an occupying claimant of land, he must have held possession thereof by himself or through others for the period of five years, such possession for such time, if in good faith, constituting "color of title."

2. Lands—Occupying Claimant—Compensation for Improvements—Rents.—An occupying claimant of land who holds under color of title may (under Code of 1860) recover for improvements made in good faith by himself, his tenants, and those under whom he claims: But the owner of the land may set-off against such claim, the value of the rents and profits of the land during the period occupied or held by the claimant, his tenants, or those through whom he claims, pp. 442, 443, 447.

Reaffirmed in Childs v. Shower, 18 Iowa 268, 269, 275.

Reaffirmed and qualified in Keas v. Burns, 23 Iowa 236, holding that in order for a party to recover for improvements on lands under the occupying claimant law, the possession under and during which they were made, must be adverse to the holder of the paramount title.

Reaffirmed and qualified in Lunquest v. Ten Eyck, 40 Iowa 214, 215; Welles v. Newsom, 76 Iowa 83, 84, 40 N. W. 107, holding that in order for one to claim for improvements on land, he must (under Secs. 2264-2269 of the Code of 1873) hold possession under color of title and make the improvements thereon in good faith: That one holds land under "color of title" (under the sections above) when he has a paper title, or holds as a good faith purchaser under a judicial or a tax sale, or when he has held possession of land by himself or his tenants, or by those through whom he claims for a period of five years.

Reaffirmed and narrowed in Welles v. Newsom, 76 Iowa 84, 40 N. W. 107, holding that an occupying claimant is not entitled to compensation for improvements made by him on land after he has been notified that an action will be commenced for its recovery, the action thereafter being actually begun.

Reaffirmed and narrowed in Snell v. Meachan, 80 Iowa 55, 56, 45 N. W. 399, holding that a person who makes improvements upon land, with full knowledge that another is the owner thereof, is entitled to no compensation therefor; such improvements in such case becomes the property of the land owner.

Cited in Gleiser v. McGregor, 85 Iowa 491, 52 N. W. 366, a case involving the value of improvements on land, rents, etc., the action not being under the occupying claimant statute.

(Note.—See further specially on this question, Jones v. Graves, 21 Iowa 474; Wiltse, Gd'n v. Hurley, 11 Iowa 473.—Ed.)

Cross references. See further on this question, annotations under Dungan v. Von Phul (8 Iowa 263), Vol. I, p. 509; Craton v. Wright (16 Iowa 133), ante. p. 417.

HALE v. HEASLIP, 16 IOWA 451

1. Homestead—Requisites to — Occupancy — To What Debts Subject.—Actual occupancy and use as a home by the family of the party claiming it, are the essentials to a homestead.

• Homestead is subject to the satisfaction of a debt created anterior to the time it is acquired by the debtor as above provided, pp. 452, 453.

Reaffirmed in Campbell v. Ayres, 18 Iowa 255, 256; Page v. Ewbank, 18 Iowa 581 (abstract); Hyatt v. Spearman, 20 Iowa 513; Elston & Green v. Robinson, 23 Iowa 211.

Reaffirmed and extended in Delavan v. Pratt, 19 Iowa 432, 433, holding further that as between a judgment creditor and the judgment debtor and his heirs, the former may show that his judgment is a lien on land and that it is subject thereto, by other proof than the record—And in Phelps v. Finn, 45 Iowa 449, 450 (reaffirming the text), this extended rule is applied to a purchaser at an execution sale in an action to redeem therefrom.

Reaffirmed and extended in Hyatt v. Spearman, 20 Iowa 513, holding further that homestead is subject to the satisfaction of a vendor's lien for its purchase price.

Reaffirmed and extended in Elston and Green v. Robinson, 21 Iowa 534, holding further that a homestead acquired after the levying of an execution under a judgment, is subject to the judgment or execution lien: Holding, also, that a defendant cannot after the levy of an execution on a lot, change his homestead from a farm to the lot, and defeat the execution lien.

Reaffirmed and extended in Kimball v. Wilson, 59 Iowa 639, 640, 13 N. W. 749, holding further that where a debtor abandons his homestead and thereafter sells it and acquires another, the new homestead is subject to a judgment against the debtor rendered in a justice's court, the transcript of which was filed in the circuit court after the abandonment of the old and before the acquisition of the new homestead; and such lien is good in favor of the judgment creditor and a purchaser at an execution sale thereunder, and against the debtor and a purchaser from him after the filing of such transcript.

Cross references. See further on this question, annotations and cross references under Cole v. Gill (14 Iowa 527) ante. p. 280; Christy v. Dyer (14 Iowa 538), ante. p. 263.

STOW, ASSIGNEE v. MILLER, 16 IOWA 460

1. Voluntary Conveyance by Parent to Child—Failure to Deliver, and Retention of Property—Effect.—Where a father makes a voluntary conveyance of land to his minor child without delivering the instrument or the possession of the property, he may thereafter cancel or destroy the instrument, and, in the absence of actual fraud, make any disposition of the property he desires.

If a father dies leaving among his papers a deed duly executed in form to one of his children, the law will give it effect, if there is anything indicating that such was the intention of the decedent (grantor): This intention is to be determined from the facts and circumstances of the case, pp. 463, 464.

Reaffirmed as to second paragraph in Newton and Seeley v. Beeler, 41 Iowa 339.

Reaffirmed and extended in Trask v. Trask, 90 Iowa 321-324, 57 N. W. 842, 48 Am. St. Rep. 446, holding further that the delivery of a deed by the grantor to a third person, to be delivered to the grantee at the direction of the grantor, or with the right to countermand, does not pass title: But delivery to a third person by the grantor with the intention that title take effect *in presenti* passes the title, although it is not to be accompanied with the right to possession until after the death of the grantor.

Reaffirmed and extended in Foreman, et al v. Archer, et al, 130 Iowa 55, 56, 106 N. W. 374, holding further that where a deed is placed by the grantor in the hands of a third person with unconditional instructions to deliver to the grantee upon the death of the grantor, and without right reserved by the grantor to revoke or recall it, it vests the fee in the grantee subject to the life estate of the grantor; and the latter cannot thereafter revoke it.

(Note.—See further, specially on this question, Albrecht v. Albrecht, 121 Iowa 521, 96 N. W. 1087; White v. Watts, 118 Iowa 549, 92 N. W. 660; Lippold v. Lippold, 112 Iowa 134, 83 N. W. 809, 84 Am. St. Rep. 331; Denzler v. Rieckhoff, 97 Iowa 75, 66 N. W. 147; Hinson v. Bailey, 73 Iowa 544, 35 N. W. 626, 5 Am. St. Rep. 700; Tallman v. Cooke, 39 Iowa 402, important cases on this subject not citing the text.—Ed.)

Cross references. See further on this question, annotations under Rule 2 of Foley v. Howard (8 Iowa 56), Vol. I, p. 492. See also in this connection, Wall v. Wall, 64 Am. Dec. 147; Foster v. Mansfield, 37 Am. Dec. 154; Scrugham v. Wood, 30 Am. Dec. 75; Wheelwright v. Wheelwright, 3 Am. Dec. 66; Bury v. Young, 35 Am. St. Rep. 186; Prutsman v. Baker, 11 Am. Rep. 592.

SARGENT v. PITTMAN BROS. & CO., 16 IOWA 469

1. **Execution Sale of Land Where There Are Other Incumbrances—Appraisement—Amount For Which Land to Sell.**—Where (under Sec. 3360 of the Code of 1860) land is sold under an execution on which there are prior incumbrances, the purchaser thereat is required to only bid two-thirds of its appraised fair cash value, less the amount of the prior incumbrances; or, in other words, the amount bid with the amount of the prior incumbrances added, must equal two-thirds of the fair cash value according to the appraisement, p. 470.

Reaffirmed and extended in Barber v. Tryon & Pierce, 41 Iowa 351, 352, holding further that where a judgment debtor seeks to set aside a sale of land under execution because it did not sell for such sum which added to the prior incumbrances amounted to two-thirds of its fair cash value as shown by the appraisal, the burden of proof is on him to affirmatively and satisfactorily establish the fact.

Reaffirmed and extended in McDonald v. Johnson, 48 Iowa 77, 78 holding further that a purchaser of land at an execution sale has a right to rely on a prior mortgage thereon, which is of record, being valid, and bid an amount which, with it added, equals two-thirds of the appraised fair cash value; and such a sale cannot be set aside for inadequacy of price by the execution debtor (grantor in the mortgage) or his grantee, upon such conveyance being thereafter declared fraudulent.

CONYNGHAM v. SMITH, 16 IOWA 471

1. Practice — Ordinary and Equitable Actions — Action on Wrong Docket—Transfer.—When an action is brought at law when it should have been brought in equity, or the converse, it may (under the Code of 1860) be transferred to the proper docket upon motion. Such fact is not a ground for demurrer to the petition, p. 473.

Reaffirmed in Traer v. Lytle, 20 Iowa 302; City of Pella v. Scholte, 21 Iowa 466; Gray v. Coan, 23 Iowa 353; Brown v. Mallory, 26 Iowa 471, 472; Gibbs v. McFadden, 39 Iowa 373, 374.

Reaffirmed and extended in Ashlock v. Sherman, 56 Iowa 312, 9 N. W. 242; Riddle v. Beattie, 77 Iowa 171, 41 N. W. 607; Swift v. Calnan, 102 Iowa 212, 71 N. W. 234, 63 Am. St. Rep. 443, 37 L. R. A. 462, holding further that (under Sec. 2519 of the Code of 1873) an error as to the kind of proceeding adopted is waived by a failure to move for its correction at the proper time; that such an error is not a ground for demurrer, but that the cause should be transferred to the proper docket upon timely motion therefor.

Reaffirmed and qualified in Byers v. Rodabaugh, 17 Iowa 56, holding that by answering after a motion to transfer from the ordinary to the equity docket, or vice versa, has been overruled, a party waives error, if any, in such ruling.

Reaffirmed and qualified in Hatch v. Judd, 29 Iowa 97, 98; Richmond v. Dubuque & Sioux City R. R. Co., 33 Iowa 490, 491, holding that a failure to move for a transfer to the proper docket before or upon filing an answer, waives such defect in the proceedings.

Cited with approval in Kitteringham v. Blair T. L. & L. Co., 66 Iowa 282, 23 N. W. 669, turning on another question.

Cited in Halloway v. Griffith, 32 Iowa 413, 7 Am. Rep. 208, holding that fictions and technical forms of actions and pleadings are abolished; the case turning upon the sufficiency of the petition and other questions, not in point.

Cross references. See further on this question, annotations under Rule 1 of *White v. Hampton* (10 Iowa 238), Vol. I, p. 677; Rule 3 of *Holmes v. Clark* (10 Iowa 423), Vol. I, p. 719; Rule 1 of *Shepard v. Ford* (10 Iowa 502), Vol. I, p. 736.

2. Parol Assignment of Bond—Action by Assignee in His Own Name.—The assignee of a bond, or other written instrument, under a verbal transfer, may sue thereon in his own name, p. 476.

Reaffirmed and explained in *Moore v. Lowrey*, 25 Iowa 339, 95 Am. Dec. 790; *Switzer v. Smith and McGowan*, 35 Iowa 271; *Downing v. Gibson*, 53 Iowa 520, 5 N. W. 702; *Seymour, et al v. Aultman & Co.*, 109 Iowa 298, 80 N. W. 402, holding that an assignment of a debt, contract, or chose in action, may be either verbal or written; that no particular form is necessary therefor, and it is sufficient if the intention of the parties be clearly shown.

Reaffirmed and explained in *Dennison v. Soper*, 33 Iowa 185, holding that except as provided by Sec. 2758 of the Code of 1860 (as to actions by fiduciaries, etc.) an action must be maintained by the "real party in interest" who is, in legal effect, the party beneficially interested in a contract, or other matter involved in an action.

Reaffirmed and explained in *First Nat'l Bank of Dubuque v. Carpenter, Stibbs & Co.*, 41 Iowa 521, 522, holding that under our statute (Revision of 1873) all instruments are assignable, and an assignee of any instrument may sue thereon in his own name.

Reaffirmed and extended in *Cottle v. Cole & Cole*, 20 Iowa 485, 486; *Rice v. Savery*, 22 Iowa 477, 478; *Knadler v. Sharp*, 36 Iowa 236, holding further that the party holding the legal title of a note, or other instrument, may sue on it, although he be an agent, or trustee, and liable to account for the proceeds to another; but that in this latter case he is open in such action, to any defense existing against the person beneficially interested.

Reaffirmed and extended in *Rice v. Savery*, 22 Iowa 478, holding further that one for whose benefit a contract is made may sue thereon, without making a party of the trustee who made it for him.

Reaffirmed and extended in *Devin v. Hendershott*, 32 Iowa 194, holding further that covenants running with the land pass to the grantee in a deed of trust, or mortgage, and he can sue thereon for breach and in his own name.

Reaffirmed and extended in *West v. Moody*, 33 Iowa 139, holding further that a debt held by an assignee under a verbal transfer may be made the subject of set-off or cross-demand in an action against him by the debtor, commenced after the debt was assigned.

Reaffirmed and extended in *Green v. Marble*, 37 Iowa 96, holding further that the verbal assignment of a note and guaranty thereof, enables the assignee to sue on the guaranty in his own name.

Reaffirmed and extended in *Foster v. Trenary*, 65 Iowa 623, 22 N. W. 620, holding further that when an assignment of a debt, con-

tract, written instrument, or chose in action, is in writing and it does not clearly express the intention of the parties, parol evidence therefor is admissible.

Reaffirmed and extended in Leach v. Hill, et al, 106 Iowa 177, 76 N. W. 669, holding further that either the party for whose benefit a promise or a contract is made, or the one in whose name it is made may sue thereon without joining the other.

Cited with approval in Huntington v. Fisher, 27 Iowa 279, holding that any one for whose benefit a bond or other obligation is made and who is injured by its breach, may maintain an action thereon.

Cited in Fleming v. Mershon, 36 Iowa 416, not in point.

DENSLOW v. VAN HORN, 16 IOWA 476

1. Breach of Promise of Marriage—Prior Unchaste Character of Woman — When No Defense — Mitigation.— In an action for breach of promise of marriage, the fact that the plaintiff had given birth to an illegitimate child before the promise, is no defense, when the defendant knew such fact at the time he made the promise; but such fact is therein receivable in evidence in mitigation of damages.

In an action for breach of promise of marriage, the plaintiff may recover not only compensation for the immediate injury, but for loss of reputation as well; and such action puts in issue the plaintiff's previous general character, pp. 477, 478, 481.

Reaffirmed and varied in Smith v. Milburn, 17 Iowa 34-37, holding that an unmarried woman of unchaste character may be seduced, and in an action therefor may recover damages for injuries resulting therefrom, except for injury to her character.

Reaffirmed and qualified in Herriman v. Layman, 118 Iowa 593, 92 N. W. 711, holding that in an action for damages for breach of promise of marriage, where the defendant pleads matters in mitigation as full justification, proof of such facts are inadmissible: That want of chastity, either before or after an alleged promise of marriage, is admissible in mitigation of damages in an action for breach of promise of marriage, if pleaded in mitigation; but such fact is not a full defense thereto.

Cited in State v. Carron, 18 Iowa 376, 87 Am. Dec. 401, holding that on the trial of an indictment for seduction, the previous chaste character of the prosecutrix must be made out in order to constitute the crime; but that proof of reformation by a woman once unchaste is sufficient: That the question of the chastity or unchastity of the prosecutrix is, in such case, one of fact for the jury.

2. Action for Breach of Promise of Marriage—Plea of Previous Unchaste Character of Plaintiff—Aggravation of Damages—Punitive Damages.—Where the defendant in an action for breach of promise of marriage, wantonly, or in bad faith, pleads that the plaintiff is of unchaste character, and fails upon the trial to introduce proof

thereof, such conduct on the part of the defendant may be considered by the jury in aggravation of damages, and they may award punitive damages therefor: But this rule is inapplicable when such a plea is interposed in such a case, by the defendant, acting in good faith and under such circumstances as will warrant a cautious attorney in the belief and expectation that it can be established, pp. 482, 483.

Reaffirmed and varied in Hendrickson v. Kingsbury, 21 Iowa 386, 390, 391, holding that punitive damages are allowable in all cases arising from the malicious or oppressive act of the defendant, or where an element of fraud is shown—Hence, holding that plaintiff may recover punitive or exemplary, as well as actual damages, in an action for assault and battery.

3. Jury Trial—Conflicting Evidence—Credibility of Witnesses—Province of Jury.—Where upon a trial by jury, the evidence is conflicting, its credibility, weight and sufficiency is for the jury, p. 479.

Special cross reference. For cases citing the text and others, see annotations under Rule 4 of Russ v. Steamboat War Eagle (14 Iowa 363), ante. p. 247.

HENDERSON v. LEGG, 16 IOWA 484

1. Practice—Equity Actions—Method of Trial.—An action to revive a mortgage surrendered by reason of the false and fraudulent representations of the mortgagor, and to foreclose the mortgage in the event it is revived, is an equitable action triable, in the absence of agreement to the contrary, according to the first method prescribed by Sec. 2999 of the Code of 1860 (requiring all evidence to be in writing): When a party to such action objects to a trial thereof by the second method of such section (by oral evidence) and it is overruled, his motion for a new trial on such ground must be sustained, pp. 486, 487.

Reaffirmed, explained and extended in State for use of Boone, et al Counties v. Orwig, 25 Iowa 286; Mally v. Mally, 31 Iowa 61, 62, holding that under the Code of 1860, all equitable actions except divorce cases, and actions for foreclosure of tax titles and of mortgages, are triable according to the first method of Sec. 2999 thereof (all written evidence): That if a cause is strictly equitable, the fact that it incidentally involves the foreclosure of a mortgage, does not authorize its trial by the second method of the above section (all oral evidence): And that in this last class of cases, the court may refer to a master or referee, without consent of the parties.

Reaffirmed and qualified in Mally v. Mally, 31 Iowa 61, 62, holding that failure to object to oral testimony at the time of its introduction in an equitable action triable by the first method of Sec. 2999 of the Code of 1860, thereby waives the objection thereto.

Distinguished and narrowed in Dumont v. Barrall, 19 Iowa 567, 568 (abstract), holding that the fact that a mortgage is attacked as

fraudulent in an action for its foreclosure, does not allow the trial of the issue according to the first method of Sec. 2999 of the Code of 1860; and such action is to be tried by the second method thereof (all oral evidence): The case turning on other questions.

Distinguished and narrowed in Searcy v. Miller, 57 Iowa 617, 618, 10 N. W. 914, holding that where plaintiff sues in equity on purchase money notes for land and asks a lien on the land, but thereafter strikes the prayer for the lien from his petition, it is not error for the court to then order the action to be tried by jury without a specific order transferring the cause to the law docket.

CLAGETT v. CONLEE; JONES v. HOCKMAN, 16 IOWA 487

(Former Appeal, 12 IOWA 101.)

1. Limitation of Actions—Actions for the Recovery of Real Estate—Adverse Possession—What is.—To constitute adverse possession of real estate in order to bar the owner thereof from recovering it, it must have been in the adverse possession of the claimant under a color and claim of title for the statutory period of limitation of actions for the recovery of real estate (ten years, under the Code of 1860), p. 489.

Reaffirmed and narrowed in Campbell v. Long, 20 Iowa 385, 386, holding that where the ten years has run or a part of a year remains to run when an infant arrives at majority, that the infant has one year after arriving at his majority in which to commence action.

Unreported citation, 128 N. W. 852.

Special cross reference. For other cases citing, sustaining, etc., the text and many more on the question, see annotations under Jones v. Hockman (12 Iowa 101), ante. p. 19.

BALLINGER v. TARBELL, 16 IOWA 491, 85 Am. Dec. 527.

1. Actions—Original Notice Not Served in Time—Judgment on—Effect.—A judgment rendered upon a service of an original notice not served the number of days required before the return day, is erroneous and will be reversed upon appeal; but it cannot be assailed as void in a collateral proceeding, p. 493.

Reaffirmed and extended in Muscatine Turn Verein v. Funck, 18 Iowa 473; Givens v. Campbell, 20 Iowa 81; Shea v. Quintin, 30 Iowa 59; Lyon v. Vanatta, 35 Iowa 525, 526; Dougherty v. McManus, 36 Iowa 659; Bennett v. Hetherington, 41 Iowa 150; Woodbury v. McGuire, 42 Iowa 342; Wilson & Co. v. Call, 49 Iowa 465, 466; Blair v. Wolf, 72 Iowa 248, 33 N. W. 670; Tomlin v. Woods, 125 Iowa 375, 101 N. W. 138, all holding further (as does the present case in argument) that in order for a judgment to be void and subject to collateral attack by reason of the manner, time or defects of notice, the service or notice, must be such as to amount to *no notice*, as other defects in relation thereto must be corrected by motion and appeal.

Cross references. See further on this question, annotations and cross references under Rule 2 of *Bonsall v. Isett* (14 Iowa 309), ante. p. 242; *Boker v. Chapline* (12 Iowa 204), ante. p. 33.

2. Mutual Judgments—Set-Off—Rights of Assignee of Judgment.—Mutual judgments will be set-off the one against the other by a court of equity, although one of them may be jointly against one of the parties and another.

A judgment is a chose in action and is assignable, but the assignee takes it subject to all set-offs and equities existing against it in the hands of his assignor and before notice to the judgment debtor of the assignment: Hence, a judgment debtor may set-off a judgment he has against such assignor as against the judgment in the hands of the assignee of the assigned judgment, pp. 493-495.

Reaffirmed in *Benson v. Haywood*, 86 Iowa 112, 53 N. W. 87, 23 L. R. A. 335.

Reaffirmed in *Cottle v. Cole & Cole*, 20 Iowa 483; *Chapman v. Coats*, 26 Iowa 292; *Tiffany v. Stewart*, 60 Iowa 211, 14 N. W. 243; *Fred Miller Brew. Co. v. Hansen*, 104 Iowa 310, 311, 73 N. W. 828, holding that the assignee of a judgment succeeds to the rights, remedies and liabilities of his assignor.

Reaffirmed and explained in *De Laval Separator Co. v. Sharpless*, 134 Iowa 30, 31, 111 N. W. 439, holding that a judgment is a chose in action and its assignee takes subject to legal and equitable defenses in favor of the judgment debtor against the assignor (judgment creditor).

Reaffirmed and extended in *Hurst v. Trussell*, 21 Iowa 504, 506, 507, holding further that the right to set-off mutual judgments exists against the lien of an attorney for an attorney's fee, where the judgment sought to be set-off existed before the attorney gave notice of his lien, under Sec. 2708 of the Code of 1860.—But see *Benson v. Haywood*, 86 Iowa 112, 53 N. W. 87, 23 L. R. A. 335 (reaffirming the text) holding further that the right to set-off mutual judgments is unaffected by the right of an attorney (under Sec. 215 of the Code of 1873) to a lien for an attorney's fee.

Reaffirmed and varied in *Ryerson v. Hendrie*, 22 Iowa 484; *Allen v. Maddox*, 40 Iowa 125, holding that persons jointly bound, either by contract or relationship (as partners, etc.) may be severally sued; or such a demand may be the subject of set-off against any one so bound.

Reaffirmed and qualified in *Osborn v. Cloud*, 23 Iowa 108, 109, 92 Am. Dec. 413, holding that a judgment cannot be levied upon and sold under an execution: That a creditor of a judgment creditor may subject the latter's judgment to the satisfaction of his (the former's) debt, by garnishment, but not by execution.

Cited with approval in *Strong v. Lawrence*, 58 Iowa 61, 12 N. W. 76, holding that a judgment creditor may sue in equity to set aside a fraudulent conveyance made by one joint judgment debtor, without

first exhausting his remedies against all the joint judgment debtors under execution: Such action may be maintained without first issuing execution and having it returned "no property found."

Cited with approval in Struman v. Robb, 37 Iowa 313, not in point, but upon analogy.

Unreported citation, 121 N. W. 1039.

Cross references. See further on this question, annotations under Hurst v. Sheets and Trussell (14 Iowa 322), ante. p. 244; Burtis v. Cook & Sargent (16 Iowa 194), ante. p. 427.

WRIGHT v. WRIGHT, 16 IOWA 496

1. Husband and Wife—Contracts Between — Validity — Contract to Release Dower and Homestead.—In the absence of fraud, a contract between a husband and wife, which is based upon a sufficient consideration, is valid.

So, a contract between a husband and wife whereby she agrees to concur in and sign a conveyance to the husband's land and to relinquish her dower and homestead therein, in consideration of the surplus of the purchase price, after the satisfaction of a mortgage thereon, belonging to and becoming her property, is valid as between the parties and against subsequent creditors of the husband, in the absence of actual fraud, pp. 506-508.

Reaffirmed and extended in Logan v. Hall, 19 Iowa 498-500, holding further that under Secs. 2505 and 2771 of the Code of 1860, where the husband borrows his wife's *separate* money and promises to repay it, equity, especially where the promise is reduced to writing and rights of creditors are not prejudiced or defeated, will enforce the contract against the husband, or if he later dies, against his estate: That as a general rule, such a contract or note, unless expressly providing for interest from a certain time, when sued on after the death of the husband, draws interest from his death; but there may be special circumstances allowing it to draw interest from its date.

Reaffirmed and extended in Mitchell & Sons v. Sawyer and wife, 21 Iowa 583, holding further that (under the Code of 1860), where a wife has separate property, she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of her husband.

Reaffirmed and extended in Robertson v. Robertson, 25 Iowa 352-354, holding further that (under the Code of 1860), a wife may sell and convey her separate property to her husband without the intervention of a trustee, and such conveyance is valid in the absence of fraud: Hence, holding that an agreement of separation between husband and wife, which is based upon a sufficient consideration and not tainted with fraud, whereby the wife relinquishes her dower and releases the husband from a claim for future maintenance is valid.

Reaffirmed and qualified in Hatch & Thompson v. Gray, 21 Iowa 32, 33, holding that although a court of equity will enforce contracts between a husband and wife where the rights of creditors have not intervened or are not prejudiced; still, a secret parol agreement between a husband and wife will not be enforced as against creditors whose rights have intervened in ignorance thereof.

Cited in McElhaney v. McElhaney, 125 Iowa 281, 101 N. W. 91, holding that contracts between husband and wife in relation to her separate property or any right growing out of it, are valid: Hence, holding that a contract between husband and wife based upon money loaned by her to her husband from her separate estate, whereby she became owner of one-half interest in a tract of public land afterwards entered by him, was enforceable.

Partially overruled in Heacock v. Heacock, 108 Iowa 545, 546, 79 N. W. 356, 75 Am. St. Rep. 273 (cited in dissenting opinion, 549), holding that a note given by a husband to his wife is (under the Code of 1873) unenforceable by her, unless she pleads and proves in her action thereon that it was given as a consideration or in relation to her separate money or property.

(Note.—See further specially, Wood v. Dunham, 105 Iowa 701, 75 N. W. 507; Union Stock Yard Nat'l Bank of South Omaha, Neb. v. Coffman, 101 Iowa 594, 70 N. W. 693; Carse v. Reticker, 95 Iowa 25, 63 N. W. 461, 5 Am. St. Rep. 421; Hoag & Steere v. Martin, 80 Iowa 714, 45 N. W. 881; Tibbetts v. Wadden, 94 Iowa 173, 62 N. W. 693; Miller v. Miller, 78 Iowa 177, 35 N. W. 464, 16 Am. St. Rep. 431; Thill v. Pohlman, 76 Iowa 638, 41 N. W. 385; Payne v. Wilson, 76 Iowa 377, 41 N. W. 45; Gilbert Hedge & Co. v. Glenn, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479; Hanson & Myer v. Manley, 72 Iowa 48, 33 N. W. 357; Hamill & Co. v. Henry, 69 Iowa 752, 28 N. W. 32; Miller v. Dickinson County, 68 Iowa 102, 26 N. W. 31; Fleming v. Town of Shenandoah, 67 Iowa 505, 25 N. W. 752, 56 Am. Rep. 354; Patterson v. Hill, Ex'r, 61 Iowa 534, 16 N. W. 599; Courtright v. Courtright, 53 Iowa 57, 4 N. W. 824; Van Doran v. Marden, 48 Iowa 186; Lower v. Lower, 46 Iowa 525; Lyle v. Gray, 47 Iowa 153; Rafferty v. Buckman, 46 Iowa 195; Peters v. Peters, 42 Iowa 182; Grant v. Green, 41 Iowa 88; Doyle v. McGuire, 38 Iowa 410; In re Alexander, 37 Iowa 454; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; Owen v. Owen, 22 Iowa 270; Jones v. Jones, 19 Iowa 236, some important cases on the subject of contracts between and the duties, rights and liabilities of husband and wife.—Ed.)

Cross references. See further on this subject, annotations under Rule 2 of Blake v. Blake (7 Iowa 46); Rule 4 of Suiter v. Turner (10 Iowa 517), Vol. I, pp. 435 and 739, respectively.

ALLEN v. ARMSTRONG, 16 IOWA 508

1. Tax Deed—What Prima Facie Evidence of—Tax Deed as Evidence of Title.—Under the Code of 1860 (Sec. 784) a tax deed is

evidence of the regularity of all proceedings in relation to the tax title anterior to its execution; and one claiming thereunder may introduce it in evidence without preliminary proof of the regularity of the assessment and proceedings concerning the tax sale, p. 510.

Reaffirmed and explained in Adams v. Beale, 19 Iowa 66, holding that under Sec. 784 of the Code of 1860, a tax deed is *prima facie* evidence only of the payment of the tax, while it is *conclusive* evidence that the property sold was listed, assessed, levied upon, advertised, sold, etc., as required by law; and oral evidence is admissible to prove the payment of such taxes by the tax purchaser.

Reaffirmed and extended in Eldridge v. Kuehl, 27 Iowa 171, holding further that a tax deed is admissible to prove facts of which it is made *prima facie* evidence.

Reaffirmed and qualified in Hurley v. Woodruff, 30 Iowa 261, holding further that a tax deed is admissible to prove title thereunder; and is *prima facie* evidence of the regularity and validity of all proceedings in relation to the listing, assessing, advertising and the legal sale of the realty and of all other proceedings prior to its execution.

Reaffirmed and narrowed in Powers v. Fuller, 30 Iowa 477; Hurley v. Powell, Levy & Co., 31 Iowa 66; Bulkley v. Callanan, 32 Iowa 465; Madson v. Sexton, 37 Iowa 562; Easton v. Perry, 37 Iowa 683; Schofield v. McDowell, 47 Iowa 130, holding that a tax deed is only *prima facie* evidence of the steps *necessary* to a valid tax sale; but it is *conclusive* of the non-essential or directory steps.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, not in point.

Partially overruled in McCready v. Sexton & Son, 29 Iowa 385, 386, 389, 390, 4 Am. Rep. 214 (cited in dissenting opinion, 408); Powers v. Fuller, 30 Iowa 477, holding that so much of Sec. 784 of the Code of 1860, as provides that a tax deed is *conclusive* evidence that land sold thereunder was legally listed, assessed, levied upon under a valid tax warrant and sold as prescribed by statute, is unconstitutional: That the legislature cannot make a tax deed *conclusive* evidence of the regularity of proceedings which are essential to a valid tax sale—But see Parker v. Sexton & Son, 29 Iowa 427-429 (citing text); Hurley v. Powell, Levy & Co., 31 Iowa 66; Bulkley v. Callanan, 32 Iowa 465; Madson v. Sexton, 37 Iowa 562, 563, holding that a failure to comply with the statute as to giving notice for a tax sale of land, and other directory parts thereof, does not invalidate it; and that land may be so sold without a tax warrant.

Cross reference. See other rules hereof.

2. Constitutional Law—Taxing Power—Due Process of Law.—The power to tax inherently resides in the state, and the taking of property under its due and valid exercise is not within the constitutional prohibition against taking property “without due process of law.”

If any given step or matter in the exercise of the power to tax

(as for example the fact of levy by proper authority) is so indispensable as, without it no tax can be raised, it cannot be dispensed with, and the owner of property cannot be concluded by legislative enactment from showing such act was not done; but minor matters in regard to the manner of exercising the tax power may, by statute, be dispensed with, or the owner may be so concluded from the existence of certain facts from showing their non-performance, pp. 512-514.

Reaffirmed in Stewart v. Board of Supervisors of Polk County, 30 Iowa 28, 1 Am. Rep. 238, upholding constitutionality of an Act authorizing taxation by counties in aid of the construction of railroads.

Reaffirmed and explained in Yoemans v. Riddle, 84 Iowa 160, 161, 50 N. W. 890, holding that the assessment and levy of taxes according to a law wherein are provisions for an appeal or other means of correcting any error, illegality, or want of authority, is not in conflict with the provision of the Constitution against the deprivation of property without due process of law: The court upholding constitutionality of taxation for drainage and ditching law, provided by Secs. 1207, 1213, 1214 and 1216 of the Code of 1873 and of Chap. 121 of the Acts of Seventeenth General Assembly as amended by Chap. 81 of the Acts of Eighteenth General Assembly—But see Collins v. City of Keokuk, 118 Iowa 35, 91 N. W. 792 (reaffirming the text), holding that it is not necessary to due process of law that the property holder be given the power to have an assessment for taxation reviewed by the courts.

Reaffirmed and extended in Stewart v. Corbin, 25 Iowa 146, 147, holding further that the failure of the county treasurer to levy upon and sell personal property owned by a tax delinquent and subject thereto, does not invalidate a tax deed to land sold for such taxes.

Reaffirmed and extended in McCready v. Sexton & Son, 29 Iowa 385-387 (cited in dissenting opinion, 401, 405, 407), 4 Am. Rep. 214, holding further that so much of Sec. 784 of the Code of 1860, as provides that a tax deed is *conclusive* evidence that land sold thereunder was legally listed, assessed, levied upon under a valid tax warrant and sold as prescribed by statute, is unconstitutional: That the Legislature cannot make a tax deed *conclusive* evidence of the regularity of proceedings which are essential to a valid tax sale—But see Parker v. Sexton & Son, 29 Iowa 427-429 (citing the text); Hurley v. Powell, Levy & Co., 31 Iowa 66; Bulkley v. Callanan, 32 Iowa 465; Madson v. Sexton, 37 Iowa 562, 563, holding that a failure to comply with the statute as to giving notice for a tax sale of land, and other directory parts thereof, does not invalidate it; and that land may be so sold without a tax warrant.

Reaffirmed and extended in Johnson v. Chase, 30 Iowa 310, holding further that the fact that a quarter-section of land is assessed and sold for taxes in three parcels, instead of as a whole, does not invalidate the sale: Holding further that the fact that a tax warrant under

which such land is sold has no seal, or is issued without an order from the board of supervisors, does not affect the validity of the tax title.

Reaffirmed and extended in Hurlburt v. Dyer, 36 Iowa 475, holding further that a mistake in the recital in a tax deed as to the date on which land was sold for taxes, does not affect its validity.

Reaffirmed and extended in Phelps v. Meade, 41 Iowa 475, 476, holding further that an error, or irregularity in the manner of a sale of land for taxes and an error in the tax deed as to the day the sale was made, does not affect the validity of the tax title: That a tax deed of land made more than three years after the tax sale, is valid.

Reaffirmed and extended in Shawler v. Johnson, 52 Iowa 476, holding further (as does the present case) that a defect in the advertisement or notice of a tax sale, will not invalidate it: That such an advertisement or notice which does not contain a description of the land to be sold for taxes, but which is otherwise correct, is sufficient.

Reaffirmed and extended in Davis v. Magoun, 109 Iowa 328, 329, 80 N. W. 430, holding further (as does the present case) that any defect, or irregularity in the advertisement or notice of a tax sale, or of the posting or publication thereof, will not (under Sec. 880 of the Code of 1873) affect either the sale or the deed made thereunder; that such a tax title is valid, both before and after the making of the tax deed.

Reaffirmed and extended in Galusha, treasurer v. Wendt, 114 Iowa 604, 606, 87 N. W. 514, upholding constitutionality of Sec. 1374 of the Code of 1897, relating to the assessment and collection of taxes on property omitted from assessment: Holding further that such section applies to the collection of taxes on property omitted from assessment, when properly taxable, for years previous to its taking effect.

Cited with approval in Lauman v. Des Moines County, 29 Iowa 313, holding that (under Sec. 762 of the Code of 1860) taxes illegally or erroneously assessed and paid by the owner of the property and who pays under protest, may be recovered from the county.

Cross reference. See Rule 1 hereof.

JANSEN v. WOODBURY, 16 IOWA 515

1. **Sale of Land Under Execution—Notice to Owner in Actual Occupancy—Failure to Give—Setting Aside Sale.**—A judgment defendant whose land is ordered sold, either under general or special execution and who is in actual occupation thereof, is (under the Code of 1860) entitled to written notice of the sale, at least twenty days previous thereto; and a failure to give such notice is ground for the sale being set aside upon motion at the same or next term of court at or after it is made, pp. 517, 518.

Reaffirmed in Fleming v. Maddox, 30 Iowa 243.

2. **Irregular Execution Sale of Land—Payment of Purchase Price by Purchaser—Re-sale Afterwards Ordered—Rights of Purchaser.**—Where under an irregular sale of land under execution (in

this case for want of notice to the owner as required by Code of 1860), the purchaser pays the purchase price, and thereafter the sale is set aside and a re-sale is ordered, the order should direct that at the second sale the purchaser under the first be allowed to bid the amount first bid with ten per cent. per annum thereon from the date of the first to the date of the last sale, and that if more be bid at the second sale, that such first purchaser be refunded such sum from the proceeds thereof, p. 519.

Reaffirmed and extended in Fleming v. Maddox, 32 Iowa 496, 497, holding further that after a purchaser of land under an irregular sale under an execution or decree has paid the purchase price to the officer entitled to receive it, the decretal or execution debtor (owner of the land) has no right to pay the judgment or decree, set aside the sale, and force the purchaser to look to the judgment or decretal creditor, or to the officer and his bondsmen for the purchase price paid; but that in such case the purchaser is entitled to the lien of the judgment or decree on the land and to remedies thereunder for the payment of the purchase money.

SWORTZELL, EX'R v. MARTIN, 16 IOWA 519

1. **Judicial Sale of Land—Inadequacy of Price—Setting Aside For.**—Without expressly so deciding the court is of the opinion that when at a sale of land under execution, or decree, the inadequacy of the price offered is great, the bidders are few, and the sheriff does not exercise his power to adjourn, the sale should be set aside, if applied for seasonably: But inadequacy of purchase price is certainly to be considered in connection with the general equities of the parties in an action to set aside such a sale, p. 522.

Unreported citation, 128 N. W. 375.

Cross reference. See further on this question, annotations under Rule 4 of Boyd v. Ellis (11 Iowa 97), Vol. I, p. 781.

GEORGE v. PARKER, COUNTY JUDGE, 16 IOWA 530

1. **Guardian and Ward—Removal of Guardian—Appeal to District Court From Order of County Court.**—An appeal lies to the district court from an order of the county court removing a guardian. If upon review upon the appeal, the district court errs in a matter of law, an appeal lies from his final judgment to the Supreme Court, pp. 531, 533.

Reaffirmed in Wilson v. Shorick, 21 Iowa 300; and 21 Iowa 355.

Cited in McIntire v. Bailey, Gd'n, 133 Iowa 424, 110 N. W. 590, holding that where there is a feeling of hostility existing between a guardian and his ward, and a condition existing, such as that for the good of all concerned such fiduciary be removed, it should be done and another should be appointed, and the former be required to immediate-

ly file his final report, and, with the approval of the court, make settlement with his successor—Such proceedings to be had in the district court.

(Note.—See further specially on this question, *In re Pierson's Ex'rs*, 13 Iowa 449.—Ed.)

FOWLER v. DOYLE, 16 IOWA 534

1. Judgment Entry Obscure—Construction in Light of Record.

—A judgment entry which is obscure, will be read and understood in connection with the pleadings and entire record in the case, p. 535.

Reaffirmed and explained in Redhead, Norton, Lathrop & Co. v. Baker, 86 Iowa 254, 53 N. W. 114, holding that where the entry of a judgment or decree is so defective or obscure as not to clearly express the exact determination of the court, reference may be had to the pleadings and other proceedings, and, if with these the obscurity is dispelled and the intention of the court made apparent, the judgment or decree will be given effect according to such intention.

Reaffirmed and extended in Mayfield v. Bennett, 48 Iowa 197, holding further that no presumption is allowed in support of a judgment, where the presumption, if allowed, would be contrary to a statement contained in the record: That when a judgment recites that "service of notice has been made upon the defendant," and an affidavit and other portions of the record negative a personal service, the recital in the judgment will be construed to mean service by publication; and such a judgment does not authorize the issuance of a general execution.

Reaffirmed and extended in American Em. Co. v. Fuller, 83 Iowa 606, 50 N. W. 50, holding further that when a record entry is not sufficiently clear, extrinsic and parol evidence is admissible to prove what was in fact adjudicated: And that where land in controversy is not described in a judgment, other evidence is admissible to identify it as being included in that contemplated by the decree: And this may be shown by the pleadings, the record, or by extrinsic and even parol evidence.

2. Garnishment Proceedings—Parties—Third Person Claiming Title or Interest in Debt.—When a third person claims an interest or title to a debt garnished, and it is adverse to the garnishing creditor, he should (under Sec. 2765 of the Code of 1860) be made a party to the proceeding, in order that the rights of the parties be fully and finally determined. If, in such case, the third person is not made a party to the garnishment proceeding, he will not be concluded by anything done therein or thereunder, pp. 537, 538.

Reaffirmed and explained in Litchfield v. Polk County, 18 Iowa 73, 74, holding that all persons necessary to a determination of the matter involved in an action must (under Sec. 2765 of the Code of 1860) be made parties by order of the court before the trial therein: That in an action involving the title to land, all parties claiming a

title or interest therein adverse to the plaintiff, must be made parties.

Reaffirmed and extended in Shear v. Green, 73 Iowa 690, 36 N. W. 643, holding further that in an action to enjoin a nuisance in the keeping and selling intoxicating liquors, that (under Secs. 2551-2553 of the Code of 1873) before the property may be adjudged sold or destroyed, all parties claiming a title or interest therein must be made parties, and their rights be adjudicated.

Reaffirmed and extended in Stroup v. Bridger, 124 Iowa 406, 100 N. W. 115, holding further that in an action of conversion, all parties claiming title or interest in the property involved in the action must (under Secs. 3462 and 3466 of the Code of 1897) be made parties thereto.

Distinguished and narrowed in Capital City Bank v. Wakefield, 83 Iowa 47, 48 N. W. 1059, holding that in a garnishment proceeding wherein it is claimed that the garnishee received notes of the debtor with the fraudulent purpose to cheat, hinder and delay the debtor's creditors, and the garnishee answers that he bought such notes of the debtor as the agent of certain other persons, the latter persons are not necessary parties to the proceeding.

Unreported citation, 126 N. W. 804.

McGREGOR v. GARDNER, 16 IOWA 538

(Later Appeal, 21 IOWA 441.)

1. Chancery Causes — Appeals in — Trial on — Questions Not Raised Below.—Upon an appeal in a chancery cause, the Supreme Court will try the whole cause on its merits, and will render such decree as the district court ought to have rendered: But such trial will be had only on the pleadings and evidence filed and introduced below, p. 543.

Reaffirmed in Grimes v. City of Burlington, 71 Iowa 126, 37 N. W. 107.

Reaffirmed and extended in Pratt v. Western Stage Co., 27 Iowa 364, 365; Coakley v. McCarty, 34 Iowa 108, holding further that errors which can be corrected upon motion in the court below, will not be reviewed in the Supreme Court, unless a motion for such correction is made before the prosecution of the appeal.

Cited in Ross v. Hawkeye Ins. Co., 93 Iowa 225, 61 N. W. 853, 34 L. R. A. 466, not in point.

Cross references. See further on this question, annotations under Rule 2 of Blake v. Blake (13 Iowa 40), ante. p. 115. See also, annotations and cross references under Pigman v. Denney (12 Iowa 396), ante. p. 66.

2. Bill of Review in District Court—When Not Allowed.—A bill of review for errors apparent on the face of a decree which has been affirmed, or rendered by the Supreme Court, cannot be sustained by the district court, p. 548.

Reaffirmed and extended in Kinsell v. Feldman, 28 Iowa 499, holding further that a bill of review will not lie in the district court for newly discovered evidence which is strictly cumulative in character, after appeal and final decree in the Supreme Court.

Cross reference. See further, annotations and cross reference under Dickson v. Graham (16 Iowa 310), ante. p. 440.

PRINCE v. GRIFFIN, 16 IOWA 552

(Later Appeal, 27 Iowa 514.)

1. Judgment—Presumption in Favor of Upon Appeal.—Upon an appeal to the Supreme Court every presumption is in favor of the validity of a judgment or decree rendered below; and this presumption must be rebutted affirmatively from the record, p. 554.

Special cross reference. For cases citing the text and many others on the question, see annotations under Boker v. Chapline (12 Iowa 204), ante. p. 33.

2. Actions—Unauthorized Acceptance of Notice by Attorney—Judgment Rendered on, Valid—When.—Where a judgment is rendered upon an acceptance of service of original notice by an unauthorized attorney, and it recites that due service was had upon the defendant, and there is nothing in the record showing want of authority in such attorney, it is valid upon collateral attack, pp. 554, 555.

Reaffirmed, explained and narrowed in Harshey v. Blackmarr, 20 Iowa 171, 172, 174, 181, 182, 89 Am. Dec. 520, holding that a judgment rendered upon an appearance entered by an attorney who has no authority therefor, will be set aside upon motion or by bill in equity, if the proceeding is commenced promptly after the discovery of the fact by the defendant and he is guilty of no *laches*, or is not estopped so to do by his acts or admissions: But a judgment rendered against a non-resident who is not (as shown by the record) in any way served with notice and upon an answer procured to be filed by an attorney without any authority or color of authority so to do, and procured by the fraudulent representations of the plaintiff, is *void* as against all persons and in all proceedings.

Cross references. See Rule 1 hereof and cross reference there found. See further on this question, annotations under Rule 2 of Bonsall v. Isett (14 Iowa 309), ante. 242.

VANNICE v. BERGEN, 16 IOWA 555, 85 AM. DEC. 531

1. Mortgage—Revivor of—Fraud—Rights of Third Persons.—Where a mortgagee of a recorded mortgage on land is induced by fraud of the mortgagor to purchase the fee simple title, and the mortgage is not released of record, the mortgage will be revived in equity as against the mortgagor, and as against subsequent judgment creditors, purchas-

ers or mortgagees of the mortgagor who do not act upon the strength of such transaction, pp. 562, 563.

Reaffirmed in Loomis v. Hudson, 18 Iowa 417; Raymond v. Whitehouse, et al, 119 Iowa 138, 139, 93 N. W. 295.

Reaffirmed and extended in Churchill v. Morse, 23 Iowa 231, 233, 92 Am. Dec. 422, holding further that one who purchases the equity of redemption of a judgment debtor in land at an execution sale thereof, takes subject to the rights of a good faith purchaser thereof from the judgment debtor before the rendition of the judgment.

Reaffirmed and varied in Lathrop v. Brown, 23 Iowa 49, 51, holding that a judgment creditor has a lien only on the interest of his judgment debtor in lands; that a judgment creditor whose judgment is first rendered, has a superior lien on the interest of the judgment debtor in land to that of a subsequent judgment creditor.

Reaffirmed and qualified in Halloway v. Platner, 20 Iowa 123, 124, 81 Am. Dec. 517, holding that an attachment or judgment creditor is not protected in equity against a prior, unrecorded deed or mortgage which by mistake misdescribes the realty intended to be conveyed or incumbered: But that when a judgment creditor becomes a purchaser at a sale under his judgment, without actual or constructive notice of prior equities or unrecorded conveyances, he is entitled to the same protection as any other *bona fide* purchaser.

Reaffirmed and qualified in Butterfield v. Walsh, 21 Iowa 99, 100, 89 Am. Dec. 557, and 36 Iowa 536; Walker v. Elston and Green, 21 Iowa 531; Gower v. Doheney, 33 Iowa 39, holding that where the execution plaintiff becomes purchaser at a sale thereunder, without actual notice of an equity existing in favor of a third person to the land sold, and there is nothing in the way of possession or otherwise to put the plaintiff upon inquiry as to such equity, he is a subsequent purchaser and has the superior right to that of the holder of the equity.

Reaffirmed and qualified in Wallace v. Bartle, 21 Iowa 349, 350, 89 Am. Dec. 584, holding that a purchaser at an execution sale, of a judgment debtor's *equitable interest* in land, the judgment debtor having no apparent or record title, takes subject to the rights of a third person who purchased such equity before such sale, although such execution purchaser had no notice of the third person's right at the time of his purchase.

Cited in Fyffe v. Beers, 18 Iowa 11, 85 Am. Dec. 577, not in point.

Special cross reference. For further cases citing the text and others on the question, see annotations under Seevers v. Delashmutt (11 Iowa 174), Vol. I, p. 796.

Cross reference. See further in this connection, Rules 2 and 3 of Blaney v. Hanks (14 Iowa 400), ante p. 254, and cross references there found.

2. Mortgages—Mortgagee Purchasing Equity of Redemption—Merger of Estates—When.—When the mortgagee of a mortgage the mortgagor, the lesser estate is, as a general rule, merged into the greater and the mortgage and mortgage debt is extinguished. But the rule does not apply and the estates are not merged when it is the intention of the parties, or it is to the interest of the mortgagee that the mortgage be kept alive, and it can be done without prejudice to the mortgagor or to the rights of third persons, pp. 562, 564.

Reaffirmed in Byington v. Fountain, 61 Iowa 514, 515, 14 N. W. 221; Fordyce v. Hicks, 76 Iowa 45, 40 N. W. 81; Gray v. Nelson, 77 Iowa 66, 41 N. W. 567; Kilmer v. Hannifan, 113 Iowa 282, 85 N. W. 16; Moore v. Olive, 114 Iowa 653, 87 N. W. 721; Raymond v. Whitehouse et al, 119 Iowa 138, 93 N. W. 295.

Reaffirmed and extended in Sims v. Hammond, 33 Iowa 373; Clinton County v. Cox, 37 Iowa 571, 572, holding further that the taking of a new note and chattel mortgage on the same personal property to secure the same indebtedness secured to the mortgagee by a previous mortgage, does not operate to discharge the first mortgage or release the lien thereunder: That as a general rule nothing but the actual payment of a debt or an express release, will operate as the discharge of a mortgage.

Reaffirmed and extended in Denham v. Sankey, 38 Iowa 271, holding further that when a lessor purchases a lease of real estate and the particular estate and the fee unite in the same person, the lease is extinguished, except that it will be kept alive, if necessary, in favor of a prior outstanding interest acquired by a third person in good faith; and this exception applies in favor of a purchaser of such interest from such third person after the purchase of the lease by the lessor (holder of the fee).

Reaffirmed and extended in Bowling v. Cook, 39 Iowa 202, 203, holding further that a mortgage on land executed by a mortgagee in a prior mortgage, is superior to the right of the assignee of the first mortgage debt, where the assignment of the first is not of record and the second mortgagee had no actual notice thereof at the time he took his mortgage.

Reaffirmed and extended in Del. R. R. Construction Co. v. Dav. & St. P. R. R. Co., 46 Iowa 411, 412, holding further that the rule is equally applicable to a mechanic's or materialman's lien on land; that a court of equity will keep an incumbrance alive, or apply the doctrine of merger as best subserves the ends of justice.

Reaffirmed and narrowed in Hoffman v. Wilhelm, 68 Iowa 514, 515, 27 N. W. 485, holding that when, in the absence of fraud, a mortgagee cancels or releases his mortgage, and proceeds by attachment to attempt to collect his debt, he cannot thereafter set such cancellation or release aside in a court of equity, and claim under the mortgage.

Cited with approval in Logan & Cook v. Taylor, 20 Iowa 300, not in point, but upon analogy.

Cited with approval in Skiff v. Cross, 21 Iowa 461, not in point.

Cited in Hackworth, Gd'n v. Zollars, 30 Iowa 436, not in point.

Special cross reference. For further cases citing, etc., the text and others on the question, see annotations under Rule 2 of *Wilhelmi v. Leonard* (13 Iowa 330), ante. p. 157.

Cross reference. See further on this question, annotations under *Packard v. Kingman* (11 Iowa 219), Vol. I, p. 806.

VANNICE v. GREENE, TRAER & CO., 16 IOWA 574

1. Confession of Judgment—Sufficiency of Statement for—Conclusiveness of Recitals in Judgment as to.—Where a judgment by confession recites that the statement on which it is based "set forth concisely the grounds of the indebtedness," when such statement was in fact insufficient, the judgment, if for a *bona fide* indebtedness and in the absence of fraud, is valid as between the parties, and, also, as against a purchaser at a sale thereunder who buys knowing nothing of the actual contents of the statement, pp. 575, 576.

Reaffirmed and extended in Thorp v. Clapp, 34 Iowa 316, holding further that a statement for a judgment by confession is sufficient as between the parties, without the seal of the notary who swore the debtor thereto.

Special cross reference. For further cases citing the text, and many more on the question, see annotations under *Vanfleet v. Phillips* (11 Iowa 558), Vol. I, p. 860.

VAN HORN v. FORD, 16 IOWA 578

1. Decedent's Estate—Power of Probate Court to Order Sale of Real Estate.—Under the Statute of 1843, the probate court of the county of the residence of the decedent at the time he died, has power to order the sale by his administrator of lands lying in other counties of the state; and the place of sale is left to the discretion of the court making the order: But such a sale must be public, pp. 583, 584.

Cited in Pursley v. Hayes, 22 Iowa 20, 92 Am. Dec. 350, as an instance of a direct attack of an administrator's sale of land.

Special cross reference. For further cases citing the text and others on the question, see annotations under Rule 1 of *Thornton v. Mulquinne* (12 Iowa 549), ante. p. 95.

KREISINGER v. ICARIAN COMMUNITY, 16 IOWA 586

(Abstract.)

1. Judgment by Default—Motion to Set Aside—Judicial Discretion of Trial Court—Reversal for Abuse of.—The trial court has a large judicial discretion on the question of a motion to set aside a

judgment by default, and his refusal to so do will not be cause for reversal, except in case of abuse thereof, and resulting prejudice to the party complaining.

So, where the trial court refuses to set aside a judgment by default, and the record shows that the defendant failed to answer for more than two years before the judgment was rendered, and the defendant fails to show a sufficient excuse for such failure, the judgment will be affirmed upon appeal, p. 586.

Special cross reference. For cases citing the text and others on the question, see annotations under *Bolander v. Atwell* (14 Iowa 35), ante. p. 200.

CARLETON *v.* BYINGTON, 16 IOWA 588

(Abstract.)

1. **Appeal to Supreme Court—Time in Which to be Taken—How Computed.**—An appeal to the Supreme Court in a civil action or proceeding, must (under Code of 1860) be taken within one year after the judgment or decree is entered in the court below: And in computing the time allowed therefor, the day of the entry of the judgment or decree is excluded and the corresponding day of the year following is included, p. 588.

Reaffirmed and qualified in *Ritchey v. Fisher*, 85 Iowa 564, 52 N. W. 506, holding that (under Secs. 45 and 3173 of the Code of 1873) appeals may be taken to the Supreme Court in civil actions and special proceedings, within six months from the rendition of the judgment or order appeal from and not afterward; and in computing the time allowed therefor the first day shall be excluded, and the last included, unless the last day falls on Sunday; in which case the time prescribed shall include the whole of the following Monday.

(Note.—See further on this question, *Parkhill v. Town of Brighton*, 61 Iowa 103, 15 N. W. 853; *Teucher & English v. Hiatt*, 23 Iowa 527, important cases on this subject, not citing the text.—Ed.)

COWDEN *v.* ST. JOHN, 16 IOWA 590

(Abstract.)

1. **Real Estate — Fixtures — Building Erected by Lessee For Trade Purposes—Rights of Prior Mortgagee and Purchaser of Land Under Foreclosure.**—Where after the execution of a mortgage on land, the mortgagee leases it to a third person with the agreement that he may erect a house thereon for the purposes of trade, with right to remove at the expiration of the lease, such lessee is the owner of and has the right to remove the building thereon erected; and the mortgagee, or a purchaser of the land at foreclosure sale who purchases with knowledge of the lessee's rights, cannot enjoin such removal, pp. 590, 591.

Cited in Van Wagner v. Van Nostrand, 19 Iowa 526, holding that a conveyance of land without exceptions or reservations therein, passes not only the earth, but everything attached thereto, whether by nature, as trees, herbage, etc., or artificially, by man, as fences, buildings, etc.; And that the removal of a building thereon at the time of the conveyance by a tenant who had erected it prior thereto with right of removal, is a breach of the covenant of general warranty in such conveyance.

(Note.—The above text was decided by a divided court, and the ruling of the trial court, which is the text, thereby affirmed.—Ed.)

McCLURE v. BURRIS, 16 IOWA 591

(Abstract.)

1. **Mortgage—Transfer of Notes Secured by—Rights of Assignee—Innocent Third Person.**—The transfer of a note secured by mortgage, carries with it the mortgage lien, and is effective as against the parties thereto and the mortgagor, but not against an innocent third person who acts in relation to the mortgaged property without either actual or constructive notice thereof. Such an assignee must record his assignment in order for it to impart constructive notice to such third person, pp. 592, 593.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Rule 1 of Bank of Indiana v. Anderson (14 Iowa 544), ante. p. 284.

EX PARTE ANDERSON, 16 IOWA 595

(Abstract.)

1. **Habeas Corpus—Testing Validity of Enlistment of Soldier by — Concurrent Jurisdiction of State and Federal Courts.**—The validity of the enlistment of a soldier in the United States Army and whether or not he is unlawfully detained in such service thereunder, may be tested upon writ of *habeas corpus* issued from a state court authorized to issue such writs: State and Federal courts have concurrent jurisdiction on such a question. But where a soldier is held under military authority to await trial before a court-martial for a military offense, the validity of his enlistment cannot be tested by such writ before such military trial, pp. 598, 599.

Cited in Ex parte Holman, 28 Iowa 95 (opinion in chambers, 145), the court holding that *habeas corpus* will not issue from a state court to test the question of whether or not a person is unlawfully detained under a process, or warrant, issued from a United States court.

Cited in 146 Iowa 242, 124 N. W. 1084.

EX PARTE MCROBERTS, 16 IOWA 600

(Abstract.)

1. Courts—Concurrent Jurisdiction of State and Federal—Effect of State Court First Taking Jurisdiction.—Where State and Federal courts have concurrent jurisdiction of a cause of action, or offence, and the State court first takes jurisdiction thereof, the jurisdiction of the Federal court is ousted for the particular case, p. 606.

Cited with approval in Ex parte Holman, 28 Iowa 158 (opinion on *habeas corpus* in chambers), the majority court reaffirming and extending the text, and holding further upon final determination, that *habeas corpus* will not issue from a State court to test the question of whether or not a person is unlawfully detained under a process, or warrant, issued from a United States Court.

Annotations to Decisions Reported in Volume 17 Iowa.

COY v. CITY COUNCIL OF LYONS CITY, 17 IOWA 1, 85 Am. Dec. 539

1. **Municipal Corporations—Judgment Against City or Town—Mandamus to Compel Levy of Tax to Pay.**—Where a creditor of a city or town obtains a judgment against it which can only be paid by the levy of a particular rate of tax for a given year, mandamus lies against the city council to compel the levy thereof, provided such tax, together with that levied for other municipal purposes does not exceed the maximum rate allowed to be levied for any particular year, pp. 4, 5.

Reaffirmed and extended in Oswald v. Thedinga, 17 Iowa 14, 15, holding further that after an execution has been issued and returned "no property found" on a judgment against a city, that upon the failure of the officers thereof, upon demand, to levy a tax, as soon as practicable thereafter, to pay off the judgment, interest and costs, they are individually liable therefor to the judgment creditor.

Reaffirmed and extended in Boynton v. District Township of Newton, 34 Iowa 514, 515, 517, holding that the drawing of an order by the president of a school district for a debt, does not discharge it; and that upon the refusal of the officers of the district to thereafter levy a tax therefor, mandamus will lie therefor.

Reaffirmed and extended in Palmer v. Jones, 49 Iowa 408, 409, 31 Am. Rep. 153, holding further that in a mandamus proceeding to compel the levy of a tax by city authorities to pay a judgment against it, the court may compel the levy of the tax in several years, and continue the cause from time to time until full relief is given.

Reaffirmed and varied in Brown v. Crego, 32 Iowa 501, holding that mandamus will lie to compel an officer to perform an imperative duty imposed on him by law.

Reaffirmed and varied in Iowa R. R. Land Co. v. Sac County, 39 Iowa 134 (dissenting opinion, 142), holding that where the board of supervisors of a county levies the maximum rate of taxes for municipal purposes and an additional tax for the payment of a judgment against the county, the collection of the additional tax may be enjoined by a tax payer whose property is sought to be sold therefor.

Reaffirmed and qualified in French v. City of Burlington, 42 Iowa 617, 618, holding that one contracting with a city is bound to take notice of its financial condition, and whether or not the proposed indebtedness is beyond the constitutional limitation.

Cited with approval in Grant v. City of Davenport, 36 Iowa 401, not in point, but upon analogy.

Cited in Harbach v. Des M. & K. C. Ry. Co., 80 Iowa 597, 44 N. W. 349, 11 L. R. A. 113, not in point.

Cross references. See further, annotations under State ex rel. Clark et al. v. City of Davenport (12 Iowa 335), ante. p. 56; Rule 1 of Clark, Dodge & Co. v. City of Davenport (14 Iowa 494), ante. p. 272.

STATE v. INGALLS AND KING, 17 IOWA 8

1. Grand Jury—Challenge—When to be Made.—A person held to answer for a public offense cannot (under Sec. 4619 of the Code of 1860) make objection to the grand jury, or to an individual juror thereof, after such jury is sworn, p. 9.

Reaffirmed and explained in State v. Pierce, 90 Iowa 509, 58 N. W. 892; State v. McPherson, 126 Iowa 78, 101 N. W. 739, holding that a defendant who is held to answer may enter a challenge to the panel of the grand jury before the jurors are sworn, but if he fails to do so at that time, he waives his right.

Reaffirmed and extended in State v. Reid, 20 Iowa 424, holding further that an objection that the court illegally reconvened the grand jury which thereafter returned the indictment against accused, should, at the latest, be made before pleading to the indictment.

Reaffirmed and qualified in State v. Gibbs, 39 Iowa 320, holding that, under Secs. 4337, 4339 of the Code of 1860, and Secs. 4691, 4693 of the Code of 1873, corresponding thereto, the fact that a grand jury was not selected, impaneled and sworn as prescribed by law is ground for a motion to set aside an indictment, unless the accused was held to answer before indictment.

Cross reference. See further on this question, annotations and notes under State v. Howard and Cress (10 Iowa 101), Vol. I, p. 650.

2. Change of Venue in Criminal Cases—Discretion of Trial Court—Abuse—Reversal on Appeal.—The trial court is vested with a sound judicial discretion in deciding upon a motion for a change of venue in criminal cases, and he is to rule thereon according to the very right of it: His ruling thereon will not be ground for reversal, unless it is clearly shown that such discretion was abused, p. 11.

Reaffirmed in State v. Baldy, 17 Iowa 40; State v. Knight, 19 Iowa 96; State v. Ross and Mann, 21 Iowa 468, 469; State v. Hutchinson, 27 Iowa 213, 214; State v. Freeman, 27 Iowa 335; State v. Collins, 32 Iowa 43; State v. Foley, 65 Iowa 52, 21 N. W. 63; State v. Blodgett, 143 Iowa 583, 21 A. & E. Ann. Cas. 231, 121 N. W. 687, the court applying the rule both upon a motion for change of venue in criminal cases upon the ground of prejudice of the presiding judge and of the people, etc.

(Note.—See further on this question, *State v. Billings*, 77 Iowa 417, 42 N. W. 456; *State v. Hale*, 65 Iowa 575, 22 N. W. 682, important cases sustaining and explaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 1 of *State v. Arnold* (12 Iowa 479), ante. p. 80.

OSWALD *v.* THEDINGA, 17 IOWA 13

1. **Municipal Corporations—Judgment Creditors of, Not Compelled to Take Scrip in Payment.**—A judgment creditor of a city, is not compelled to take scrip, or the ordinary evidences of indebtedness issued by the city, for or in payment of his judgment, but he may elect to do this if he so desires, pp. 14, 15.

Reaffirmed and extended in *Iowa R. R. Land Co. v. Carroll County*, 39 Iowa 163, holding further that counties, cities and other municipal corporations, may, under Chapter 87, Laws of 1872, amendment to Sec. 3275 of the Code of 1860, issue bonds in payment of a judgment without submission of the question to a vote of the people.

Cited with approval in *Porter v. Thomson*, 22 Iowa 394, the case involving Rule 2 of this present case.

2. **Cities and Towns—Judgment Against—When Officers Failing to Levy Tax to Pay are Personally Liable.**—After an execution has been issued and returned “no property found” on a judgment against a city, upon the failure of the officers thereof, upon demand, to levy a tax as soon as practicable thereafter, to pay off the judgment, interest and costs, they are individually liable therefor to the judgment creditor, p. 15.

Reaffirmed and narrowed in *Porter v. Thomson*, 22 Iowa 394-396, holding that where the maximum rate of taxation allowed by law for any year is exhausted in order to pay necessary expenses of a city, the proper officers thereof are not required upon demand, to levy a tax for that year for the purpose of paying a judgment against it; but when such demand is once made, they (the proper city officers) must thereafter and without further demand levy the tax of the succeeding year that the maximum tax rate is not exceeded for necessary expenses of the city, and, upon failure, are personally liable to the judgment creditor.

Distinguished in *Boynton v. District Township of Newton*, 34 Iowa 514, 515, 517, holding that the drawing of an order by the president of a school district for a debt does not discharge it; and that upon the refusal of the officers of the district to thereafter levy a tax therefor, mandamus will lie therefor.

Cross reference. See further in this connection, annotations and cross references under *Coy v. City Council of Lyons City* (17 Iowa 1), ante. p. 479.

SCHOOL DISTRICT TOWNSHIP OF SIOUX CITY v. PRATT, 17 IOWA 16

1. Pleadings—When Demurrer lies.—A demurrer lies, under the Code of 1860, only for the causes set out in Sec. 2876 of that Code.

Redundant and impertinent matter, or surplusage in a pleading in a civil action or proceeding, must be reached by motion to strike and not by demurrer, pp. 16, 17.

Reaffirmed in Turner v. First Nat'l Bank of Keokuk, 26 Iowa 566, holding that the fact that matter is improperly alleged in a pleading in the alternative, when it should be averred directly in connection with other allegations thereof, must be reached by motion and not by demurrer.

Reaffirmed in Mornan v. Carroll, 35 Iowa 24, 25, holding that (under Sec. 2876 of the Code of 1860) a demurrer lies for *defect* of but not for *misjoinder* of parties.

2. School District—Acts of Board of Directors, Ministerial—Appeal to County Superintendent.—The acts of the board of directors of a school district are (under the Code of 1860) ministerial, and a reversal of the decision of such board by the county superintendent upon appeal (under Sec. 2140 of that Code) is a ministerial act, and not a final judicial determination of the question involved. So, a decision of the county superintendent upon an appeal adjudging a contract for the erection of a school house of a school district's board of directors to be illegal and void, does not affect an action by a tax payer, commenced theretofore to set aside such contract as fraudulent and illegal, pp. 17, 18.

Distinguished and narrowed in Newby v. Free, 72 Iowa 381, 382, holding that (under Secs. 1724, 1829-1835 of the Code of 1873) the decisions of the board of directors and of the county superintendent upon questions relating to the conduct of and of the location of schools, are final and conclusive.

(Note.—See further, qualifying and narrowing, but not citing, the text, *Indep. Dist. of Lowell v. Indep. Dist. of Duser*, 45 Iowa 391; *Marshall v. Sloan*, 35 Iowa 445; *Vance v. Dist. Township of Wilton*, 23 Iowa 408.—Ed.)

STATE v. WOOD, 17 IOWA 18

1. Perjury—Indictment—Sufficiency of Averment as to Knowledge of Falsity.—Where an indictment for perjury after setting out the facts testified to, avers that the accused knew them to be false, it sufficiently alleges that the accused knew them to be false *at the time* he so testified, p. 20.

Cited with approval in State v. Reid, 20 Iowa, 418, on the question of raising the question after verdict, of the sufficiency of an allegation of venue in an indictment, and holding that it cannot be so raised,

where it does not appear that the substantial rights of the accused were thereby prejudiced.

2. Verdict on Indictment—Judgment Rendered on—Time to be Rendered—Presumption of Regularity on Appeal.—Upon an appeal to the Supreme Court every presumption is in favor of the regularity of the proceedings below; and when the record thereon in a criminal prosecution, fails to show that the district court continued in session "three clear days" between the verdict and the rendition of the judgment, it will be presumed that the trial court deferred its judgment to as remote a period as it reasonably could, and a judgment rendered before the expiration of such days will not be ground for reversal. The term "three clear days" means three days exclusive of the day of the return of the verdict, p. 22.

Reaffirmed and qualified in State v. Roan, 122 Iowa 140, 97 N. W. 999, (decision under Sec. 5431 of the Code of 1897), holding also, that where defendant is sentenced upon a day fixed by agreement, he cannot thereafter complain because it was premature.

(Note.—See further, sustaining, qualifying and narrowing, but not citing the text, State v. Usher, 136 Iowa 611, 111 N. W. 812; State v. Turney, 77 Iowa 269, 42 N. W. 190; State v. Watrous, 13 Iowa 489.—Ed.)

3. Criminal Law—Sentence—Presumption of Regularity in Manner of, upon Appeal.—Upon an appeal it will be presumed, unless the record affirmatively shows the contrary, that the trial court pursued the statute in relation to the manner of sentencing a convicted person, pp. 22, 23.

Reaffirmed and extended in State v. Gibbs, 39 Iowa 320, holding further that unless the record affirmatively shows to the contrary, it will be presumed upon appeal that the trial court ruled correctly and that facts existed justifying it.

STATE v. HESSENKAMP, 17 IOWA 25

1. Indictment in Language of Statute—Failing to Name Offense—Sufficiency.—When an indictment charges an offense in the language of the statute and sets out the facts constituting it with such clearness that there is no doubt as to the offense charged, it is (under Sec. 4659 of the Code of 1860) sufficient, although the technical name thereof be not therein set out, p. 26.

Reaffirmed in State v. Baldy, 17 Iowa 40; State v. Shaw, 35 Iowa 577; State v. Alderman, 40 Iowa 376.

Reaffirmed in State v. Reid, 20 Iowa 418, on the question of raising the question after verdict of the sufficiency of an allegation of venue in an indictment, and holding that it cannot be so raised, where it does not appear that the substantial rights of accused were thereby prejudiced.

Reaffirmed and explained in State v. Shaffer, 21 Iowa 487, 488, holding that an indictment for willful trespass by accused cutting down or destroying trees on the land of another, is sufficient if it allege the offense with such certainty and conciseness as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to the law of the case: That where in such an indictment the language is sufficient to enable any person giving it a fair and ordinary construction to know on whose land the timber alleged to be destroyed was situated, the venue is stated; and the land described with reasonable certainty, it is good.

Reaffirmed, explained and qualified in State v. Allen, 32 Iowa 492, 493, holding that if any one of the material facts constituting an offense be omitted from an indictment or information, it fails to charge an offense, and no judgment can be rendered thereon upon a verdict of guilty: That the exact language of the statute denouncing an offense need not be used, in an indictment or information, but that the material facts constituting the offense must be stated with such conciseness and certainty as to enable a man of common understanding to know what is meant, and the court to pronounce judgment upon conviction according to the law of the case: Holding further that an indictment, or information, for selling intoxicating liquor to another, must state the name of the person to whom it was sold, if known, and if not known it should be so stated.

Reaffirmed and extended in State v. Shaw, 35 Iowa 577; State v. McIntire, 59 Iowa 265, 270, 13 N. W. 286, 288, holding further that because the name of the offense is omitted from or erroneously stated in an indictment, or that it is not in the form required by the statute (as to title of the action, etc.) does not constitute ground for demurrer.

Reaffirmed and extended in State v. Davis, 41 Iowa 313, 314, holding further that where an indictment alleges facts constituting the crime of murder in the first degree, but names the crime as *manslaughter*, the name thereof will be treated as surplusage and the accused will be tried for murder in the first degree.

Cited with approval in Jamison v. Burton, 43 Iowa 286, not in point, but on a parity.

Cross reference. See further on this question, annotations and note under Rule 2 of State v. Ansaleme (15 Iowa 44) ante. p. 301.

2. Criminal Law—When Malice Implied.—Malice is presumed from the intentional doing of a criminal act. It is presumed that a person intends consequences which naturally result from his acts, and when they are criminal and mischievous, malice will be inferred, p. 27.

Reaffirmed and explained in Reddin v. Gates, 52 Iowa 212, 2 N. W. 1081; White v. Spangler, 68 Iowa 225, 227, 26 N. W. 87, holding

that malice may be inferred from the circumstances surrounding the doing of an act: And that where a person assaults and beats another without just (legal) provocation, malice will be presumed.

SMITH v. MILBURN, 17 IOWA 30

1. Pleadings—Defects in Petition or Other Pleadings—When not Cause for Reversal of Judgment.—Under Sec. 2978 of the Code of 1860, a judgment will not be reversed for defects in a petition, or other pleading, not affecting and prejudicing the substantial rights of the party appealing and complaining, p. 32.

Reaffirmed in Doniphan & Hughes v. Street, 17 Iowa 321, 322; Fulmer v. Fulmer, 22 Iowa 233.

Reaffirmed and extended in Gray v. Bean, 27 Iowa 223, holding that in an action *ex delicto*, defective allegations in a petition as to the damages resulting from the tort, are cured by answer, trial and verdict.

Reaffirmed and extended in Andre v. Ch. & N. W. R. R. Co., 30 Iowa 110, holding further that defects in a petition, or other pleading, not affecting or prejudicing substantial rights, are not ground for motion in arrest of judgment.

Reaffirmed and varied in Chase v. Scott, 33 Iowa 312, holding that presumptions on appeal are in favor of the rulings of the trial court, and that prejudicial error must be thereon made to affirmatively appear from the record.

Reaffirmed and varied in Blackburn v. Powers, 40 Iowa 683, holding (under Sec. 2836 of the Code of 1873) that it is not enough for appellant to show error committed by the trial court; he must further affirmatively show from the record upon appeal that such error prejudiced his substantial rights.

Cross reference. See further on this question, annotations under Rule 4 of Cotes & Patchin v. City of Davenport (9 Iowa 227) Vol. 1, p. 568.

2. Pleadings—Reply, when Necessary—What Allegations in Answer Impliedly Controverted—Evidence in Such Case.—Under the Code of 1860, allegations in an answer not in the nature of a counterclaim, set-off, or cross demand, are controverted by operation of law. Under such Code a reply is only allowed where the answer contains a counterclaim, set-off, or cross demand; and where a reply is filed when unallowable, it will not affect the issue.

Where allegations in an answer are denied by operation of law, the plaintiff may introduce proof of any defense or avoidance which he could plead in a reply thereto, pp. 33, 34.

Reaffirmed in Hamilton v. State Bank at Dubuque, 22 Iowa 312; and 25 Iowa 596, 597 (abstract); McCreedy v. Sexton & Son, 29

Iowa 402, 403, 4 Am. Rep. 214; Barger v. Farris & Wilmer, 34 Iowa 230, 231; Corbin v. Beebee, 36 Iowa 340.

Reaffirmed and explained in Barger v. Farris & Wilmer, 34 Iowa 230, 231; Gwyer v. Figgins, 37 Iowa 520, holding further that when a reply is filed when not required, it does not change the issue, or shift the burden of proof, and the case stands as if it had not been filed.

Cross reference. See further on this question, annotations and note under Adams v. Peck (14 Iowa 508) ante. p. 275.

3. Seduction—What is—Flattery or Deception Required.—In an action for her seduction by an unmarried female, the plaintiff must prove that the defendant had sexual intercourse with her, which he accomplished by some promise or artifice, flattery or deception: For the law affords no redress to such a female who voluntarily submits to such intercourse, p. 35.

Reaffirmed in Brown v. Kingsley, 38 Iowa 222; Baird v. Boehner, 72 Iowa 322, 33 N. W. 696; Egan v. Murray, 80 Iowa 183, 184, 45 N. W. 564; Breiner v. Nugent, 136 Iowa 327, 333, 111 N. W. 448, 450.

Reaffirmed and extended in State v. Crawford, 34 Iowa 40; State v. Heatherton, 60 Iowa 177, 14 N. W. 230, holding further (under prosecutions for seduction) that in order to constitute the *crime* of seduction the accused must accomplish the sexual intercourse by false promises, artifices or deception.

(Note.—See further, sustaining, but not citing the text, Hopkins v. Mathias, 66 Iowa 333; 23 N. W. 732; Delvee v. Boardman, 20 Iowa 446.—Ed.)

Cross reference. See Rule 4 hereof, in this connection.

4. Seduction Action for by Woman of Previous Unchaste Character—Evidence—Damages.—An action for seduction may be maintained by an unmarried female of previous unchaste character, and she may recover all damages therein and for all injuries thereby occasioned, except damages for injury to her character. In such action the defendant may, in mitigation of damages, prove that the plaintiff was of unchaste character at or near the time of the alleged seduction; but evidence of unchastity of a remote period prior thereto is inadmissible, pp. 36, 37.

Reaffirmed and explained in Olson v. Rice, 140 Iowa 632, 119 N. W. 85, holding that in an action of seduction by an unmarried female for damages on account of injury resulting therefrom *except as to damages to her character*, evidence of the previous unchaste character of the plaintiff is *no defense*, but is admissible *in mitigation of damages*.

Reaffirmed and varied in Breiner v. Nugent, 136 Iowa 327, 333, 111 N. W. 448, 450, holding that in an action by an unmarried female for her seduction, where she avers her previous chaste character and flattery, artifices and deception by defendant causing her seduction, she

may prove various acts of sexual intercourse between herself and defendant, and that she thereafter gave birth to a child, such proof being admissible in aggravation of damages.

Cited in State v. Carron, 18 Iowa 376, 87 Am. Dec. 401, holding that on the trial of an indictment for seduction, the previous chaste character of the prosecutrix must be made out in order to constitute the crime; but that proof of reformation by a woman once unchaste is sufficient: That the question of the chastity or unchastity of the prosecutrix is, in such case, one of fact for the jury.

Cited in Berholf v. Van Houwenlengen, 21 Iowa 432, 433, holding that the fact that a husband co-habits with his wife after she has committed adultery is no defense to an action for damages by the husband against her seducer; but the fact may be given in evidence in such action by the defendant in mitigation of damages, and as evidence of collusion between husband and wife.

Unreported citation, 127 N. W. 980.

Cross reference. See further in this connection, annotations under Rules 1 and 2 of Denslow v. Van Horn (16 Iowa 476) ante. p. 460.

STATE v. BALDY, 17 IOWA 39

1. Indictment in Language of Statute—Failing to Name Offense—Sufficiency.—When an indictment charges an offense in the language of the statute and sets out the facts constituting it with such clearness that there is no doubt as to the offense charged it is (under Sec. 4659 of the Code of 1860) sufficient, although the technical name thereof be not therein set out, p. 40.

Cited with approval in State v. Weems, 96 Iowa 447, 65 N. W. 394, not in point.

Special cross reference. For other cases citing the text, and more on the question, see annotations under State v. Hessenkamp (17 Iowa 25) ante. p. 483.

2. Change of Venue in Criminal Cases—Discretion of Trial Court—Abuse of—Reversal.—The trial court is vested with a sound judicial discretion in deciding upon a motion for a change of venue in criminal cases, and he is to rule thereon according to the very right of it: His ruling thereon will not be ground for reversal, unless it is clearly shown that such discretion was abused, p. 40.

Special cross reference. For cases citing the text, and others on the question, see annotations under Rule 2 of State v. Ingalls and King (17 Iowa 8) ante. p. 480.

3. New Trial—Misconduct of Jury or Juror as Ground—Juror Drinking Intoxicants.—Where, after the retirement of the jury for deliberation, one of them leaves the others, and, in charge of the bailiff repairs to a place and drinks a glass of intoxicating liquor, it is such

misconduct as will authorize the setting aside the verdict and granting a new trial, pp. 41, 43.

Reaffirmed and explained in Ryan v. Harrow, 27 Iowa 495, 500, 502, (Cited, 496, 498, 499), 1 Am. Rep. 302, holding that the drinking intoxicating liquors by a juror or jurors, after the jury has retired for deliberation, is a ground for new trial, although such juror or jurors may not so drink to excess.

Reaffirmed and qualified in State v. Morphy, 33 Iowa 273, 11 Am. Rep. 122; Van Buskirk v. Daugherty, 44 Iowa 44; State v. Bruce, 48 Iowa 537, 538, 30 Am. Rep. 403, (cited in opinion on rehearing, 540) holding that the drinking of intoxicating liquors by a juror or jurors during the progress of or adjournment of a cause, and *before final submission* for deliberation and verdict, is not a ground for a new trial, unless it be shown that such drinking so affected the juror's or jurors' brain or brains that he or they were thereby incapable of calm and dispassionate reasoning, or that the party complaining was otherwise prejudiced thereby—And the rule applies in both civil and criminal cases.

Reaffirmed and qualified in State v. Reilly, 108 Iowa 737, 78 N. W. 681, holding that the drinking of intoxicating liquors by jurors after the finding and signing of the verdict, but before it is returned into court, is not ground for a new trial.

Reaffirmed and narrowed in Hopkins v. Knapp & Spalding Co., 92 Iowa 214, 60 N. W. 620, holding that the use of intoxicating liquors by a juror while the jury is deliberating, unless it is so used as a medicine and in case of actual sickness, is a ground for a new trial: That where a juror while the jury is deliberating uses intoxicating liquors, adopting a plea of sickness as a subterfuge, the verdict will be set aside.

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, Hemmi v. Ch. G. W. Ry. Co., 102 Iowa 25, 70 N. W. 746; State v. Kennedy, 77 Iowa 209, 41 N. W. 609; O'Neil v. K. & Des M. Ry. Co., 45 Iowa 546; State v. Livingston, 64 Iowa 560, 21 N. W. 34; Fairchild v. Snyder, 43 Iowa 23; Berry v. Berry, 31 Iowa 415.—Ed.)

4. Adultery—Prosecution Under Code of 1860—Co-operation of Consort Commencing, not Required.—Under Sec. 4347 of the Code of 1860, no prosecution for adultery can be commenced except upon the complaint of the injured husband or wife; but once the prosecution is so commenced it may be prosecuted to conviction without the further co-operation of the consort. So, where an indictment for adultery is returned against a husband, found upon the evidence before the grand jury of his wife and other witnesses, the defendant may be tried and convicted, without the state introducing the wife as a witness, pp. 43, 44.

Reaffirmed and explained in State v. Dingee, 17 Iowa 233, 234, holding that after a prosecution for adultery is once commenced by the

injured husband or wife (under Sec. 4347 of the Code of 1860), whether before an examining magistrate or by indictment, it is thereafter within the complete control of the courts, and the further voluntary prosecution by the husband or wife is unnecessary.

Reaffirmed, explained and narrowed in Bush v. Workman, sheriff, 64 Iowa 206, 207, 19 N. W. 911, holding that (under Sec. 4008 of the Code of 1873) no prosecution for adultery may be commenced except upon the complaint of the husband or wife of *the accused*. Holding further that where a married man held by a justice of the peace, upon a charge of adultery, to answer the action of the grand jury, sues out a writ of *habeas corpus*, and the response of the officer having him in custody fails to state that the prosecution was commenced by petitioner's wife, it is insufficient and the accused should be discharged on such writ.

Reaffirmed and extended in State v. Briggs, 68 Iowa 419, 420, 27 N. W. 359, holding further (under Sec. 4008 of the Code of 1873) that a prosecution for adultery may be commenced by the husband or wife of the accused person, either before a magistrate or before the grand jury: Holding further that when an indictment for adultery is returned upon the complaint of the husband or wife of the accused, the name of such complainant, witness, is not required to be indorsed thereon as a private prosecutor under Sec. 4292 of the Code of 1873.

(Note.—See further, State v. Henke, 58 Iowa 457, 12 N. W. 477; State v. Bennett, 31 Iowa 24; State v. Sanders, 30 Iowa 582; State v. Wilson, 22 Iowa 364; State v. Roth, 17 Iowa 336, important cases on this question, not citing the text.—Ed.)

Cross reference. See further on this question, annotations under State v. Dingee, 17 Iowa 232) *Infra.* p. 521; State v. Roth (17 Iowa 336) *Infra.* p. 535.

STATE v. MCCLEARY, 17 IOWA 44

1. Intoxicating Liquors—Federal License no Protection for State Offense of Unlawfully Selling.—A federal license granting authority to sell intoxicating liquors in this state, is no defense to an indictment for nuisance by keeping and selling intoxicating liquors at a given place, as denounced by the statute of this state, pp. 45, 46.

Reaffirmed and extended in Stornel v. Timbrel, sheriff, 84 Iowa 343, 51 N. W. 161, holding further that the payment of a special federal intoxicating liquor tax, does not exempt one from punishment for violation of the intoxicating liquor statutes of this State.

(Note.—See further, sustaining and explaining, but not citing, the text, State v. Baughman, 20 Iowa 497; State v. Stutz, 20 Iowa 488; State v. Carney, 20 Iowa 82.—Ed.)

STATE v. BOWERS, 17 IOWA 46

1. Criminal Law—Continuance—Affidavit for—Counter-affidavits.—Although not expressly deciding, the court doubts whether the State has a right to introduce counter-affidavits upon a motion, supported by affidavit, of accused for a continuance on account of the absence of witnesses who would, if present, prove an *alibi* and also impeach the character of the witnesses indorsed on the indictment, pp. 47, 48.

Cited in State v. Wells, 61 Iowa 631, 632, 17 N. W. 91, 47 Am. Rep. 822, holding that (under Sec. 2750 of the Code of 1873) an affidavit of accused supporting a motion for continuance on the ground of the absence of a witness, is not traversible: But affidavits supporting a motion of accused for a continuance in a criminal case, made under Sec. 2749 of that code, (for any cause which satisfies the court that substantial justice will be done by granting the continuance) may be traversed by the State by counter-affidavits.

Cited in Jones v. Ch. & N. W. R. R. Co., 36 Iowa 71, not in point.

2. Criminal Law—Trial of Indictment—Witnesses Before Grand Jury—Evidence.—Upon the trial of an indictment the witnesses who were before the grand jury are not confined to their evidence as shown by the minutes returned with the indictment, but may testify to any other competent facts bearing upon the guilt or innocence of accused, p. 50.

Reaffirmed in State v. Ostrander, 18 Iowa 456; State v. McCoy, 20 Iowa 263; State v. Vanvleet, 23 Iowa 27, 28; State v. Bernstein, 99 Iowa 7, 68, N. W. 442; State v. Wrand, 108 Iowa 76, 78 N. W. 789; State v. Perkins, 143 Iowa 56, 57, 20 A. & E. Ann. Cas. 1217, 120 N. W. 63.

Reaffirmed and extended in State v. Craig, 78 Iowa 640, 641, 43 N. W. 463; State v. Harlan, 98 Iowa 459-461, 67 N. W. 382, holding further that where (under Sec. 4421 of the Code of 1873) the State serves notice that it will call and use as a witness a person not before the grand jury, it is not confined to prove the evidence set out in such notice, but may prove any competent facts by him.

Reaffirmed and varied in State v. Morris, 36 Iowa 273, holding that the fact that the evidence shown by the minutes returned with an indictment is insufficient to authorize the finding thereof, is not a ground for quashing or setting it aside.

Cited in State v. McComb, 18 Iowa 49, not in point.

(Note.—See further on this question, State v. Seery, 129 Iowa 259, 105 N. W. 511; State v. Yetzer, 97 Iowa 423, 66 N. W. 737; State v. Kreder, 86 Iowa 25, 52 N. W. 658; State v. Rainsbarger, 74 Iowa 196, 37 N. W. 153, important cases on and analogous to, but not citing the text.—Ed.)

BYERS v. RODABAUGH, 17 IOWA 53

1. Actions—Action on Wrong Side of Docket—How Question Raised—Demurrer—Motion to Transfer.—When an action is brought in equity when it should have been at law, or the converse, the question cannot be reached by demurrer, but it must be raised by motion to transfer to the proper docket, pp. 56, 57.

Reaffirmed in Traer v. Lytle, 20 Iowa 302; City of Pella v. Scholte, 21 Iowa 466; Brown v. Mallory, 26 Iowa 471, 472; Gibbs v. McFadden, 39 Iowa 374; Riddle v. Beattie, 77 Iowa 171, 41 N. W. 607.

Cited in H. & C. F. & Minn. Ry. Co., v. Case, 37 Iowa 699, holding that a demurrer does not lie to a petition because it asks relief not allowed by its averments.

Cited in Hall v. Henninger, 145 Iowa 241, 242, (dissenting opinion) 121 N. W. 10, the majority court holding that injunction will not lie in equity when the plaintiff has a plain, speedy and adequate remedy at law, and involving other questions, not in point.

Cited in Turner v. First Nat'l Bank of Keokuk, 26 Iowa 566, not in point, but on questions of when demurrer lies under the Code of 1860, on another proposition.

Cited in Mornan v. Carroll, 35 Iowa 25, not in point, but on the question of when demurrer lies under Code of 1860, on another proposition.

Cross reference. See Rule 2 in connection herewith. See further, Rule 1 of Conyngham v. Smith (16 Iowa 473), ante. p. 458.

2. Actions—Action on Wrong Side of Docket—Motion to Transfer—Equitable Issue in Law Action—Practice.—When an action is brought in equity which should have been commenced at law, or the converse, the defendant is not always and as a matter of absolute right entitled to a transfer to the proper docket: But in all cases a party is entitled to a trial of issues, legal or equitable, according to the methods prescribed therefor by the Code.

So, where an equitable defense is set up in an action at law, the defendant may insist upon a trial thereof as in equity as prescribed by the Code of 1860 and separate from the legal issue; and in this last case, the equitable issue should be first tried, and thereafter the law issue, if necessary, pp. 57-59.

Reaffirmed in Hackett v. High, 28 Iowa 540; Morris v. Merritt & Co., 52 Iowa 502, 3 N. W. 509.

Reaffirmed as to first paragraph in Wadsworth v. Wadsworth, 40 Iowa 450.

Reaffirmed and qualified in Johnston & Son, and Johnston v. Robuck, and Amos, 104 Iowa 526, 73 N. W. 1063, holding, however, (under Sec. 3435 of the Code of 1897) that wheer in an action at law in which an equitable defense is interposed, the trial of the legal issue

will practically settle the case, then it may be first tried—And to the same effect is, *Morris v. Merritt & Co.*, 52 Iowa 502, 3 N. W. 509 (reaffirming the text) decided under the Code of 1873.

Reaffirmed and qualified in *Tufts v. Norris*, 115 Iowa 252, 253, 88 N. W. 368, holding that (under Sec. 3435 of the Code of 1897) the interposition of an equitable defense in an action at law, does not deprive the plaintiff of the right to have his legal issue tried by a jury.

Cited with approval in *Doyle v. Emerson*, 145 Iowa 360, 124 N. W. 177, the case turning on other questions.

(Note.—See further, *Gatch v. Garretson*, 100 Iowa 252, 69 N. W. 550; *Evans v. McConnell*, 99 Iowa 326, 63 N. W. 570; *Leach v. Kundson*, 97 Iowa 643, 66 N. W. 913; *Wilkinson v. Pritchard*, 93 Iowa 308, 61 N. W. 965; *Rabb v. Albright*, 93 Iowa 50, 61 N. W. 402; *Frost v. Clark*, 82 Iowa 298, 48 N. W. 82; *Ryman v. Lynch*, 76 Iowa 587, 41 N. W. 320, important cases on this question, not citing the text.—Ed.)

Cross references. See Rules 1 and 3 hereof. See further on this question, annotations under *Van Orman v. Spafford, Clarke & Co.* (16 Iowa 186); Rule 1 of *Kramer v. Conger* (16 Iowa 434) ante. pp. 425 and 453, respectively.

3. Actions—Action on Wrong Docket—Waiver of Error as to.—The fact that an action is brought in equity when it should have been brought at law, or the converse, is waived by a party answering after his motion to transfer has been overruled, p. 56.

Reaffirmed and explained in *Hatch v. Judd*, 29 Iowa 97, 98; *Richmond v. Dubuque & Sioux City R. R. Co.*, 33 Iowa 490, 491, holding that a failure to move for a transfer to the proper docket before or upon filing an answer, waives such defect in the proceeding.

Reaffirmed and extended in *Weaver v. Kintzley*, 58 Iowa 193, 12 N. W. 263, holding further (under Code of 1873) that the failure to object to the form of the action before going to trial, waives the defect.

Partially overruled in *Johnson & Son, and Johnson, v. Robuck and Amos*, 104 Iowa 526, 73 N. W. 1063, holding that going to trial does not waive the error in the court improperly changing the form of the action.

Cross reference. See Rules 1 and 2 hereof, in this connection, See further, on this question, annotations under Rule 1 of *Conyngham v. Smith* (16 Iowa 471) ante. p. 458.

4. Real Estate—Conflicting Titles—Deraignment of Titles Where Both Held under or through Same Source—Proof of Title Required.—Where in an action for the recovery of real estate involving conflicting titles, both parties claim title under or through a common source or grantor, it is only necessary for the plaintiff to deraign title to the common grantor; in such case he is not required to trace the title of such grantor, p. 60.

Reaffirmed in Brown v. Taber, 103 Iowa 3, 72 N. W. 417.

Reaffirmed and extended in Morrison v. Wilkerson, 27 Iowa 375, holding further that the rule is applicable in an action of ejectment against a tenant of the grantor of the plaintiff.

Reaffirmed and extended in English v. Otis, 125 Iowa 558, 101 N. W. 295, holding further that the rule applies to actions to quiet title to land.

Unreported citation, 82 N. W. 481.

(Note.—See further, sustaining, but not citing the text, Cooley v. Brayton, 16 Iowa 10; Conger v. Converse, 9 Iowa 554.—Ed.)

STERRITT v. ROBINSON, EXECUTOR, 17 IOWA 61

1. District Court—Jurisdiction of—How Divested by Statute—Actions Against Personal Representatives.—District courts are courts of general original jurisdiction, and this jurisdiction over any particular subject-matter cannot be taken away by statute except by express words or irresistible implication.

So, Sec. 2395 of the Code of 1860, providing that claims against a decedent's estate for mere money demands, where no liens are to be enforced shall not be prosecuted originally in the district court, except with the approbation of the county court, does not oust the district court of jurisdiction in an action on such a demand against a personal representative, although commenced without the approbation or consent of the county court, pp. 62-64.

Reaffirmed and extended in Cooley v. Smith, Ex'r, 17 Iowa 103, holding further that where a claim of the fourth class against the estate of a decedent is sued on in the district court before the statutory period for filing and proving in the county court, provided by Sec. 2405 of the Code of 1860 (a year and a half after the appointment of an administrator and notice thereof) has expired, the claim or demand is not barred.

Reaffirmed and extended in Waples v. Marsh, 19 Iowa 383, 386, 387, holding further that the statute (Code of 1860) does not give exclusive jurisdiction to the county court of all matters connected with the settlement of estates of decedents: That an action in equity in the district court, may be maintained by creditors of decedent to compel the administrator to sell the real estate for the satisfaction of their claims.

Reaffirmed and extended in Starry v. Starry, 21 Iowa 255, 256, holding further that courts of equity have concurrent jurisdiction with courts of law in the assignment of dower; and such jurisdiction of an equity court therefor is not divested by the special proceedings provided therefor (by the Code of 1860) in the county court: That the limitation provided by Sec. 2428 of the Code of 1860, applies to and bars the commencement of proceedings in the county court for

assignment of dower; but does not apply to or bar an action in equity in the district court, instituted for such purpose by a widow in peaceable possession of the realty since the death of her husband.

Reaffirmed and extended in Cowin v. Toole, 31 Iowa 516, 517, holding further that the district court has exclusive jurisdiction of actions and proceedings in equity: And that an action in equity therein lies to set aside, for fraud, proceedings in the county court.

Reaffirmed and extended in McCrary v. Deming, 38 Iowa 531, 532, holding further that the district court has concurrent jurisdiction with the circuit or probate court in claims and actions against the estate of a decedent and a personal representative; and that Chap. 86, Sec. 3 of the Acts of the Twelfth General Assembly and Chap. 158, Secs. 19, 20, of the Acts of the Thirteenth General Assembly, does not wrest such jurisdiction from the district court: Holding further that an action for breach of the covenants of a deed of a decedent, is maintainable against his representative in the district court, without first filing and proving the claim in the circuit or probate court.

Cited in Manker v. Phoenix Loan Ass'n of St. Joseph, Mo., 124 Iowa 344, 100 N. W. 38, holding that one who voluntarily invokes the aid of a court, cannot after judgment, question its jurisdiction.

Impliedly overruled as to last paragraph in Crane v. Malony, 39 Iowa 41, holding that (under Sec. 2395 of the Code of 1860) a claim for a mere money demand against the estate of a decedent cannot be sued on in the district court, without the approbation of the circuit (formerly county) court— But see Clough v. Ide, Adm'r, 107 Iowa 671, 78 N. W. 698, (reaffirming the text) holding (under Code of 1897) that probate and district courts have concurrent jurisdiction of proof of claims against a decedent's estate, and that an action against a personal representative to establish a claim against a decedent's estate which is based on a judgment, is maintainable in the district court.

(Note.—See further as to last paragraph, Moore v. McKinley, 60 Iowa 367, 14 N. W. 768; Crane v. Guthrie, 47 Iowa 542; Goodrich v. Conrad, 24 Iowa 254, important cases on this question not citing the text.—Ed.)

MALLET V. STONE, 17 IOWA 64, 85 AM. DEC. 545

1. Usury—Usurious Contract to Refrain from Suing on Legal Contract or Note—Effect.—A contract to refrain from suing on a legal contract or note for the payment of money, which new agreement is for a consideration in excess of the legal interest due on the original contract or note, is usurious, and all money paid thereunder will, in an action on the original and upon proper pleading, be applied as a payment on the first indebtedness; but such new illegal contract does not taint the old legal one with usury, or allow a plea of usury thereto in an action thereon, pp. 65, 66.

Reaffirmed and extended in Sexton v. Murdock, 36 Iowa 518, holding further that the receiving in money or goods, of interest more than the legal rate without any contract, does not work a forfeiture to the school fund as provided by the statute; but the money or goods thus received will, after paying the legal rate of interest, be applied as a payment on the principal of the debt; but if an illegal rate of interest be contracted for, then the forfeiture to the State for the use of the school fund will follow, whether the illegal interest has been received or not.

Cross references.

"Usury—Contract of—What is—Evidence—Proceedings."—See annotations under Campbell v. McHarg (9 Iowa 354), and Smith et al v. Coopers et al (9 Iowa 376) Vol. I, pp. 588 and 593, respectively.

"Usury—Who can interpose plea"—See annotations under Perry v. Kearnes (13 Iowa 174) ante. p. 134.

GRAY, PHELPS & CO. v. MONTGOMERY, 17 IOWA 66

1. Injunction—Dissolution—Appeal—Insufficient Record on—Affirmance.—Upon an appeal from an order dissolving an injunction, where the record thereon fails to show that it contains all the affidavits or evidence on which the trial court acted, the ruling of the trial court will be presumed to have been based upon sufficient evidence, and the order or judgment will be affirmed, pp. 66, 67.

Reaffirmed, varied and qualified in Winslow, Harris & Co. v. Turner, 20 Iowa 295, holding that where objection to a trial *de novo* on an appeal in a chancery action (on the ground that the pleadings and evidence are not part of the record), is made on the hearing, after appellant's argument is filed, and in the absence of his counsel, the Supreme Court should affirm without prejudice to the right of appellant to prosecute another appeal.

Cross references. See further as to *de novo* trial of chancery actions upon appeal, annotations under Rule 2 of Blake v. Blake (13 Iowa 40) ante. p. 115; Anderson v. Easton & Son, (16 Iowa 56) ante. p. 406; Garner v. Pomeroy (11 Iowa 149) Vol. I, p. 791.

THOMAS v. HILLHOUSE, 17 IOWA 67

1. Sales, Mortgages or Pledges of Personal Property—Rights of Subsequent Attaching or Garnishing Creditors of Seller.—Under Sec. 2201 of the Code of 1860, no sale, or mortgage of personal property where the seller retains the actual possession of the property and it is not in writing and acknowledged as conveyances of real estate and filed for record with the recorder of deeds of the county wherein the seller resides, is valid as against a subsequent attachment or garnishment creditor of the seller: But the rule is inapplicable to a good faith sale of personal property which is leased for a definite period to a

third person; and such a sale is (under the above section), valid as against a subsequent attachment or garnishing creditor of the seller.

When, in the absence of fraud, a debtor sells, mortgages, or pledges personal property, not retaining the actual possession thereof, before the levy of an attachment or garnishment process against him, the right of the purchaser, or mortgagee or pledgee, are superior to those of the attaching or garnishing creditor of the seller, although such creditor and the officer do not know of the prior sale at the time of executing the writ, pp. 70-72.

Reaffirmed in Prather & Parr v. Parker, 24 Iowa 27, 28; Boothby & Co. v. Brown, 40 Iowa 106, holding (under Secs. 2201 of the Code of 1860 and 1923 of the Code of 1873, corresponding thereto) that where personal property included in a prior unrecorded bill of sale, is levied on by the sheriff under an attachment of a creditor of the vendor, neither the sheriff nor the attaching creditor knowing of the sale at the time of the levy, and the property being in the possession of the vendor (debtor), then the attachment is prior to the claim of the vendees in the bill of sale.

Reaffirmed and explained in King v. Wallace Bros., 78 Iowa 225, 42 N. W. 777; Frank & Co. v. Levi & Co., 110 Iowa 269, 270, 81 N. W. 460, holding that "actual possession" as used in Sec. 1923 of the Code of 1873 (the same as the section of the text) means immediate personal supervision and control by the seller or mortgagor, though he employ others to aid in that control; but that when such seller or mortgagor intrusts the custody and control of the property, sold or mortgaged, to another and without retaining the immediate personal supervision thereof, then the "actual possession" is in the other and not the seller or mortgagor, and the transaction is valid as against subsequent attaching or execution creditors, or purchasers of or from the latter, although they have neither actual or constructive notice thereof.

Reaffirmed, explained and extended in Fox v. Edwards, 38 Iowa 216, 217, holding that (under Sec. 2201 of the Code of 1860 and Sec. 1923 of the Code of 1873) where a debtor sells a crib of corn, to be later measured, at a certain price per bushel, and the sale is not in writing, acknowledged and recorded as provided by Sec. 1923 of the Code of 1873 (the same as the section of the text) means immediate become such before the measuring of the corn, without actual notice, and also as to innocent subsequent purchasers.

Reaffirmed and extended in Sansee v. Wilson, 17 Iowa 582, 583, (abstract) holding further that where before the levy of an execution upon a buggy, the execution debtor in good faith sells it, and delivers possession of certain of its parts to the purchaser, the rights of the latter are paramount to those of the subsequently levying execution creditor.

Reaffirmed and extended in Case & Co. v. Burrows, 54 Iowa 683, 684, 7 N. W. 132; Campbell v. Hamilton, 63 Iowa 294, 295, 19 N. W. 220, holding further that a sale of personal property by a debtor, where the property is in possession of a third person, is (under Sec. 1923 of the Code of 1873, the same as the section of the text) valid as against and superior to an attachment subsequently levied by a creditor of the seller, although the subsequent creditor and the officer have no notice, either actual or constructive, of such sale at the time of levying the writ.

Reaffirmed and extended in Lufkin & Wilson v. Preston, 57 Iowa 29, 10 N. W. 290, holding further that the assignment of a lease by a lessor invests the assignee with all the rights of the lessor and of the right and title to crops thereunder as against a subsequent attachment or execution creditor and purchasers of the lessor, where the lessor at the time of the assignment, has neither possession nor right to possession of such crops—And such an assignee may maintain replevin therefor against any such person.

Reaffirmed and extended in Young v. Evans, sheriff, 118 Iowa 146, 92, N. W. 112, holding further that where personal property sold by an unrecorded bill of sale is stored by the seller in rooms rented for such purpose from one not in the business of storing property at the time and after the sale, it is not valid (under Sec. 2906 of the Code of 1897, corresponding to the section of the text) as against a subsequent judgment or execution creditor of the seller, without notice thereof.

Reaffirmed and qualified in Allison & Crane v. King, 21 Iowa 303, 304, holding that where a prior purchaser of a note, obtained by a verbal transfer from a debtor, afterwards sold under execution and bought by another, seeks to set aside the execution or decretal sale, he must allege and prove that the execution or decretal purchaser took with notice of the prior transfer.

Cited with approval in Alsberg, Jourdan & Co. v. Latta, 30 Iowa 447, a case wherein personalty which was sold under execution was never in fact previously sold, the facts showing that the first sale was never completed.

Cross reference. See Rule 2 hereof in this connection.

2. Attachment or Garnishment—Rights of Creditor Under.—

An attaching or garnishing creditor acquires only the rights or interest of the debtor at the time of the service of the writ in or to the property or assets attached or garnished, unless such creditor shows fraud or collusion impairing his rights, p. 71.

Reaffirmed in Stephenson v. Walden, 24 Iowa 86; Harshberger v. Harshberger, 26 Iowa 506; Laird Bros. v. Dickerson, 40 Iowa 674; Howe & Co. v. Jones, 57 Iowa 135, 8 N. W. 454; Bacon & Co. v. Thompson, 60 Iowa 288, 14 N. W. 314; Rogers & Dewey v. High-

land, 69 Iowa 506, 29 N. W. 430, 58 Am. Rep. 230; Shaver Wagon & C. Co., v. Halstead, 78 Iowa 735, 43 N. W. 624; Des Moines Cotton Mill Co. v. Cooper, 93 Iowa 655, 656, 61 N. W. 1084; Anderson v. Taylor, 131 Iowa 486, 108 N. W. 1051, holding further that an attachment creditor, by levy thereof, acquires a lien only upon the *interest* of the attachment debtor, in the property levied on, at the time of the levy.

Reaffirmed and extended in Rea v. Wilson, 112 Iowa 519, 522, 84 N. W. 540, holding further that a prior unrecorded mortgage, which by mistake fails to correctly describe the land mortgaged, is superior to an attachment subsequently levied thereon.

(Note.—The above rule and cases are in relation to the *interest* or *estate* of the debtor in property attached, or garnished, where the statute of Rule 1 hereof is not involved.—Ed.)

Cross references. See Rule 1 hereof in this connection. See further, annotations, notes and cross references under Rule 2 of Allison v. Barrett (16 Iowa 278) ante. p. 435; Courtright v. Leonard (11 Iowa 32) Vol. 1, p. 766.

LEWIS, EXECUTOR *v.* KERR AND CRAIG, 17 IOWA 73

1. Principal and Agent—Death of Principal—When Operates to Revoke Agent's Authority.—An agency when not coupled with an interest of the agent, is terminated by the death of the principal; and in such case any contract by the agent after the death of the principal is void, although it be made before he has notice of the demise. So, an authority to an agent to sell and convey lands, not based upon a past debt, or present loan by the agent to the principal, or coupled with any other valuable interest of the agent, and not by its terms made irrevocable, is terminated by the death of the principal; and a sale or conveyance thereof thereafter is void, although the agent had no notice of such death at the time of the execution of the contract or conveyance, pp. 76, 79, 80.

Reaffirmed in Vance v. Anderson, 39 Iowa 430, 431.

Reaffirmed and extended in Furenes v. Eide, 109 Iowa 514, 80 N. W. 540, 77 Am. St. Rep. 545, holding further that where deeds to real estate are delivered by the grantor to be delivered to the grantees, the authority to so deliver is terminated upon the death of the grantor, and the delivery thereof after such death is of no effect and the instruments pass no title: Unless in such case the evidence shows that such agency was irrevocable, or was to extend after the grantor's death.

(Note.—See further, sustaining and explaining, but not citing the text, Darr v. Darr, 59 Iowa 81, 12 N. W. 765; Crispin v. Wilkeman, 57 Iowa 523, 10 N. W. 919.—Ed.)

BUTCHER & COX v. BUCHANAN, 17 IOWA 81

1. Mistake—When Equity Grants Relief from—What Mistakes not Subject of Relief in Equity.—A court of equity will relieve against innocent mistakes, unmixed with any fault of the applicant, but not from those caused by the laches or negligence of the person applying therefor. So, where a sheriff misdescribes land in levying upon it under execution, a purchaser at a sale thereunder, in accordance with the erroneous description, cannot sue the execution defendant (owner of the land) in equity and compel him to execute a deed containing a correct description, p. 85.

Reaffirmed and extended in City of Burlington v. Gilbert, 31 Iowa 368, 7 Am. Rep. 143, holding further that, in the absence of fraud, equity will not relieve from a mistake which ordinary vigilance would have prevented.

FORT DONGE CITY SCHOOL DISTRICT v. DISTRICT TOWNSHIP OF WAH-KANA, 17 IOWA 85

1. School Districts—Election for Organization—Sufficiency of Notice.—A notice for an election for the organization of a school district must (under Sec. 2097 of the Code of 1860) provide for taking the sense of all the voters of the proposed territory constituting the district; and a notice for such election providing for taking the sense of the voters of part of such territory is insufficient, and an election thereunder is invalid, and the district so organized has no legal existence, p. 88.

Reaffirmed in Indep. Sch. Dist. of Granville v. Board of Supervisors, 25 Iowa 308, under Chap. 172, Acts of 1862, as amended by Chap. 143, Acts of 1866, allowing any city, town or sub-district having not less than two hundred inhabitants, and certain territory contiguous thereto to organize into a separate school district.

Reaffirmed and extended in State ex rel. Harmis v. Alexander et al, 129 Iowa 540, 105 N. W. 1022, holding further that when at an election (under Sec. 2794 of the Code of 1897) for the organization of a school district there is but one poll when there should be two, and some of the voters of the proposed territory are thereby prevented from voting thereat, the election is invalid, and the district has no legal existence: That in such case parties aggrieved are not required to appeal to the county superintendent as provided by Sec. 2818 of the Code of 1897, but may proceed by *Quo Warranto*.

ADLER & BRO. v. CLAFLIN, MELLIN & CO., 17 IOWA 89

1. Fraudulent Conveyances—Chattel Mortgage to Secure Creditor—Postponing Others—Turning Property Over to Mortgagee to pay Debt.—A *bona fide* mortgage of chattels by a debtor to one of his creditors to secure a debt, is not fraudulent, although other

creditors are thereby postponed and delayed: And in such case the property may be turned over to the mortgagee (creditor) for the honest purpose of its being disposed of to satisfy the mortgage debt, p. 91.

Reaffirmed and extended in Hughes v. Cory, 20 Iowa 404, 408, 409, holding further that a right reserved in the mortgage for the mortgagor to sell the mortgaged goods in the usual course of retail trade, he agreeing to keep the stock up to the value at the time the mortgage is executed, does not render such instrument fraudulent; and that the recording of a bill of sale, pledge, or mortgage repels all imputations of fraud which may arise from the retention of possession by the vendor, pledgor, or mortgagor.

Reaffirmed and extended in Clark v. Hyman, 55 Iowa 20-22, 7 N. W. 390. 39 Am. Rep. 160, holding further that a good faith chattel mortgage of goods by a merchant, made to secure a creditor, and accompanied with an agreement for the mortgagor to retain and sell the goods in the usual course of trade, is not fraudulent by reason of such arrangement.

Cross references. See further on this question, annotations and cross references under Rule 3 of *Wilhelmi v. Leonard* (13 Iowa 330) ante. p. 157; Rules 3 and 4 of *Fromme v. Jones* (13 Iowa 474) ante. p. 176.

FORDS v. VANCE, 17 IOWA 94

1. **Judgment Lien on Land—Prior Unrecorded Deed Superior to.**—A prior unrecorded deed to land is superior to the lien and rights of a subsequent judgment creditor of the grantor therein: And in such case the subsequent judgment creditor cannot defeat the rights of the grantee by redeeming from a judgment creditor of the grantor, whose lien attached before the execution of the conveyance, p. 95.

Reaffirmed, explained and extended in Thomas v. Kennedy, 24 Iowa 405, 406, 95 Am. Dec. 740, holding that the lien of a judgment attaches to the interest of the judgment debtor in land, and not to the naked legal title; and that a purchaser from the judgment debtor who, at the time of the rendition of the judgment, holds under an imperfect or equitable title which is afterwards perfected by conveyance placed of record, may set up such defense against the judgment creditor or against a purchaser at a sale under such judgment made after the recording of such perfected conveyance.

Cross reference. See further on this question, annotations and cross references under *Welton v. Tizzard* (15 Iowa 495) ante. p. 371.

2. **Chancery Actions—Appeal—When not Tried De Novo—Insufficient Record.**—When upon an appeal in a chancery action, it does not appear from the recitals in the decree, by a bill of exceptions, the certificate of the clerk of the district court, or in some other com-

petent manner that the transcript contains all the evidence introduced below, a trial *de novo* upon the merits will not be had, p. 95.

Reaffirmed and qualified in Winslow, Harris & Co. v. Turner, 20 Iowa 295, holding that where objection to a trial *de novo* on an appeal in a chancery action (on the ground that the pleadings and evidence are not part of the record), is made on the hearing, after appellant's argument is filed and in the absence of his counsel, the Supreme Court should affirm without prejudice to the right of appellant to prosecute another appeal.

Special cross reference. For further cases citing, sustaining and explaining the text, see annotations under Anderson v. Easton & Son (16 Iowa 56) ante. p. 406.

Cross references. See further on this question, annotations, notes and cross references under Rule 2 of Cook v. Woodbury County (13 Iowa 21) ante. p. 111; Garner v. Pomroy (11 Iowa 149) Vol. I, p. 791.

WORRELL v. WADE'S HEIRS, 17 IOWA 96

1. **Pleading in Equity—Dismissal of Bill—Effect on Cross-bill—Practice.**—The dismissal of a bill in chancery upon hearing, does not authorize the court to dismiss a cross-bill therein where the latter presents an issue separate from, although connected with the cause of action in the bill. In such case the defendant is entitled to a trial of the issue presented by the cross-bill, pp. 98, 99.

Reaffirmed, explained and extended in Spearing v. Chambers and Ingham, 25 Iowa 101, holding further that (under Sec. 2892 of the Code of 1860) the dismissal by plaintiff of his bill in equity, does not authorize the dismissal of a cross-bill therein filed, unless the matter set up in the cross-bill is necessarily dependent upon the establishment by plaintiff of the facts set out in his bill.

Reaffirmed and extended in King v. Thorp, 21 Iowa 67, 68, holding further that where in an action at law, the defendant files an answer containing an equitable and separate issue in the nature of a cross-bill, it is reversible error for the court, pending a motion by the defendant to transfer to equity, upon the plaintiff dismissing his petition, to dismiss the cross-bill.

(Note.—The text and its citing cases were all decided under the Code of 1860.—Ed.)

COOLEY v. SMITH, EX'R., 17 IOWA 99

1. **Judgment of Supreme Court Contrary to Direction in Opinion—Collateral Attack.**—That a judgment in the Supreme Court is contrary to that directed to be entered by the opinion in the case, is not a ground for its collateral attack, p. 102.

Reaffirmed, explained and extended in Goodenow v. Litchfield, 59 Iowa 231, 9 N. W. 109, holding that the judgment or decree of a

court of last resort controls the written opinion thereof, and when they conflict, the former prevails and determines the rights of the parties: That when a decree upon an appeal to the Supreme Court of the United States simply affirms the decree of the Circuit Court of the United States, its effect is to only determine matters adjudicated by the circuit court, although the opinion in the case may exceed such determination of the latter.

2. Decedent's Estate—Claims Against of Fourth Class—When not Barred by Failure to Prove and File within Statutory Period.—Claims of the fourth class against the estate of a decedent must (under Sec. 2405 of the Code of 1860) be proved and filed in the county court within a year and a half after the giving of notice of the death of the decedent and of the appointment and qualification of the personal representative, or they are barred; but the limitation is inapplicable where such a claim is sued on in the district court within such period, p. 103.

Reaffirmed and extended in Crane v. Guthrie, 47 Iowa 544, holding further (under the Code of 1873) that a judgment in an action in the district court against the heirs and administrator of a decedent, to foreclose a mortgage on land of the latter given to secure his note, sufficiently establishes such claim against the estate.

(Note.—See further, sustaining, but not citing, the text, Woodward, Adm'r. v. Lavery, 14 Iowa 381.—Ed.)

Cross reference. See further on this question, annotations under Ferrall v. Irvine (12 Iowa 52) ante. p. 8.

3. Decedent's Estate—Concurrent Jurisdiction of County and District Courts for the Allowance of Claims Against.—The district and county courts have concurrent jurisdiction (under Sec. 2395 of the Code of 1860) for the allowance of a claim for a mere money demand against a decedent, p. 103.

Special cross reference. For cases citing, qualifying and impliedly overruling the text, see annotations under Sterritt v. Robinson, Ex'r (17 Iowa 61) ante. p. 493.

4. Decedent's Estate—Mere Money Demand Against—Approbation of County Court to Sue on in District Court—Waiver of Objection.—Even though it be necessary, under Sec. 2395 of the Code of 1860, for a creditor of a decedent to obtain the approbation of the county court before suing on a mere money demand, not involving the enforcement of a lien, in the district court [Note.—The contrary of which seems to be decided by the court in this case.—Ed.], yet such objection is cured by a judgment in the district court, and cannot be thereafter collaterally raised, p. 104.

Cited and varied in Manker v. Phoenix Loan Ass'n of St. Joseph, Mo., 124 Iowa 344, 100 N. W. 38, holding that one who voluntarily

invokes the aid of a court cannot, after judgment, question its jurisdiction.

Cross reference. See further, Rule 3 and cross reference there found.

URBAN *v.* HOPKINS, 17 IOWA 105

1. Wills—Sale of Real Estate Devised, upon Happening of Contingency—Widow as Executrix—Marriage of—Effect.—Where a will directs that upon the happening of a certain event or contingency the executor is to sell certain real estate, upon the happening thereof the executor may sell such property, and the question of whether or not a sale thereof is necessary to pay the testator's debts, or whether or not the executor acted in good or bad faith in the management of the fiducial affairs is immaterial. So, where a will provides that if testator's widow marries, the homestead tract is to be sold by the executors, and the widow and another are executors, the marriage of the widow (under the statute of 1843) terminates her authority and fiducial capacity, and the remaining executor may sell such property, pp. 106, 107.

Reaffirmed and extended in Iowa Loan & Trust Co. *v.* Holderbaum, Ex'r., 86 Iowa 12-14, 52 N. W. 554, holding further that an authority in a will to the executor to sell testator's real estate to pay debts, or to borrow money and make mortgages thereon for such purpose as the executor deems to the best interests of the estate, confers authority to the executor to sell all or any portion of the property, or to borrow money at different times from different persons and make mortgages for the loans, on all or any portion thereof: And that the mortgagees or lenders of money, in such last case, to the executor are not bound to see to the application of the funds, and, in the absence of fraud, their mortgages are not affected by his (the executor's) misappropriating the funds derived from the loans.

Reaffirmed and extended in Iowa Loan & Trust Co. *v.* Holderbaum, Ex'r., 86 Iowa 13, 52 N. W. 554; *In re Estate of Manning*, 134 Iowa 171, 172, 111 N. W. 412, holding further that where an executor, trustee or other fiduciary borrows money without authority, but the estate, or *cestui que trust* gets the benefit thereof, the transaction binds the estate, or *cestui que trust*, and the lender may recover the amount loaned, with legal interest against the fiduciary, to be paid out of the estate or trust property.

GREGG *v.* THOMPSON, 17 IOWA 107

1. Courts of General Jurisdiction—Presumption as to Jurisdiction and Regularity of Proceedings—Defective or Insufficient Original Notice—Collateral Attack of Judgment.—In order for a judgment of a court of general jurisdiction to be void and subject to

collateral attack by reason of the insufficiency of the original notice or of its service, it must amount to *no notice*; *defective* original notice or service thereof, must be corrected by motion and appeal, pp. 108, 109.

Unreported citation, 124 N. W. 358.

Cross reference. See further on this question, annotations and cross references under *Boker v. Chapline* (12 Iowa 204) ante. p. 33.

BEATTY v. GREGORY, 17 IOWA 109, 85 AM. DEC. 546

1. Mines and Mining—Parol License to Mine Acted on by Licensee—Revocation by Licensor—Ejectment by Licensee.—Where under a parol license to mine and dig for minerals, which license does not provide when it shall terminate, the licensee takes possession and expends labor and money in the preparation for and opening of the mine, he is a tenant at will, and the licensor cannot revoke such license without first giving the notice required by the statute for the termination of tenancies at will, or by compensating the licensee for his expenditures.

Where such a licensee has not abandoned or forfeited his license, and it has not been legally revoked by the licensor, he may maintain ejectment against the licensor or his subsequent licensee who takes with notice of the former license, to obtain possession of the mine, and its appurtenances, pp. 114-116.

Reaffirmed in *Hosford v. Metcalf*, 113 Iowa 243, 84 N. W. 1055.

Reaffirmed and extended in *Anderson v. Simpson*, 21 Iowa 401, 402, holding further that a parol license to mine, where the licensee enters into actual possession of the mine and expends labor or money in its operation, is not within the Statute of Frauds: Holding further that where a licensee thereof agrees with his licensor that he will cease to operate it, but will commence again when the licensor gives him notice so to do, the cessation of operation not to work a forfeiture of the license, that such an agreement is good except as to subsequent licensees, without notice thereof, from the licensor—A case wherein the licensee proceeded by injunction to restrain the interruption of his rights.

Reaffirmed and extended in *Harkness v. Burton*, 39 Iowa 104, holding further that a parol license to mine in lands, part of which is homestead, is not required to be concurred in by the wife of the licensor: That injunction lies in favor of a licensee under a parol license who has expended money or labor thereunder, to restrain a licensor who has not revoked the license as in the text, and his subsequent lessee or licensee, from mining in or upon the land included in the first license.

Reaffirmed and extended in *Cook v. C. B. & Q. R. R. Co.*, 40 Iowa 455, holding further that where a licensee under a parol license in

relation to land, has acted under the authority conferred, and incurred expense in its execution, equity regards it as an executed contract, and will not permit it to be revoked.

(Note.—The license in this last case was for the construction of a ditch.—Ed.)

Reaffirmed and extended in Ruthven v. Farmers' Creamery Co., 140 Iowa 575, 118 N. W. 917, holding that a parol license to lay tile over land for the purpose of drainage, and which has been fully executed, is irrevocable; that a parol license in relation to land is irrevocable, when fully executed.

Reaffirmed and extended in Vannest v. Fleming, 79 Iowa 644, 44 N. W. 908, 18 Am. St. Rep. 387, 8 L. R. A. 277, holding that a fully executed parol license in relation to land, is irrevocable; Holding further that where adjoining land owners construct a ditch across their land at their joint expense and labor, the right thereto is mutual, and neither party or his privies can annul the agreement without the consent of the other or his privies.

Reaffirmed and varied in Grant v. City of Davenport, 18 Iowa 188-195, holding that where a city by an ordinance releases its title and interest to a Landing on a river to the dedicator of land who claimed to have reserved it from his dedication, it cannot thereafter claim title to or interest in or control over it, as against a subsequent purchaser from the dedicator who has held possession thereof for more than fifteen years and who has placed valuable improvements thereon.

Reaffirmed and varied in Anderson v. Acheson, 132 Iowa 753, 755, 110 N. W. 338, holding that one who buries his dead in a lot under a parol license therefor, may maintain an action for damages against the owner of the fee or strangers, for any unlawful disturbance of his possession thereof.

Reaffirmed and qualified in Upton & Swivel v. Brazier, 17 Iowa 157, holding that a license to mine is revocable at the will of the licensor, unless the licensee has taken actual possession of the mine and expended labor or money in preparing to or actually working it: That a license to mine will not be held to be an *exclusive* right therefor, unless such fact be clearly expressed or necessarily implied: And that a license to mine gives the licensee only a right to mine in the range or crevice of which he takes actual possession and expends labor or money in preparing to or actually operating.

Reaffirmed and qualified in Kipp & Kendall v. Coenen & Bechtel, 55 Iowa 65, 66, 7 N. W. 419, holding that where a licensee under a parol license in relation to land has expended no money and done no act towards the object of the license which would, in case of revocation, result in injury to him, such license may be revoked by the licensor. In such case revocation may be inferred from acts of the licensor inconsistent with the validity of the license.

2. Mines and Mining—License for—Forfeiture—Custom as Controlling.—A general and uniform custom among miners and owners of mineral lands as to when and for what causes a failure to work the mine will not cause a forfeiture is, in the absence of an express agreement to the contrary, admissible in an action involving an issue as to forfeiture thereof for failure to operate, pp. 118, 119.

Special Cross reference. For cases citing, sustaining, explaining, etc., the text and many others, see annotations under Rule 2 of Rindskoff Bros. v. Barrett (14 Iowa 101) ante. p. 211.

DUBUQUE & SIOUX CITY R. R. Co. v. CITY OF DUBUQUE, 17 IOWA 120

1. Municipal Corporations—Taxation of Real Estate of Railroad by.—The court is equally divided as to the power of a municipal corporation to tax real estate situated within its corporate limits and belonging to a railroad company, p. 123.

Cited in City of Davenport v. C. R. I. & P. R. R. Co., 38 Iowa 649, note, the case holding that a city authorized by charter to levy and collect taxes upon "all taxable property" within its limits, may tax the depot grounds, tracks and other real estate of a railroad company therein.

2. Cities and Towns—Municipal Taxation—Railroads—Rolling Stock.—Under the Code of 1860, and Chap. 173, Laws of 1862, rolling stock of a railroad company is not subject to taxation for municipal purposes by a city or town, p. 123.

Cited in City of Dubuque v. C. D. & M. R. R. Co., 47 Iowa 201, (cited in dissenting opinion, 213) holding that it is within the power of the Legislature to provide, in any proper manner, for the valuation of property, and to fix its *situs* for the purposes of taxation: Holding further that Chap. 26, Laws of 1872, relative to the assessment for taxation of property of railroad companies by the census board, etc., is constitutional.

Overruled in City of Dubuque v. Ill. Cent. R. R. Co., 39 Iowa 76, 84, 87, (cited with approval, 89) holding that the rolling stock of a railroad company is subject to municipal taxation in the city wherein it has its chief place of business in this state.

MASSIE v. MANN, 17 IOWA 131

1. Actions—Bonds in—Attorney at Law Not to be Surety on—Effect of His Becoming Surety on.—Section 3446 of the Code of 1860, prohibits an attorney at law from becoming a surety on any bond in any action or proceeding in court: But the fact that an attorney at law becomes surety on an injunction bond is not ground for the dissolution of the writ, without plaintiff being first given a reasonable opportunity to supply a sufficient bond; and in no case will such defective bond be a ground for dismissal of the action, p. 132.

Reaffirmed and narrowed in Valley Nat'l Bank v. Garretson, 104 Iowa 656-658, 74 N. W. 12, holding that Sec. 3446 of Chap. 163 of the Code of 1860, and Sec. 2931 of the Code of 1873, corresponding to it, prohibiting an attorney at law from becoming surety in any proceeding in court, applies to all proceedings and to all courts; and that an attorney at law cannot thereunder become surety upon an appeal bond appealing a judgment in a justice's court to the district court: That in such a case where there are no other sufficient sureties on the bond, the appeal will be dismissed.

2. Injunction—Dissolution—Effect on the Action.—A dissolution of an injunction does not operate to dismiss the action in which it is issued, but the plaintiff has a right to be heard upon the merits of his cause of action, p. 132.

Reaffirmed and explained in Russell v. Wilson & Co., 37 Iowa 377, 378, holding that where in an injunction action, the petition states facts showing plaintiff to be entitled to an injunction, and the answer makes an issue and denies every allegation of the bill, the temporary injunction may be dissolved; but the plaintiff is entitled to a hearing on the merits, as he may be entitled to an injunction upon final decree.

Cross reference. See, in this connection, annotations, note and cross reference under Anderson v. Reed (11 Iowa 177) Vol. 1, p. 798.

3. Execution from Supreme Court—Injunction by District Court.—The district court of a county wherein land levied upon under an execution from the Supreme Court is situated, may, upon proper showing, enjoin proceedings thereunder, p. 133.

Overruled in Phelan v. Johnson, 80 Iowa 731, 732, 46 N. W. 70, holding that under Sec. 3396 of the Code of 1873, a suit to enjoin an action or a judgment must be brought in the county and court in which the action is pending or in which the judgment was obtained: And that the district court of a county other than that wherein the original action was commenced and judgment appealed from rendered, has no jurisdiction to enjoin proceedings under an execution from the Supreme Court: The court further saying: "We need not determine now whether we would entertain an original injunction proceeding, to set aside for fraud a judgment rendered in this court. It will be time enough to decide that question when a case arises which presents it. It is very clear that if we would not entertain such a case, under Code (1873), Sec. 3396, it should be commenced in Polk County, wherein this court is held, or if the case wherein this court rendered judgment is pending in the court below, it should be commenced in the proper court of the county in which the action is pending."

4. Vendor and Purchaser of Land—Purchaser Assuming to Pay Incumbrance—Rights of Parties—Subrogation—Rights of Third Persons.—A purchaser of mortgaged realty who assumes the debt, or covenants to pay it, is, as between himself and his vendor

(mortgagor), a principal, and upon the vendor paying a note secured by such mortgage, he is entitled to be subrogated to all the rights of the mortgagee as against such purchaser, but not as against the holder of another note thereby secured or a purchaser at a foreclosure sale to satisfy it, pp. 135, 137.

Reaffirmed and extended in Kellogg v. Colby, 83 Iowa 519-521, 49 N. W. 1003, holding further that a purchaser of land assuming to pay a mortgage thereon as a part of his purchase price, will not, upon its payment, be subrogated to the rights of the mortgagee as against a purchaser at a foreclosure sale of a junior mortgage made by his vendor and of record at the time of his purchase of such property.

Special Cross reference. For further cases citing, sustaining, etc., the text and many others on the question, see annotations under Corbett v. Waterman (11 Iowa 86) Vol. 1, p. 778.

Cross reference. See further on this question, annotations under Moses v. Clerk of Dallas District Court (12 Iowa 139) ante. p. 27.

STATE v. VANCE, 17 IOWA 138

1. **Homicide—Provocation not Amounting to Self Defense, may Reduce Killing to Manslaughter.**—Where accused kills a person under great provocation, but not such as invokes self defense, the crime may be thereby reduced to manslaughter, but will not be completely excused or justified, p. 144.

Cited in 147 Iowa 569, 126 N. W. 692.

2. **Homicide—Trespass on Property not Dwelling—Killing with Deadly Weapon—Murder.**—Trespass against property, not a dwelling house, does not justify a killing by the owner by use of a deadly weapon; and such a killing will be murder, although actually necessary to prevent the trespass, p. 144.

Reaffirmed and extended in Hooker v. Miller, 37 Iowa 614, 615, 18 Am. Rep. 18, holding further that one setting a spring gun in his vineyard, is liable in damages for injuries thereby caused to one entering it, either in the night or day, for the purpose of taking grapes without permission.

3. **Homicide—Argument of the Court in Charge to Jury—What Proper.**—An instruction or charge of the court to the jury in a criminal prosecution is not improper as argumentative, nor reversible error, when the entire instructions or whole of the charge shows that the court felt the necessity of fairly and fearlessly administering the law. So, upon the trial of one for murder in shooting a person who was committing a bare trespass to his (defendant's) property, not dwelling house, it is not error for the court to state in his charge to the jury that "boys have no right to enter a melon patch of another, and help themselves to his melons without his consent; but it would be a reproach to the laws of any state or country, to hold that for such an

act, the owner has a right, without notice or warning, to shoot them down and take their lives," p. 148.

Reaffirmed in State v. Decklotts, 19 Iowa 450, holding that upon the trial of an indictment for murder it is not improper or reversible error for the court, in his instructions to the jury, to say that "You should endeavor to move forward in the discharge of this duty without hesitation, fear or favor, let the result and its consequences be what they may. The good of society requires that crime should be surely and promptly punished. No considerations of sympathy or excessive kindness should for a moment deter you from finding the defendant guilty, if you are satisfied from the testimony, beyond a reasonable doubt that he is so guilty. On the other hand you are to be uninfluenced by any excitement or prejudice in the community, which has less reliable knowledge of the facts and less legal and moral responsibility than you have, acting upon oath. The vast importance to the defendant, of the result of your deliberations, should alone prompt you to a careful and full investigation of the whole case, actuated by but one motive, that of doing entire justice under the evidence, and the law as given you by the court"—The court holding further that in cases of such magnitude, instructions which enjoin upon the jury a full, careful and conscientious consideration of the case, and a manly discharge of duty, are entirely proper.

STATE v. ST. CLAIR, 17 IOWA 149

1. Receiving and Aiding in Concealing Stolen Property—Sufficiency of Evidence to Convict.—In order to convict one under an indictment for receiving and aiding in concealing stolen property, knowing it to be stolen, it is not necessary to prove that the accused actually received and concealed it. It is sufficient if he was present, knew it was stolen property, and saw it hidden by another, afterwards keeping silent and refusing to give information to the officer searching for it, unless these facts be satisfactorily explained. Knowledge by the accused of the property having been stolen may be inferred from the circumstances of the case, pp. 152, 153.

Reaffirmed in State v. Turner, 19 Iowa 153, 154.

UPTON & SWIVEL v. BRAZIER, 17 IOWA 153

1. Mines and Mining—License for—When not Exclusive—Parol License—When Revocable.—A license to mine will not be held to be an *exclusive* right therefor, unless such fact be clearly expressed, or necessarily implied.

A parol license to mine is revocable at the will of the licensor unless the licensee has taken actual possession of the mine and expended labor or money in preparing to or actually working it, in which last case the licensee is entitled to notice as a tenant at will or

compensation for his expenditures upon revocation. A license to mine gives the licensee only the right to mine in the range or crevice of which he takes actual possession and expends labor or money in preparing to or actually operating, p. 157.

Reaffirmed in Halpin & Co. v. McCune, 107 Iowa 496, 78 N. W. 211.

Special cross reference. For further cases citing the text and others, see annotations under Rule 1 of Beatty v. Gregory (17 Iowa 109 ante. p. 504.

HAYDEN FOR USE OF ADAMS v. ANDERSON, 17 IOWA 158

1. Pleadings—Demurrer—When Proper—Demurrer to Particular Count of Pleading—What Admitted by.—A demurrer is only proper when the *entire* pleading or the particular count demurred to, fails to state a sufficient cause of action or defense. A demurrer admits facts pleaded, but controverts their legal sufficiency, p. 162.

Reaffirmed in Clark v. Cress, 20 Iowa 53, 54; Johnson v. Tantlinger, 31 Iowa 503; Benedict v. Hunt, 32 Iowa 31; Wright v. Connor, 34 Iowa 242; Schulte & Wagner v. Hennessy, 40 Iowa 354; Dist. Township of White Oak v. Dist. Township of Oskaloosa, 44 Iowa 518; Delaware County Bank v. Duncombe, 48 Iowa 492; Gordon v. Ch. R. I. & P. Ry. Co., 129 Iowa 756, 106 N. W. 180.

(Note.—See further, sustaining, but not citing, the text, In re McMurray's estate, 107 Iowa 648, 78, N. W. 691; C. I. & D. R. R. Co. v. C. R. I. F. & N. W. R. R. Co., 67 Iowa 324, 25 N. W. 263; Holbert v. B. & M. R. R. Co., 38 Iowa 315; Bonney v. Bonney, 29 Iowa 448, and there are others.—Ed.)

2. Pleadings—Irrelevant, Redundant or Improper Matter in—Motion to Strike.—Irrelevant, redundant, improper, or scandalous allegations or matter in a pleading or a count thereof, when it is otherwise good, is to be reached by motion to strike and not by demurrer, pp. 162, 163.

Reaffirmed in Johnson v. Tantlinger, 31 Iowa 503; Wright v. Connor, 34 Iowa 242; Schulte & Wagner v. Hennessy, 40 Iowa 354; Delaware County Bank v. Duncombe, 48 Iowa 492.

3. Replevin—Action on Bond—Conclusiveness of Judgment in Replevin as to Ownership of Property.—Where a judgment in an action of replevin only adjudicates the right to *possession* of the property to be in the defendant, then in an action on the bond the defendants (plaintiff in replevin and his sureties) may show, in mitigation of damages that the plaintiff (defendant in replevin) was not or is not the owner of the property: But where in a replevin action the plaintiff avers ownership of the property and the answer makes an issue thereon, the judgment against him therein concludes the plaintiff

and his sureties from thereafter raising such question of ownership, pp. 164, 165.

Cited in Harward v. Davenport, sheriff, and Johnson, 105 Iowa 599, 75 N. W. 490, holding that a mortgage on personal property given by one not the owner thereof is of no effect, and that a judgment for its foreclosure and sale on execution thereunder, does not preclude the true owner from maintaining replevin therefor.

Cited in Williams v. Chapman, 60 Iowa 58, 14 N. W. 89, not in point.

Cross references. See Rule 4 hereof. See further on this question, Hawley v. Warner (12 Iowa 42) ante. p. 7, and cross references there found.

4. Replevin—Res Adjudicata—Failure of Party to Prove Issue.—The failure of a party to introduce proof upon an issue in replevin, does not affect the conclusiveness of the judgment therein rendered upon the issue raised by the pleadings, p. 165.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Whitaker v. Johnson County (12 Iowa 595) ante. p. 102.

ABELL v. CROSS, 17 IOWA 171

1. Actions—Service of Notice by Publication—What Record Must Show—Void Judgment.—When the notice in an action is served by publication, the record must show that all the requirements of the statute were strictly complied with, or the court will have no jurisdiction, and a judgment rendered thereunder will be void, pp. 174, 175.

Reaffirmed in Bardsley v. Hines, 33 Iowa 158, 159; Bradley v. Jamison, 46 Iowa 71; Miller v. Corbin, 46 Iowa 151, 152; Royer v. Foster, 62 Iowa 324, 17 N. W. 517, all under the Code of 1851, and Chap. 240 of the Acts of 1856-1857.

Reaffirmed and explained in Priestman v. Priestman, 103 Iowa 323, 72 N. W. 536, holding that the filing of the affidavit required by Sec. 2618 of the Code of 1873, is a condition precedent to the conferring of jurisdiction upon the court in an action against a non-resident, and a judgment rendered against such a defendant served only by publication, when the affidavit has not been filed, is *void*: That the rule applies when the affidavit is filed *after the publication of the* notice in the newspaper for one or more issues, but before the completion of the publishing thereof by insertion in other issues.

Reaffirmed and extended in Empire Real Estate & Mort. Co. v. Beechley, 137 Iowa 9, 10, 114 N. W. 557, holding further that Sec. 3536 of the Code of 1897, in reference to the proof of notice by publication, must be strictly complied with, or a judgment in such an action will be void: That where the plaintiff in such an action administers

the oath required by such section to the publisher of the newspaper making the publication, or his foreman, a judgment entered therein thereon is void, as well as all proceedings thereunder.

Reaffirmed and narrowed in Little v. Chambers, 27 Iowa 525-527, holding that where a decree is rendered in an action, for foreclosure of a tax title, wherein all the requirements of the statute in relation to service of notice by publication are shown by the record to have been complied with, except that in his affidavit for such service the plaintiff states that the defendant "could not be found within the state; that his name and residence were unknown, and could not with reasonable diligence be ascertained," that the fact that the facts constituting such diligence were not set out in the affidavit, will not render the decree *void* on its face and subject to collateral attack.

Cited with approval in Melhop & Kingman v. Doane & Co., 31 Iowa 400, 7 Am. Rep. 147, a case involving the effect of a foreign judgment, and holding that in order for a judgment to be valid, the court must have jurisdiction both of the subject-matter and of the parties.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a collateral attack of a judgment.

Distinguished and narrowed in Sweeley v. Van Steenburgh, 69 Iowa 699-701, 26 N. W. 79, holding that under Sec. 2618 of the Code of 1873, a judgment rendered upon a notice by publication as allowed by such section, is valid, when the records show that the notice was published in the manner and for the length of time prescribed by law, before the rendition of the judgment, if the defendant is *in fact* a non-resident, although proof of such non-residence be not shown by the record— But see Carnes v. Mitchell, 82 Iowa 606, 607, 48 N. W. 943, (reaffirming the text) distinguishing the above case, and holding that unless an affidavit be filed stating, as required by Sec. 2618 of the Code of 1873, that personal service cannot be made on the defendant within this state, that a decree rendered upon a service by publication, in an action involving a matter allowing service by publication under such section, is *void* for want of jurisdiction of the court.

(Note.—See further on this question, Snell v. Meservy, 91 Iowa 323, 59 N. W. 32; Chase v. Kaynor, 78 Iowa 450, 43 N. W. 269; Taylor v. Ormsby, 66 Iowa 109, 23 N. W. 288; Fanning v. Krapfl, 61 Iowa 417, 14 N. W. 727, important cases on this question, not citing the text.—Ed.)

Cross reference. See further on this question, annotations and note under Rule 1 of Tunis v. Withrow (10 Iowa 305) Vol. 1, p. 688.

2. Tax Sales—Strict Compliance with Statute.—Where it is sought to divest the owner of real estate of his title, by *ex parte* pro-

ceedings for his failure to pay taxes, strict conformity with the law in relation thereto is required, p. 176.

Reaffirmed in Gardner v. Early, 69 Iowa 44, 28 N. W. 428, under the Code of 1873.

Reaffirmed and explained in Rima v. Cowan, 31 Iowa 127, holding that a tax sale of lands must be in strict conformity with the law in reference thereto, or it will be void: And that a sale for taxes of several distinct parcels of land in gross instead of in separate parcels, is void.

Reaffirmed and extended in Preston v. Van Gorder, 31 Iowa 253, 254, holding further that in the sale of land for taxes the county treasurer has only the authority conferred by and must strictly pursue the statute; and that where a tax sale of land is (under Sec. 763 of the Code of 1860) made for certain taxes, it cannot thereafter be sold for taxes for years prior to the sale.

AYRES v. HARTFORD FIRE INSURANCE CO., 17 IOWA 176, 85 AM. DEC. 553.

(Cases arising from same facts, 21 Iowa 185, 193.)

1. **Fire Insurance—Alienation, Mortgaging, etc., Property Insured—Effect.**—Where after the issuance of a fire insurance policy on property, the insured wholly aliens it and retains no interest therein, the policy is, as to him, at an end; but if an interest is still retained in the property by the insured, the policy protects the interest retained, unless there be stipulations in the policy to the contrary, p. 184.

Reaffirmed in Ayers v. Home Ins. Co., 21 Iowa 190.

2. **Fire Insurance—Stipulation in Policy Against Sale, Transfer, etc.—Effect.**—Where a policy of fire insurance stipulates that upon a sale, transfer or change of title in the property insured, the policy shall be void and cease, etc., then if there be a change or transfer of title to such an extent that the insured will have greater temptation to burn the property or less interest and watchfulness in guarding it from destruction by fire, the policy is void and ineffective: But a mere change or transfer of title which is no more than nominal, or where the real ownership in fact remains the same, although the evidence of the title be changed or transferred, will not affect the effectiveness of the policy, pp. 185, 186.

(Note.—The above text was decided by two judges, one other judge holding that under such a stipulation any sale, transfer or change of title in the property avoided the policy, and one judge did not take part in the opinion.—Ed.)

Reaffirmed in Ayers v. Home Ins. Co., 21 Iowa 190, 191; Cone v. Century Fire Ins. Co., 139 Iowa 207, 208, 117 N. W. 308.

Reaffirmed and explained in Simeral v. Dubuque Mut. Fire Ins. Co., 18 Iowa 323, holding that a fire insurance policy does not pass so as to continue the liability of the insurer to an assignee or purchaser

of the property insured, unless consent is given by the properly authorized officers of the insurer: That where a policy of insurance makes the charter and by-laws of the insurer part thereof, and they provide how such policy is to be continued in case of assignment or sale of the property insured, then an assignee or purchaser of the property must pursue the provisions of the charter and by-laws in relation thereto in order to obtain any rights under the policy.

3. Insurance Companies—Misrepresentations by Insured—Acts of Agent—Estoppel by.—Where a local agent has authority only to receive and forward applications for insurance to an insurance company, parol evidence is inadmissible to prove that the agent incorrectly took down, or changed the statements in such an application: But if a local agent of such a company has the power to and does pass upon a risk without submitting it to the insurer, and fails to correctly take down facts stated by the applicant, in ignorance of which the application is signed, then, in the absence of an express provision in the policy to the contrary, the insurer is thereby estopped from claiming any rights by reason thereof, p. 190.

Reaffirmed in Ayers v. Home Ins. Co., 21 Iowa 192.

Reaffirmed and extended in Anson v. Winnesheik Ins. Co., 23 Iowa 86, 89, 90, holding further that where a local agent of a fire insurance company, *with full power to take risks*, at the time of taking an application for a fire insurance policy knows that an ancestor to whom the property formerly belonged, is dead, and tells the heirs applying for the insurance that it will have to be taken in the ancestor's name, that such facts estop the insurer from claiming that it is not liable for loss under the policy to the heirs of the ancestor, although the policy was issued in the name of the dead person.

Reaffirmed and varied in Armstrong v. State Ins. Co., 61 Iowa 215, 217, 16 N. W. 96, holding that authority to an agent of a fire insurance company to take applications, receive and receipt for premiums, forward applications and premiums, and receive from the company policies of insurance when issued, and deliver them to insured, does not give such agent authority to make a contract of insurance for his company; and the fact that such agent counter-signed policies issued by the company before he delivered them, does not give such power.

Reaffirmed and narrowed in Bartholomew v. Merchants' Ins. Co., 25 Iowa 514-516, 96 Am. Dec. 65; *Hingston v. Aetna Ins. Co.*, 42 Iowa 47, holding that if an applicant for insurance truly answers the questions asked, and the agent for the insurance company does not truly take down the answers, but deceives and misleads, although not designedly, the applicant into the belief that his application is all right, and the application is signed by reason of such conduct of the agent, the company is liable under a policy issued thereon.

Cited in *Viele v. Germania Ins. Co.*, 26 Iowa 74, note, 96 Am. Dec. 83, an important case involving waiver of conditions in a policy of insurance by the insurance company, etc.

4. Insurance Companies—Knowledge of Agent of Facts Avoiding Policy—Effect.—Knowledge on the part of a local agent of a fire insurance company of facts avoiding a policy for breach of a condition thereof by insured, does not, without more, amount to a waiver by the company to insist on its rights by reason thereof, p. 187.

Reaffirmed in *Dickinson County v. Miss. Ins. Co.*, 41 Iowa 290, holding that knowledge of the breach of the conditions of a policy of fire insurance by an agent who has only power to take applications and forward them to the insurance company, does not bind the latter or prevent its setting up such breach in an action on the policy.

5. Fire Insurance Policies—Proofs of Loss—Waiver of—Specific Objection to—Effect.—Mere silence will not amount to a waiver of defective proofs of loss as required by a fire insurance policy; but if proofs of loss under a fire insurance policy are furnished by the insured, and the insurer objects to them for specific reasons, the latter cannot defeat recovery on other reasons or objections to such proofs than those claimed at the time they were furnished. Proofs of loss by insured may be waived by the insurer, p. 192.

Reaffirmed in *Ayers v. Home Ins. Co.*, 21 Iowa 193; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa 565.

(Note.—See further, sustaining, but not citing the text, *Young v. Hartford Ins. Co.*, 45 Iowa 377.—Ed.)

Cross references. See further on this question, annotations under Rules 2-5 of *Keenan v. Mo. State Mut. Ins. Co.* (12 Iowa 126) ante. p. 24; *Keenan v. Dubuque Mut. Fire Ins. Co.* (13 Iowa 375) ante. p. 164.

6. Pleadings—Admissions in—Evidence.—An admission in a pleading is admissible in evidence against the party for whom it was filed, in another action against him: The presumption is that such pleading was filed by his consent and under authority, and this he must rebut by satisfactory evidence to destroy the effect of such admission, p. 188.

Reaffirmed and explained in *Shipley v. Reasoner*, 87 Iowa 557, 560, 54 N. W. 470, holding that if a party desires the advantage of an admission of his adversary contained in a pleading in the action which has been withdrawn or superseded by an amended and substituted pleading, he must regularly introduce the original pleading in evidence upon the trial, so that the adverse party may have an opportunity to explain it: That only the pleadings forming the issue being tried may be considered without being introduced in evidence.

Reaffirmed and extended in *Jones v. Clark*, 37 Iowa 588, 589, holding further that a paper signed by a party's attorney and filed in

an action is admissible against him therein to prove the facts therein admitted: That such paper is even admissible against him in another action.

Reaffirmed and extended in Peden v. Ch. R. I. & P. Ry. Co., 78 Iowa 136, 42 N. W. 627, 4 L. R. A. 401, holding further that admissions of record of an agent in an action wherein his principal is a party, are admissible against the latter in another action against him; but the principal may rebut them by showing in the last action that such agent had no authority to make them.

HUMPHREY v. MOORE, 17 IOWA 193

1. **Real Estate—Possession of by Vendee Under Parol Contract of Purchase—Constructive Notice.**—Actual possession by a purchaser who has paid the purchase money of real estate under a parol contract of purchase thereof, operates as constructive notice of his title and equity therein, to subsequent purchasers, mortgagees, and other persons dealing therewith adversely to him, p. 194.

Special cross reference. For cases citing and sustaining the text and many others, see annotations under Rule 2 of Baldwin v. Thompson (15 Iowa 504) ante. p. 374.

HOOK v. MOWRE, 17 IOWA 195

1. **Fraudulent Conveyances—Conveyance Merely Voluntary—Actual Fraudulent Intent—Rights of Subsequent Creditors.**—A subsequent creditor of the grantor cannot assail a prior conveyance on the mere ground that it was voluntary, where there is no proof of a fraudulent intent on the part of the grantor; but where the fraudulent conveyance is actually fraudulent and the property is held in secret trust for the grantor who is permitted to obtain credit or draw in creditors, on the faith of his possession and apparent and asserted ownership, such creditor may have relief against such conveyance for no other reason than that he has been defrauded, p. 202.

Reaffirmed in Brainard v. Van Kuran, 22 Iowa 265.

Reaffirmed and explained in Stewart v. Rogers, 25 Iowa 398, 95 Am. Dec. 794, holding that in the absence of an existing actual intent to defraud, whether a voluntary conveyance to a child will be void as to the creditors of the father (grantor) will depend upon its reasonableness, and the condition of the grantor as respects his ability to pay his debts out of the property retained by him.

Reaffirmed and explained in Bonnell v. Allerton, 51 Iowa 176, holding that a deed made intentionally to defraud existing creditors is fraudulent as to subsequent ones.

Reaffirmed, explained and extended in Brundage v. Cheneworth, 101 Iowa 262, 263, 70 N. W. 211, 63 Am. St. Rep. 382, holding that where a conveyance is merely voluntary and the grantor had no

fraudulent intent; it cannot be set aside by a subsequent creditor: That a conveyance actually and intentionally fraudulent as to existing creditors, as a general rule is not fraudulent as to subsequent creditors, but that this rule admits of exceptions, such as when the conveyance is made by the grantor with the express intent and view of defrauding those who may thereafter become creditors, or cases wherein the grantor makes the conveyance with the express intent of thereafter becoming indebted, or cases of voluntary conveyances where the grantor pays existing creditors by contracting other indebtedness in a like amount, when the subsequent creditors are subrogated to the rights of the creditors whose debts their money has paid, or cases in which one makes a conveyance to avoid the risks or the losses likely to result from new business ventures: And that if a conveyance is actually fraudulent as to existing creditors and is merely colorable and the property is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors.

Reaffirmed and extended in Gardner v. Cole, 21 Iowa 213, 214, holding further that where a conveyance to land is voluntary and tainted with actual fraud, and the grantor after its execution retains possession of the property and sells it to another for a valuable consideration, who has no *actual notice* of the first deed, the latter purchaser may avoid the voluntary fraudulent conveyance.

Reaffirmed and extended in Barhydt & Co. v. Perry, 57 Iowa 419, 10 N. W. 821, holding further that where one member of a partnership conveys his entire individual real estate, without consideration, to a third person, such conveyance is constructively fraudulent and void as against the partnership creditors, although the conveyance was made in good faith: And further holding that where a debtor borrows money with which he directly or indirectly satisfies creditors existing at the time of a fraudulent conveyance, such subsequent creditor has the same rights as the prior creditors so satisfied.

Cited with approval in Baldwin v. Tuttle, 23 Iowa 74, holding that where a conveyance of land to a wife recites that it is for the consideration of "love and affection" and a sum of money, it is, on its face, fraudulent as against a creditor of the grantor at the time of its execution.

Cited with approval in Huntington, Wadsworth & Parks v. Jewett, Tibbets & Co., 25 Iowa 251, 95 Am Dec. 788, holding that a judgment that a conveyance is fraudulent as to certain creditors (plaintiffs in the action) is not evidence that it is fraudulent as to other creditors of the grantor, or other persons who were not parties to the action wherein the judgment was rendered.

Cited with approval in Day v. Lown, 51 Iowa 369, 370, 1 N. W. 790, holding that where a grantor sues to set aside a conveyance because it was procured by fraud, and the defendant (fraudulent

grantee) depends on the ground that it was executed to defraud creditors, the plaintiff (grantor) will not be denied relief unless the defendant shows that at the time of the execution of the conveyance the plaintiff actually had creditors who were thereby defrauded.

Cross references. See further on this question, annotations under *Fifield v. Gaston* (12 Iowa 218) ante. p. 35; *Lyman v. Cessford* (15 Iowa 229) ante. p. 330; *Whitescarver v. Bonney* (9 Iowa 480) Vol. I, p. 611.

MCBRIDE *v.* PORTER, 17 IOWA 203

1. **Trust Property not to be Diverted—Property in Trust for Corporations or Voluntary Associations—Rights of Majority of Members.**—Where property is held by a corporation, or a voluntary association absolutely and without limitation, a majority of the members may dispose of, retain, occupy and manage it as they please, admitting the minority to the same benefits as themselves; but where property is conveyed in trust for a corporation, or voluntary association, subject to a limitation, it is not within the power of the majority, minority, or even all of the members, to divert the property from the use and trust for which it was conveyed, pp. 206, 207.

Reaffirmed and extended in *First Presbyterian Church v. Congregational Society*, 23 Iowa 572, 573, holding that where realty is conveyed to the trustees and their successors of a particular religious society or association, neither the trustees or a majority of the members may divert it from use by the particular religious society or association for which it was conveyed: That in such case a lease by the trustees or majority of the members thereof of such realty to another religious society or association, is void.

Cited with approval in *Hubbard v. German Catholic Congregation*, 34 Iowa 35, 37, 39, involving the right of a majority of the members of a religious society or association to mortgage or sell its real estate to pay its debts— The property not being held in trust, but owned absolutely by the society or association.

STATE FOR USE OF SCHOOL FUND *v.* LAKE, 17 IOWA 215

1. **Mortgage—What Extinguishes—Effect of Judgment on Note Secured by.**—The lien given by a mortgage on land is not extinguished by a judgment on a note thereby secured: Only satisfaction of the debt which a mortgage is given to secure, extinguishes it; and it is not affected by a change of a note it secures, the giving a different instrument evidencing the lien debt, or by judgment on the indebtedness, p. 219.

Reaffirmed in *Chase v. Abbott*, 20 Iowa 158.

Reaffirmed and explained in *Port v. Robbins*, 35 Iowa 209, 210, holding that no change in the form of the evidence of the indebted-

ness secured or the manner of time of payment thereof, will operate to discharge a mortgage or lien thereunder: Only actual payment of the debt, or an express release will have such an effect.

Reaffirmed and extended in *Moore v. Ellsworth*, 22 Iowa 300, 301, holding further that a mortgage lien is not extinguished until the debt is paid; and that the fact that a mortgage creditor, or lienholder, presents his claim against a decedent (mortgagor) and has it approved and allowed, does not bar his right to sue in equity and foreclose the lien.

Reaffirmed and extended in *Jordan v. Smith*, 30 Iowa 501, 502, holding further that a judgment at law against the principal and surety on a mortgage note, does not extinguish the mortgage lien.

Reaffirmed and extended in *Freeburg v. Eksell*, 123 Iowa 468, 99 N. W. 120, holding further that an action to foreclose a mortgage is not barred by the statute of limitation until the debt it is given to secure is so barred.

Reaffirmed and qualified in *Clinton County v. Cox*, 37 Iowa 572, *Freeburg v. Eksell*, 123 Iowa 468, 99 N. W. 120, holding that the lien of a mortgage continues until its debt is paid, or discharged, or the mortgage is released, or the debt, by operation of law, can no longer be enforced.

Reaffirmed and qualified in *Morrison v. Morrison and Berry*, 38 Iowa 78, holding (as does the present case) that where a party sues at law and recovers on a mortgage note, he is entitled to the rights and remedies provided by law for judgments at law, and that such a judgment is a lien only from its rendition, *as against third persons*, unless it specially recites the fact of its being for a lien note, describes the property, and orders a special execution: But as between the parties, a mortgage lien is not extinguished by such a judgment, or by anything other than the satisfaction of the debt.

Reaffirmed and qualified in *Washington County v. Slaughter*, 54 Iowa 268, 6 N. W. 292, holding that where one purchases a judgment or buys land sold under execution thereon, after a prior mortgage by the judgment debtor on the land has been released of record, he takes it discharged of the prior mortgage lien although it was never in fact paid or satisfied.

(Note.—See further, sustaining, but not citing the text, *Stambrough v. Daniels*, 88 Iowa 318, 55 N. W. 466; *Sigworth v. Meriam*, 66 Iowa 480, 24 N. W. 4.—Ed.)

Cross references. See further on this question, annotations under *Packard v. Kingman* (11 Iowa 218) Vol. 1, p. 806.

See also, in this connection, annotations under Rule 2 of *Vannice v. Bergen* (16 Iowa 555) ante. p. 472.

2. Mortgage Lien on Land—When Extinguished—Purchase by Mortgagee at Execution Sale Under Foreclosure Decree—Ef-

fect.—Where a mortgagee obtains a judgment at law for his mortgage debt, and purchases at a sale thereunder, giving for his title at such sale the full amount of his mortgage debt, such debt and mortgage is thereby satisfied, and neither the mortgagee nor his assignee can thereafter claim any rights under the mortgage, pp. 220, 221.

Special cross reference. For cases citing and distinguishing the text, and many others on this question, see annotations under Rule 2 of *Vannice v. Bergen* (16 Iowa 555) ante. p. 472.

STATE *v.* DYER, 17 IOWA 223

1. **Limitation of Actions—Action on Official Bond for Officer Failing to Pay Over Money—When Barred.**—An action on an official bond for an officer failing to pay over money collected by him is (under Sec. 2740 of the Code of 1860, and corresponding Sec. 1659 of the Code of 1851); barred unless commenced within three years after the cause of action accrued; and the rule is applicable in an action by the state against a county treasurer and the sureties on his bond for his failing to pay over state taxes collected by him, pp. 226, 227.

Reaffirmed and explained in *Keokuk County v. Howard*, 41 Iowa 12, 13, holding that under Sec. 2529 of the Code of 1873, (corresponding to sections of the text) an action against an officer as individual and not on his bond, for failure to pay over money officially collected by him, is barred if not commenced within three years from the accrual of the cause of action.

Reaffirmed and extended in *Steele & Johnson v. Bryant*, 49 Iowa 117, 119, 120, holding further that an action against a district court clerk and his sureties, for taking an insufficient stay bond, accrues at the expiration of the period of the stay: That the extent of the damage, or whether fully known at the time the act of misfeasance or non-feasance of an officer takes place, in no manner affects the cause of action therefor.

(Note.—In this last case no fraud of the officer in concealing the cause of action was in issue.—Ed.)

Reaffirmed and qualified in *State v. Henderson*, 40 Iowa 245, holding that under Secs. 793, 794, and 3727 of the Code of 1873, the bond of a county treasurer is *to the county and all members thereof intended to be thereby secured*, and not to the state; and that the state cannot maintain an action thereon for state taxes collected and not paid over, after the statute of limitation has barred the county to sue thereon therefor, as provided in the text.

Reaffirmed and narrowed in *Dist. Township of Boomer v. French*, 40 Iowa 602-604, holding that an action against a public officer for failure to pay over money collected by him, or for other omission of official duty, may be brought after the three years, where the cause

of action was fraudulently concealed by the officer; and in such case the bar of the statute commences to run from the time the right of action was, or might by the use of diligence have been, discovered.

Cited with approval in O'Banion v. De Garmo, 121 Iowa 141, 96 N. W. 740, not in point, but upon analogy.

DUBUQUE COUNTY v. KOCH, 17 IOWA 229

1. Mortgages—Actions—Rights of Mortgagee.—A mortgagee may sue the mortgagor in equity, foreclose and sell the mortgaged property, and thereafter sue a surety on the mortgage note for the residue of the note remaining unpaid after sale of such property, pp. 230, 231.

Reaffirmed, explained and extended in Allen v. Maddox, 40 Iowa 125, holding that persons jointly bound either by contract or relationship (as partners, etc.) may be severally sued; or such a demand may be the subject of set-off against any one so bound.

Cross reference. See further in this connection, annotations and cross references under State for use of School Fund v. Lake (17 Iowa 215) ante. p. 518.

2. Appeal and Error—Errors not Argued—Effect.—Errors not argued upon an appeal to the Supreme Court will be presumed to be waived and will not be considered, p. 231.

Special cross reference. For cases citing the text, and others, see annotations under Shaw v. Brown (13 Iowa 508) ante. p. 180.

STATE v. DINGEE, 17 IOWA 232

1. Adultery—By Whom Prosecution For to be Commenced—Procedure Thereafter.—A prosecution for adultery is (under Sec. 4347 of the Code of 1860) to be commenced upon the complaint of the injured husband or wife, but when once so commenced, whether before an examining magistrate or by indictment, it is thereafter within the complete control of the courts, and the further voluntary prosecution by the husband or wife is unnecessary, pp. 233, 234.

Reaffirmed, explained and narrowed in Bush v. Workman, sheriff, 64 Iowa 206, 207, 19 N. W. 911, holding that (under Sec. 4008 of the Code of 1873) no prosecution for adultery may be commenced except upon the complaint of the husband or wife of the *accused*: Holding further that where a married man held by a justice of the peace upon a charge of adultery, to answer the action of the grand jury, sues out a writ of *habeas corpus*, and the response of the officer having him in custody fails to state that the prosecution was commenced by the petitioner's wife, it is insufficient and the accused should be discharged on such writ.

Cited in State v. Roth, 17 Iowa 345 (dissenting opinion), the majority court reaffirming and explaining the text, and holding that a

prosecution for adultery must be commenced by the husband or wife of the person charged with the offense.

Cross reference. See further on this question, annotations under Rule 4 of State v. Baldy (17 Iowa 39) ante. p. 487; State v. Roth (17 Iowa 336) *Infra*. p. 535.

DILLEY v. NUSUM, 17 IOWA 238

1. Justice's Court—Pleadings and Evidence in.—Great liberality in the matter of pleadings, and in the introduction of evidence thereunder, is allowed in a justice's court. Technical nicety of pleading is not required in such a court, it being enough to state the cause of action in general terms, and sufficiently explicit as to apprise the defendant of the nature of the claim against him, p. 239.

Reaffirmed in Root v. Ill. Cent. R. R. Co., 29 Iowa 103; Shea v. Livingston, 32 Iowa 160; Fauble v. Stewart, 35 Iowa 380.

(Note.—See further, sustaining and explaining, but not citing the text, Blake v. Graves, 18 Iowa 313.—Ed.)

Cross references. See further, sustaining, but not citing the text, annotations and notes under Greff v. Blake (16 Iowa 222) ante. p. 429; Brownell v. Smith (13 Iowa 287) ante. p. 151.

2. Appeal and Error—Instructions Based on Evidence—Imperfect Record—Review.—The Supreme Court will not review instructions given by the trial court, correct as abstract propositions of law, and based upon the evidence, when the record on appeal does not contain the evidence introduced upon the trial, p. 240.

Reaffirmed in Shepherd v. Brenton, 20 Iowa 42, 43.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Farr v. Fuller (8 Iowa 347) Vol. 1, p. 517.

KEPHART v. BUTCHER, 17 IOWA 240

1. Promissory Notes—Taking of Note of Third Person on Account of—When Extinguishes Original Indebtedness.—The acceptance from the maker of a promissory note by the holder or payee, of a promissory note of a third person on account thereof, does not, in the absence of an express agreement to that effect, operate as an absolute payment or extinguishment of the note or indebtedness for which it was received: In the absence of proof of an express agreement to the contrary, it will be presumed that the third person's note was so received as an extinguishment of the original note *upon condition* that it is paid, pp. 244, 245.

Reaffirmed and extended in Porter v. City of Dubuque, 20 Iowa 443, 445, holding that where a vendor of city lots, for a valuable consideration, agrees to release all claims thereon, he thereby loses his lien.

Reaffirmed and varied in Griffin v. Erskine and Andrews, receivers, 131 Iowa 451, 455, 9 A. & E. Ann. Cas. 1193, 109 N. W. 16, holding that where a bank to whom a note is sent for collection receives a check or draft in payment thereof, and such check or draft is thereafter paid, it constitutes a payment of the note.

Cited in Watson v. Chesire, 18 Iowa 209, 87 Am. Dec. 382, holding that one who indorses a negotiable instrument *without recourse*, when the instrument is unenforceable because of fraud, want of consideration, its being forged, or for other inherent infirmity, is liable for the consideration paid therefor, to the purchaser or indorsee thereof who takes without notice thereof.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on the question, see annotations under Gower v. Holloway (13 Iowa 154) ante. p. 131.

DAVIS v. SLATER, 17 IOWA 250.

1. **Illegal Contracts—Illegal Sale of Intoxicating Liquors as Consideration—Contract Void.**—A contract having as a consideration the illegal sale of intoxicating liquors, is void as against all persons in all cases, p. 253.

Reaffirmed, extended and varied in Sommer v. Cate, 22 Iowa 586, 587, holding further that in an action to recover the value or the possession of intoxicating liquors, the plaintiff must allege and prove not only that he has been illegally deprived of them, but that he owned or possessed them with lawful intent.—Applying this rule in an action against a common carrier for loss of intoxicating liquors in his hands for carriage and delivery.

Cited in Monty v. Arneson, 25 Iowa 392, (dissenting opinion), the majority court holding that the owner of intoxicating liquors in his possession for unlawful sale may recover possession thereof of a sheriff, or other person wrongfully obtaining their possession.

Cited in Barnett v. Mendenhall, 42 Iowa 302, on the question of a void conveyance of homestead, for failure of wife to join.

JASPER COUNTY FOR USE OF SCHOOL FUND v. ROGERS, 17 IOWA 254

1. **Mortgage of Land to School Fund—Sale for Taxes—Effect—Rights of Tax Title Holder.**—Under Secs. 810, 811 of the Code of 1860, the purchaser at a tax sale of land which is mortgaged to the school fund, takes subject to such mortgage.

In such case the purchaser acquires only the right of the mortgagor, the right to redeem from the mortgage, p. 255.

Reaffirmed and explained in Iowa County v. Beeson, 55 Iowa 264, 7 N. W. 597, holding that where a purchaser of land at a tax sale seeks to redeem from a sale under decree of the foreclosure of a mortgage on the land for money borrowed from the school fund, and after

the statutory period of redemption has expired (the tax sale purchaser not having been made a party to the action foreclosing the mortgage), he can do so only by paying the amount of the mortgage debt, and not by paying the amount which the land sold for at the sale under the decree.

Reaffirmed and explained in Ayres v. Adair County, 61 Iowa 729, 17 N. W. 162, holding that a tax sale purchaser of land mortgaged for money borrowed from the school fund may redeem from a sale under a decree of foreclosure of the mortgage, where he is not made a party to the action to foreclose.

Reaffirmed and extended in State v. Shaw, 28 Iowa 77, holding further that the text is applicable to all sales of lands for taxes made after Sec. 811 of the Code of 1860 took effect, where the lands sold are mortgaged to secure a loan for money borrowed from the school fund, whether the taxes became delinquent before or after its taking effect.

Reaffirmed and extended in Lovelace v. Berryhill, 36 Iowa 381, holding further that the rule is applicable in favor of a purchaser or assignee of a mortgage on land for money borrowed from the school fund, and in favor of a purchaser of such land at a sheriff's sale under a decree of foreclosure of such mortgage; and such parties take the land free from the lien for taxes or the rights of a tax purchaser thereof.

(Note.—See further specially on this question, *Crum v. Cotting*, 22 Iowa 411; *Helphrey v. Ross*, 19 Iowa 40, important cases not citing the text.—Ed.)

STATE v. CARNAHAN, 17 IOWA 256

1. Trial—Instructions—Grouping Facts in—Instruction Requiring Qualification—When not Error.—Where on the trial of an indictment the court groups facts in an instruction, and then tells the jury that such facts, if shown by the testimony, warrants a conviction, the instruction, although not commendable, is not necessarily reversible error. In such an instance the accused may offer an instruction grouping facts in his favor, and telling the jury that they, if proved, warrant an acquittal.

An instruction which is substantially correct, even though it may require qualification, and which does not tend to mislead the jury, is not erroneous; as it is the duty of the party complaining to ask the qualification, p. 257.

Reaffirmed in Tucker v. McClure, 17 Iowa 583, 584 (Abstract).

Special cross reference. For further cases citing the text, and many others on the question, see annotations under Rule 4 of State v. Tweedy (11 Iowa 350) Vol. 1, p. 824.

LARGE v. MOORE, 17 IOWA 258

1. Garnishment—Debt Assigned Before Answer of Garnishee—Duty of Garnishee to Set up, if Known.—Where before answer the garnishee knows that the debt garnished has been assigned by the debtor, it is his (the garnishee's) duty to set up such fact as a defense in his answer, failing which he will be liable to the assignee for the amount of the debt, pp. 259, 260.

Reaffirmed in McPhail & Co. v. Hyatt, 29 Iowa 141, 142; Steltzer v. Condon, 139 Iowa 756, 118 N. W. 40.

Reaffirmed and qualified in O'Melia v. Hoffmeyer, 119 Iowa 446, 93 N. W. 498, holding that ordinarily the garnishee if notified of the assignment of a debt owing by him, is bound to make it known by his defense in the garnishment proceedings; but where in such case, he does this and the assignee, also, comes in and makes defense, his (the garnishee's) answer will not be taken for confessed, if undenied, but may be disregarded.

Cross reference. See further on this question, annotations under McCoid v. Beatty (12 Iowa 299) ante. p. 50.

MASON v. MESSENGER & MAY, 17 IOWA 261

1. Lands—Half-breed Tract—Partition of—Act of 1839, Constitutional.—The Act of January 4, 1839, relative to proceedings for partition by joint owners of real estate known as the half-breed tract, is constitutional, and not in conflict with the ordinance of 1787; and a decree of partition of any such land, although had upon notice by publication, is valid and binding on the parties to the proceedings, and their privies, pp. 264, 272.

Reaffirmed and qualified in Barney v. Miller, 18 Iowa 464, holding that although the title derived under a decree of partition of the half-breed tract of land is conclusive as to all those who were parties to it, and cannot be controverted by evidence of title to interests or shares prior thereto, yet a purchaser of a part of such tract from a party to such partition proceedings, may show that at the time of the decree and thereafter he held possession of the part which he purchased, under another title and adversely to the title derived by his vendor by the decree.

2. Constitutional Law—Power of Legislature to Pass Laws—Due Course of Common Law in Ordinance of 1787, Construed.—The inhibition in the ordinance of 1787, as to the taking of private property, etc., except by "judicial proceedings according to course of the common law," is synonymous with the constitutional provision against such taking, etc., except by "Due process of law," and means that the right of a person to his life, liberty or property, shall not be divested, except by a judicial determination, after due notice, in pursuance of a general law.

A general law allowing rights and remedies of property owners and observing the above requirements, is not unconstitutional or contrary to the ordinance mentioned, pp. 267, 272.

Reaffirmed in Eikenberry & Co. v. Edwards, 67 Iowa 622-624, 25 N. W. 833, 56 Am. Rep. 360, upholding constitutionality of Sec. 3145 of the Code of 1873, in reference to proceeding to discover and subject property to execution, and for the arrest and imprisonment of a judgment debtor who fails to appear before the district or circuit court or a judge thereof, upon proper proceedings and notice, or his failing to fully answer interrogatories upon so appearing.

Reaffirmed in Guthrie County v. Conrad, 133 Iowa 174, 177, 110 N. W. 456, upholding as constitutional Sec. 2297 of the Code of 1897, and holding that thereunder a father is liable for the care of his insane minor son who is incarcerated in the State Hospital after being legally adjudged insane.

Reaffirmed, explained and qualified in Good v. Norley, 28 Iowa 192-198, holding that the Legislature may provide for process, prescribe its substance and time of service, or clothe courts with such power; but such process so provided must be within proper restrictions so as not to defeat its object, which is notice of the pendency of a proceeding: And that probate proceedings to sell real estate of decedent, where the heirs and persons having an interest therein are not served with notice, are void *ab initio*.

3. Judgments—Collateral Attack for Fraud—When Allowed.—

A judgment of a court having jurisdiction of the subject-matter and of the parties in the action wherein it is rendered, cannot be collaterally impeached for fraud, unless it be shown to be void upon its face for fraud or by want of notice to the party against whom it is entered, pp. 273, 274.

Reaffirmed and explained in Melhop & Kingman v. Doane & Co., 31 Iowa 400, 7 Am. Rep. 147, a case involving the effect of a foreign judgment, and holding that in order for a judgment to be valid, the court must have jurisdiction both of the subject-matter and of the parties.

Reaffirmed and explained in B. & M. River Ry. Co. v. Hall, 37 Iowa 622, holding that the proceedings and judgment of a court having jurisdiction of the subject-matter and of the parties, cannot be collaterally questioned, but are absolutely binding, unless they are modified or set aside by the tribunal in which they occurred, or reversed upon appeal from the judgment.

Reaffirmed and extended in Smith v. Smith, 22 Iowa 518, holding further that if a judgment can be attacked for fraud in any case, it must be by a direct proceeding for such purpose; that it cannot be so attacked when offered in evidence in an action.

Reaffirmed and qualified in Mahoney v. State Ins. Co., 133 Iowa 576, 110 N. W. 1043, 9 L. R. A. (New Series) 490, holding that a judgment cannot be collaterally assailed for fraud, unless it is such fraud as renders it absolutely void.

(Note.—See further, explaining and qualifying, but not citing the text, Edmundson v. Indep. Sch. Dist. of Jackson, et al, 98 Iowa 639, 67 N. W. 671, 60 Am. St. Rep. 224; Bacon v. Chase, 83 Iowa 521, 50 N. W. 23; Phelan v. Johnson, 80 Iowa 727, 46 N. W. 68.—Ed.)

CITY OF DAVENPORT v. PEORIA MARINE & FIRE INSURANCE CO., 17 IOWA 276.

1. Principal and Agent—Authority of General Agent—Effect of Private Instructions Limiting Power.—A principal is bound by the acts of a general agent within the usual extent of his general employment, although the agent's authority is limited by private instructions, unless persons dealing with him have full knowledge of such instructions at the time they deal or contract with him, p. 279.

Reaffirmed in Viele v. Germania Ins. Co., 26 Iowa 58, 96 Am. Dec. 83.

Reaffirmed and explained in Kaufman Bros. & Co. v. Farley Mfg. Co., 78 Iowa 685, 43 N. W. 614, 16 Am. St. Rep. 462, holding that in determining what authority has been given, it may, as a general rule, be assumed that the principal intended to give, and that the authority conferred includes and carries with it, the power to employ all the usual and necessary means of executing it in such manner as to accomplish the objects which the principal had in view in creating the agency.

Reaffirmed and extended in Spence v. Ch. R. I. & P. Ry. Co., 117 Iowa 5, 90 N. W. 347, holding further that a principal is bound by the acts of his agent within the general scope of his authority; that persons dealing with an agent may take the visible and apparent interpretation of that authority by the principal himself as the one by which he chooses to be bound; and that persons who reasonably and in good faith rely upon such apparent authority, are not prejudiced by limitations thereon, of which they have no notice, and cannot with reasonable diligence ascertain.

Reaffirmed and extended in Fishbaugh v. Spunaugle, 118 Iowa 341, 342, 92 N. W. 60, holding further that the principal of either a general or special agent is bound to the extent of the *apparent* authority conferred by him; and that any private instructions limiting such apparent authority, will not affect the rights of persons dealing or contracting with such an agent, without notice thereof.

Reaffirmed and extended in Reupke v. Stuhr & Son Grain Co., 126 Iowa 633, 102 N. W. 510, holding further that where the principal confers upon his agent authority to transact business, in reference to which there is a well known usage or custom, it is the presumption of

the law, in the absence of anything to indicate a contrary intent, that such authority was conferred in contemplation of the usage, and third persons who deal with the agent in good faith and in the exercise of reasonable prudence, will be protected.

Cross references. See also, on this question, *Bryant v. Moore*, 45 Am. Dec. 96; *Walker v. Skipwith*, 33 Am. St. Rep. 161; *Burner Co. v. Odline*, 12 Am. St. Rep. 45; *Ruggles v. Insurance Co.*, 11 Am. St. Rep. 674; *Murphy v. Insurance Co.*, 27 Am. Rep. 761.

2. Cities and Towns—Judgment Against—Lien of.—A judgment against a city is not (under Sec. 3274 of the Code of 1860) a lien on its public buildings or other public property exempted by such section from levy and sale under execution; and is not, therefore, a lien on a hospital owned and used for hospital purposes.

A judgment is not a lien upon realty exempted by statute from judicial sale, p. 281.

Cited in *Turrill v. McCarthy*, 114 Iowa 686, 87 N. W. 668, not in point.

(Note.—See further, sustaining, but not citing the text, *Loring v. Small*, 50 Iowa 271.—Ed.)

3. Fire Insurance—Policy Issued and Delivered After Loss—When Effective—Parol Contract for Insurance.—Where after destruction by fire of property insured, a fire insurance policy is executed and delivered, which, pursuant to a prior agreement between insurer and insured, is dated of a date previous to the loss and on which the contract for insurance on the property was made by parol, the policy is binding as of its date, and the insurer must answer for the loss, pp. 284, 290.

Reaffirmed and explained in *Revere Fire Ins. Co. v. Chamberlin*, 56 Iowa 508, 9 N. W. 386, holding that a contract for fire insurance may be by parol, and if, in such case, the property is destroyed by fire before the issuance and delivery of the policy evidencing the contract, the insurance company is nevertheless liable on such policy and contract for insurance, for the loss.

Reaffirmed and varied in *Taylor v. State Ins. Co.*, 98 Iowa 524, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186, holding that an agent of a fire insurance company who has power to make contracts of insurance and to issue policies, has the power to correct the description of property in a policy and include other property therein which was covered by the contract for insurance, but was omitted from the policy by mistake; and such correction may be made by the agent either before or after the loss of the property by fire, if during the continuance of the agency.

Reaffirmed and varied in *Herring v. American Ins. Co. of Newark*, 123 Iowa 533, 99 N. W. 130, holding that where a written application for fire insurance is accepted by the insurance company, it is

liable for loss of the property by fire thereafter and during the period of the insurance, although no policy has issued at the time of the loss.

Reaffirmed and qualified in Sater v. Henry County Farmers' Ins. Co., 92 Iowa 582, 61 N. W. 210, holding that in order for a parol contract to execute a policy of insurance to be valid, it must be definite as to amount of insurance, amount of rate, and all other requisites to any other contract: That a parol agreement for renewal of insurance on property, which fails to stipulate the amount of insurance or the rate, and leaves them undetermined, is not binding, and cannot be made the basis of an action, either on the contract or for damages for failure to perform— And to the same effect, see Taylor v. State Ins. Co., 107 Iowa 277, 77 N. W. 1033 (reaffirming and qualifying the text), involving the requisites to a valid parol contract for insurance.

Cited with approval in City of Indianola v. Jones, 29 Iowa, 283, holding that under Sec. 1134 of the Code of 1860, a municipal corporation may contract by parol through agents, the same as individuals.

Cited in Viele v. Germania Ins. Co., 26 Iowa 54, (and in Note 71) 96 Am. Dec. 83, an important case on the question of waiver of conditions in a policy of insurance, and how and by whom they may be waived.

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, Smith v. State Ins. Co., 64 Iowa 716, 21 N. W. 145; Hubbard & Spencer v. Hartford Fire Ins. Co., 33 Iowa 325.—Ed.)

BEARDSLEY v. BRIDGMAN, 17 IOWA 290

1. Slander—Words Imputing Want of Chastity to Female—Slander Per se.—Spoken words imputing want of chastity to a female, constitute slander, *per se* p. 292.

Reaffirmed in Cleveland v. Detweiler, 18 Iowa 301, 302; Snediker v. Poorbaugh, 29 Iowa 491; Haynes v. Ritchey, 30 Iowa 77, 6 Am. Rep. 642; Cushing v. Hederman, 117 Iowa 638, 91 N. W. 941, 94 Am. St. Rep. 320.

Reaffirmed and explained in Cleveland v. Detweiler, 18 Iowa 301, 302; Haynes v. Ritchey, 30 Iowa 77, 6 Am. Rep. 642, holding that to charge a woman with sodomy or having had intercourse with an animal, constitute slander, *per se* p. 292.

Cross reference. See further on this question, note and cross references under Estes v. Carter (10 Iowa 400) Vol. 1, p. 714.

2. Slander—Proof of Repetition by Defendant of Slanderous Words—For What Received—Instructions—Misconduct of Trial Court.—In an action for slander, evidence of a repetition by the defendant of the slanderous words, is admissible to prove malice, but not in aggravation of damages; and where such evidence is so introduced,

it is reversible error for the trial court to tell the jury that it is admitted "to bear upon the question of damages." In such an instance the jury should be cautioned or instructed that the evidence is received only to prove malice or intent of the defendant, and not to enhance or aggravate damages, pp. 292-294.

Reaffirmed in Hinkle v. Davenport, 38 Iowa 361, 362; Ellis v. Lindley, 38 Iowa 461.

Reaffirmed and explained in Prime v. Eastwood, 45 Iowa 642; Halley v. Gregg, 74 Iowa 564, 38 N. W. 416, holding that in order to make a repetition of slanderous words competent to prove malice in an action for slander, it is not necessary to specially plead such fact of repetition— The last case holding that if it is so specially pleaded, allegations concerning it may be stricken on motion.

Reaffirmed and extended in Bailey v. Bailey, 94 Iowa 600, 601, 63 N. W. 341, holding further that in an action for slander, repetitions by the defendant of the slanderous words or words of a similar import, whether before or after the speaking and publication of the words complained of, are admissible to prove the malice of the defendant.

(Note.—See further, sustaining and explaining, but not citing the text, Hanners v. McClelland, 74 Iowa 318, 37 N. W. 389; Jean v. Hennessy, 69 Iowa 373, 28 N. W. 645; Schrimper v. Heilman, 24 Iowa 505.—Ed.)

3. Slander—Evidence—Mitigation of Damages—What Evidence Admissible for—Truth of Words to be Specially Plead.—In an action for slander all evidence or circumstances which would have been admissible in mitigation of damages under a general issue at Common Law may be so admitted under an answer in denial, under Sec. 2929 of the Code of 1860: But all evidence or circumstances tending to prove the truth of the words spoken, are not admissible, unless the defendant specially pleads the truth of the words in justification, p. 295.

Reaffirmed and qualified in Kinyon v. Palmer, 18 Iowa 385, 387; Desmond v. Brown, 33 Iowa 14, holding that in an action of slander or libel, the defendant may (under Sec. 2929 of the Code of 1860) plead and prove, either or both justification, and matters in mitigation of damages; and the failure in such a case, to establish the plea of justification will not, of itself, prove the malice of the defendant or affect the competency of evidence in mitigation of damages.

Cited in Dorn & McGinty v. Cooper, 139 Iowa 746, 16 A. & E. Ann. Cas. 744, 117 N. W. 2, holding that evidence of the friendly feelings of the defendant towards the plaintiff in an action for libel is admissible therein, only to negative express malice, and not in mitigation of damages.

4. Slander—Evidence in Mitigation—Rumor.—In an action of slander, a plea that the words spoken constituted a rumor only, repeated by the defendant, is insufficient as matter in mitigation of dam-

ages, unless it is further alleged therein that they were spoken by the defendant in the good faith belief that they were true and without malice towards the plaintiff, p. 296.

Cited in Wallace v. Homestead Co. and Pierce, 117 Iowa 356, 90 N. W. 837, holding that in an action for libel, that where the alleged libel does not, on its face, purport to be published on the authority of others, but of defendant's own knowledge it cannot be shown in mitigation of exemplary damages that it originated with another: But that if the rumors or reports are so general and prevalent that they have affected plaintiff's general character, they may be shown in evidence, not for the purpose of negating defendant's malice, but as mitigating plaintiff's damages.

Cited in Dorn and McGinty v. Cooper, 139 Iowa 746, 16 A. & E. Ann. Cas. 744, the court holding that in an action for libel, where the defendant published the libel as of his own knowledge, evidence of what others had told him is only admissible to negative malice, and not in mitigation of the actual damages sustained by the plaintiff.

SEARS v. LIVERMORE, 17 IOWA 297, 85 AM. DEC. 564

1. Trust Deed to Land—Power of Sale Under,—Mode Prescribed By to be Strictly Pursued—Effect of Failure.—A sale of land and deed made in pursuance thereof, under a trust deed will be set aside in equity, if the manner of making the sale is set forth in the deed, and it is not strictly, literally and precisely pursued, pp. 299-301.

Reaffirmed and explained in Penny v. Cook, 19 Iowa 544, holding that a power under a deed of trust is jealously watched by the courts, and when the power has been fraudulently or oppressively and unfairly or irregularly exercised, the owner will be allowed to come in and impugn the sale and redeem the property; especially where the application is not stale, and the property has not passed into the hands of *bona fide* purchasers.

Reaffirmed and qualified in Campbell v. Tagge, 30 Iowa 307, 1 Am. Rep. 238, holding that where a trust deed requires notice of the sale of land thereunder to be inserted in a newspaper of the county wherein the land is situated "for at least twenty days before the sale," it authorizes the trustee to so advertise in either a weekly or daily newspaper of such county.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a direct attack on a sale of land by a trustee.

STOTTS v. BYERS, 17 IOWA 303

1. Negotiable Note—Transfer Before Maturity to Protect Indorsee as Surety of Indorser—Bona Fide Holder for Value.—Where a negotiable note is transferred before maturity as collateral

security to protect the indorsee from his liability as surety for the indorser—which he becomes by reason of the transfer,—the indorsee is a *bona fide* holder for value, and is protected against prior equities and defenses, p. 304.

Reaffirmed and extended in Lathrop v. Donaldson, 22 Iowa 237, holding further that where the time of the payment of a pre-existing debt is extended in consideration of negotiable paper not due being transferred as collateral security, the transferee is a *bona fide* holder for value, and is protected against equities and defenses of the maker—And the same rule applies to accommodation paper: Holding further that in an action on a negotiable promissory note by an indorsee thereof, it will be presumed that he obtained it in good faith, for value, before maturity; and that in the absence of proof to the contrary such a note is not affected by any equities existing between the maker (defendant) and the payee (indorser).

Cross reference. See further on this question, annotations under Rules 2 and 3 of Trustees of Iowa College v. Hill (12 Iowa 462) ante. p. 75.

PRATT v. DELAVAN, 17 IOWA 307

1. Evidence—Husband and Wife—Communications Between—Incompetency—To What the Rule does not Apply.—The rule excluding as a witness the husband or wife (under Secs. 3983 and 3984 of the Code of 1860) applies to communications made by the one to the other while married, which inhibition continues after the relation ceases: But this rule does not render the wife incompetent to testify as to matters within her own knowledge, which she knows independent of her husband, pp. 309, 310.

Reaffirmed in Shafer v. Dean, Adm'r., 29 Iowa 145, 146.

Distinguished in Shuman v. Supreme Lodge of Knights of Honor, 110 Iowa 483, 484, 81 N. W. 718, holding that under Sec. 4607 of the Code of 1897, a wife cannot, after the husband's death, testify as to communications made by him to her while the marriage relation existed.

2. Actions—Assignment of Subject-matter Pendente Lite—Effect.—The assignment of the subject-matter of an action as collateral security for the payment of a debt owing by the plaintiff to the assignee, is not ground for a new trial or the setting aside of a judgment rendered thereon in the name of the plaintiff, p. 310.

Reaffirmed and extended in Forney & Thayer v. Ralles & Willetts, 30 Iowa 562, 563, holding further that in case of the transfer pending action of any interest therein, it may be continued in the name of the original party, or the court may allow the transferee to be substituted.

Cross reference. See further on this question, annotations and cross references under Wahl v. Phillips (15 Iowa 478) ante. p. 367.

LYON v. NORTHUP, 17 IOWA 314

1. **Judgment—Satisfaction by Check.**—Where a judgment creditor accepts a check of the judgment debtor for the amount of his judgment and costs, and under the agreement that it is received in full satisfaction of the judgment, it has such effect and extinguishes the judgment, pp. 316, 317.

Reaffirmed and extended in Wilson v. Smith, 23 Iowa 256, holding further that where a judgment creditor takes a note from his judgment debtor in payment and satisfaction of the judgment, it has the effect of satisfying and extinguishing the judgment, whether the judgment debtor be solvent or insolvent at the time the note is taken.

DONIPHAN & HUGHES v. STREET, 17 IOWA 317

1. **Conveyance—Defective—Contract to Convey—Equitable Relief—Against Whom Granted.**—A conveyance of real estate which is so defective as to pass no title will in equity, if the consideration has been paid, be treated as a contract to convey, and the title will therein be decreed to be perfected: And this rule will be so enforced as against the grantor, his heirs, or a subsequent purchaser from the grantor with notice of the defective conveyance and of the equitable right of the grantee therein, p. 320.

Reaffirmed and narrowed in Overman and Brown v. Kerr, 17 Iowa 490, 491, holding that where a conveyance to land is not valid by reason of no delivery, it is equally invalid as a contract to convey, and the rule is inapplicable in such a case.

2. **Appeal—Defective Pleadings—When not Cause for Reversal.**—Defects in pleadings are not cause for reversal when appellant's substantial rights were not thereby prejudiced in the court below, and it appears that substantial justice was done, as if the pleadings were perfect, pp. 321, 322.

Reaffirmed in Fulmer v. Fulmer, 22 Iowa 233; Lampman v. Bruning, 120 Iowa 170, 94 N. W. 563; Pratt v. Fishwild & Williams, 121 Iowa 647, 96 N. W. 1091; Cahill v. Ill. Cent. R. R. Co., 137 Iowa 584, 115 N. W. 218.

Reaffirmed and extended in Clay v. Alcock, 23 Iowa 593, holding further that where a party proceeds to a trial upon the merits as if his pleading were denied, and does not raise the question during the trial, he cannot after trial take advantage of the fact that his pleading is undenied.

Reaffirmed and extended in Flanders v. McClanahan, 24 Iowa 490, holding further that where the defendant makes no objection to the form of a pleading, but treats it as a "reply or petition" before and on the trial, he cannot raise such question after verdict and judgment.

Reaffirmed and varied in Chase v. Scott, 33 Iowa 312, holding that presumptions on appeal are in favor of the rulings of the trial

court, and that prejudicial error must be thereon made to affirmatively appear from the record.

Reaffirmed and varied in Blackburn v. Powers, 40 Iowa 683, holding (under Sec. 2836 of the Code of 1873) that it is not enough for appellant to show error committed by the trial court; he must further affirmatively show from the record upon appeal that such error prejudiced his substantial rights.

STATE v. REDMAN, 17 IOWA 329

1. **Criminal Law—Former Jeopardy—Defective or Uncertain Verdict of Guilty—When no Bar to New Trial.**—Where on the trial of an indictment or information a verdict of guilty is so defective and uncertain that the court does not know for what offense or crime to enter judgment, it may be set aside and a new trial ordered by the court, even over the objection of the accused, and will not constitute jeopardy or operate as a bar to another trial, p. 335.

Reaffirmed and explained in State v. Arthur, 21 Iowa 325, holding that where a verdict of conviction is so fatally defective as that the court is unable to render judgment thereon, the jury should be directed to retire for further deliberation and put it in proper form; but that where this is not done, a new trial may be ordered, and the defective verdict will not bar another trial.

Reaffirmed, explained and qualified in State v. Smith, 88 Iowa 183, 55 N. W. 198, holding that jeopardy attaches when a jury has been empaneled and sworn in a court of competent jurisdiction upon the trial of a sufficient indictment; and that when a jury is so empaneled and sworn to try an insufficient indictment, the court may discharge it and re-submit the charge to the grand jury, such proceedings being no bar to the trial of accused under a sufficient indictment thereafter returned.

Reaffirmed and extended in State v. Vaughan, 29 Iowa 287, 288, holding further (as does the present case in argument) that the discharge of a jury unable to agree upon a verdict in a criminal prosecution, is a matter of sound discretion of the trial court, and does not constitute jeopardy or bar another trial.

Reaffirmed and extended in State v. Knouse, 33 Iowa 367, 368, holding further (as does the present case in argument) that jeopardy does not attach where a verdict and judgment of conviction is reversed, and the accused may thereupon be again tried for the same offense or crime of which he was convicted.

Reaffirmed and extended in State v. Tatman, 59 Iowa 473, 474, 13 N. W. 633; State v. Parker, 66 Iowa 588, 589, 24 N. W. 226, holding that jeopardy does not apply when the jury is discharged without a verdict by reason of any overruling necessity, or for inability to agree upon a verdict, or if the term of court as fixed by law termi-

nates before the finishing of the trial, or if the jury be discharged with the consent of the accused, or if a new trial be granted: That the trial court has a sound judicial discretion as to discharging the jury in cases of necessity, and jeopardy does not apply in such a case unless the trial court abuses such discretion.

Reaffirmed and extended in State v. Scott, 99 Iowa 38, 39, 68 N. W. 451, holding that the quashing an indictment does not operate as an acquittal under an indictment thereafter found, although the trial court at the time of quashing the first indictment does not enter an order re-submitting to the grand jury.

Reaffirmed and extended in State v. Jamison, 104 Iowa 345, 73 N. W. 831, holding further that an acquittal or conviction of a person of an offense or crime by a court without jurisdiction, does not constitute a good plea of jeopardy upon the trial of such person for such offense or crime in a court having jurisdiction thereof: That when under the law, or for want of evidence, a plea of former jeopardy is not sustained, the trial court may so charge the jury.

STATE v. ROTH, 17 IOWA 336

1. Adultery—Prosecution for—By Whom to be Commenced.—

A prosecution for adultery must (under Sec. 4347 of the Code of 1860) be commenced upon the complaint of the husband or wife of the party accused; and where a husband or wife of a party guilty of adultery with an unmarried person, presents a complaint to the grand jury against the latter, it does not authorize the indictment of the adulterous consort, pp. 341, 342.

Reaffirmed in State v. Sanders, 30 Iowa 585.

Reaffirmed and explained in State v. Wilson, 22 Iowa 367, holding that where an unmarried person is guilty of adultery with a married person, such unmarried person may be punished for such offense; that the injured husband or wife may make the complaint and commence the prosecution against either or both of the guilty parties—But see State v. Mahan, 81 Iowa 122, 46 N. W. 856, (reaffirming and explaining the text) holding that, under Sec. 4008 of the Code of 1873, an unmarried person who commits adultery with a married person, may be indicted therefor without complaint of the consort of the other guilty party.

Reaffirmed and explained in State v. Harmann, 135 Iowa 169, 112 N. W. 633, holding that under Sec. 4932 of the Code of 1897, a prosecution for adultery must be commenced by the husband or wife of the accused; that the fact of such commencement need not be alleged in the indictment, but may be proved as any other fact: And when so proved, and the proof is not disputed, it is not improper for the court to tell the jury that it was so commenced.

Reaffirmed and explained in State v. Hasty, 121 Iowa 509, 510, 96 N. W. 1116, holding that the having sexual intercourse by a married

person with an unmarried person of the opposite sex, constitutes the offense of adultery, both at Common Law and under the statute (Code of 1873).

Reaffirmed, explained and qualified in State v. Oden, 100 Iowa 23-25, 69 N. W. 271, holding that where an unmarried person commits adultery, and thereafter marries, an indictment for such offense may be returned without the consent of the consort who became such after its commission.

Reaffirmed and extended in Bush v. Workman, sheriff, 64 Iowa 206, 207, 19 N. W. 911, holding further that (under Sec. 4008 of the Code of 1873 no prosecution for adultery may be commenced except upon the complaint of the husband or wife of *the accused*: Holding further that where a married man held by a justice of the peace, upon a charge of adultery, to answer the action of the grand jury, sues out a writ of *habeas corpus*, and the response of the officer having him in custody fails to state that the prosecution was commenced by petitioner's wife, it is insufficient and the accused should be discharged on such writ.

Reaffirmed and extended in State v. Briggs, 68 Iowa 419-421 27 N. W. 359, holding further that (under Sec. 4008 of the Code of 1873) that a prosecution for adultery may be commenced by the husband or wife of the accused person, either before a magistrate or before the grand jury: Holding further that when an indictment for adultery is returned upon the complaint of the husband or wife of the accused, the name of such complainant, witness, is not required to be indorsed thereon as a private prosecutor, under Sec. 4292 of the Code of 1873.

Reaffirmed and extended in State v. Smith, 108 Iowa 443-445, (cited in dissenting opinion, 448), 79 N. W. 118, holding further that one guilty of adultery with a married person may, under Sec. 4932 of the Code of 1897, be indicted therefor upon complaint of the person who was the husband or wife of the other guilty party *at the time of the commission of the offense*: And that the divorce of the guilty married person and subsequent remarriage, either to the complaining consort or another, after the commission of the offense, does not affect this rule.

Reaffirmed and narrowed in State v. Henke, 58 Iowa 459, 12 N. W. 478, holding that upon the trial of a married person for adultery, the State must prove that the prosecution was commenced (as provided by Sec. 4008 of the Code of 1873) by the injured husband or wife of the accused.

(Note.—See further, State v. Athey, 133 Iowa 382, 108 N. W. 224; State v. Cunningham, 111 Iowa 233, 82 N. W. 775; State v. Andrews, 95 Iowa 451, 64 N. W. 404; State v. Russell, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195; State v. Corliss, 85 Iowa 18, 51 N. W. 1154; State v. Donovan, 61 Iowa 278, 16 N. W. 130; State v.

Bennett, 31 Iowa 24, important cases concerning and intimately connected with, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under State v. Dingee (17 Iowa 232) ante. p. 521; Rule 4 of State v. Baldy (17 Iowa 39) ante. p. 487.

MARTIN v. SWEARENGEN, 17 IOWA 346

1. **Pleadings—Answer—Needless Repetitions May be Stricken.**—A party in his answer may plead as many defenses as he has, and may even state facts therein which are properly proved under a general denial; but needless repetitions of the same defense or defenses stated in such pleading in the same or in different counts, either in the same or in a different form, will be stricken upon motion, p. 348.

Reaffirmed in Cate v. Gilman, 41 Iowa 534, holding that the defendant may aver matters and facts in subsequent paragraphs of his answer which may properly be proved under specific denials of the first paragraph thereof.

2. **Pleadings—Answer—Partial Defense—How Pled.**—A partial defense, or matters in mitigation may be set up in an answer in an action for damages; but it must be specially pleaded as such, p. 349.

Special cross reference. For cases citing the text and others on the question, see annotations under Rule 4 of Davenport Gas Light & Coke Co. v. City of Davenport (15 Iowa 6 ante. p. 295).

POLK COUNTY FOR USE OF SCHOOL FUND v. SYPHER, 17 IOWA 358,
85 AM. DEC. 568

1. **Foreclosure of Mortgage on Land—Decree Ordering Sale of Separate Parcels—Sale of More than Sufficient to Satisfy—Motion of Junior Lienholder for Surplus—Waiver of Irregularity.**—Where a decree foreclosing a mortgage on land directs the sheriff to sell it in separate parcels, and the sheriff sells more of the parcels than is necessary to satisfy the decree, a junior lienholder who moves that the surplus of the proceeds of the sale be applied to the payment of his debt, thereby waives the irregularity, if any, in the sale, pp. 362, 363.

Cited in Treiber v. Shafer, 18 Iowa 35, holding that a decree in a foreclosure action which orders the mortgaged land to be sold under special execution "according to law" is sufficient; and in such case it is the sheriff's duty to sell only so much as is necessary to satisfy the debt, interest and costs.

Cited in Osborne v. Cloud, 21 Iowa 239, holding that notice of a motion to set aside a sale of land under an execution, must be given to the purchaser thereat, or the order setting it aside will be reversed upon appeal.

Cross reference. See further on this question, annotations under Lay v. Gibbons (14 Iowa 377) ante. p. 249.

2. Execution Sale of Land—Subjection of Surplus of Proceeds by Other Lienholders—When Sheriff not Personally Liable for Paying Over Surplus.—When lands are sold under an execution to satisfy a prior judgment and there are other liens upon it, the liens follow the surplus, in equity, and the surplus will be distributed in order and according to priority of liens, whether they be judgment or by mortgage; and in such case it is not in the power of the debtor to assign the surplus and defeat the lienholders, and the sale of such surplus under execution in favor of a junior lienholder is, in operation of law, such an assignment: But where a sheriff, without actual notice of liens of creditors, pays over the surplus in his hands arising from an execution sale, to the judgment debtor, he is not liable to the creditors of such debtor holding liens on such surplus, pp. 363, 364.

Cited in Skiff v. Cross, 21 Iowa 461, 462, holding that where a sheriff pays or turns over money or property in his hands as such officer, either wrongfully or by mistake, to a person not entitled thereto, the sureties on his official bond may sue the person receiving it, therefor.

Cited in Hanschild, Adm'r. v. Stafford, 27 Iowa 303, not in point, but on a parity.

Unreported citation, 129 N. W. 318.

Cross reference. See further on this question, annotations under Rules 2-5 of Cook & Sargent v. Dillon (9 Iowa 407) Vol. 1, p. 598.

STATE EX REL. VEILE v. FUNCK, 17 IOWA 365

1. City Elections—Charter Providing for Contest—Quo Warranto.—Where the charter of a city provides that the city council "shall be the judge of the election and qualifications of its own members," but no ordinance is passed thereunder prescribing the time and manner of contesting elections to such offices, it does not preclude a party claiming to have been elected to such an office to test the right and title thereto by proceedings in the nature of *Quo Warranto* as provided by Chap. 151 of the Code of 1860, p. 368.

Cited with approval in State ex rel. Deal v. Alexander, 107 Iowa 180, 186, 77 N. W. 842, holding further that an ordinance of a city providing for the contest of the *election* of any city officer on the same ground and for the same causes specified in cases of contested elections of county officers, does not preclude a party from proceeding under Sec. 3345 of the Code of 1873 from testing the right and title to a city office created by the city council under Sec. 524 of that Code, and made appointive by the council.

Unreported citation, 127 N. W. 1039.

2. City Elections—Special Provision as to Contest, in City Charter—Effect on Right of Quo Warranto Proceeding.—Whether if the city council had passed an ordinance prescribing the time and

manner of contesting elections to the offices mentioned in Rule 1 and as authorized by its charter as therein mentioned, such contest would have been exclusive or cumulative of the right to proceed by *Quo Warranto* to test the right and title to such an office, is not determined, p. 368.

Cited in Haverstock v. Aylesworth, judge, 113 Iowa 381, 85 N. W. 635, the court therein holding that where a statute prescribes a special tribunal and remedy for the contest of an election to an office, it is not exclusive of the right of a party to proceed by *Quo Warranto* to test the right or title thereto, unless such statute manifests an unequivocal intention that the right to proceed by *Quo Warranto* be thereby taken away.

3. Appeal—Bias of Juror as Ground for Reversal—Imperfect Record.—The complaint upon appeal that one of the jurors who rendered the verdict on which the judgment appealed from was rendered, had formed and expressed an unqualified opinion against the appellant and on the merits of the case, before being accepted and sworn, will not be cause for reversal, where the record upon appeal does not show that the juror was, before being sworn, examined under oath on such question, and that such opinion was unknown to appellant at the time he was accepted and sworn: And in such a case, a recital in the journal entry that "the jury was empaneled, tried and sworn" is insufficient to show that they were examined under oath as to whether or not they had formed or expressed an unqualified opinion as to the guilt or innocence of accused, pp. 372, 373.

Reaffirmed and explained in McKinney v. Simpson, 51 Iowa 663, 2 N. W. 535, holding that an affidavit in support of a new trial on the ground that one of the jurors before being sworn to try the issue had expressed an opinion adverse to the party moving therefor, must show that the moving party did not know such fact at the time the juror was accepted, that the opinion was adverse to him, and that the juror was examined as to such fact under oath before being accepted and sworn.

4. Appeal—Verdict Against the Evidence—Conflicting Evidence—Affirmance.—A judgment will not be reversed upon appeal to the Supreme Court because the verdict was against the evidence, where the record shows that the evidence upon the trial was conflicting, p. 373.

Special cross reference. For cases citing the text, and many others on this question, see annotations under Rule 1 of State v. Tomlinson (11 Iowa 401) Vol. 1, p. 833.

CORWIN v. WALLACE, 17 IOWA 374

1. Res Adjudicata—Action on Contract—When Judgment In is no Bar to Action for Value of Labor and Materials.—Where a

contractor sues on a contract for building a house and the defendant (land owner) defeats the action on a plea and proof of non-performance of the contract by plaintiff, and after judgment against plaintiff in such action, the defendant accepts the benefits of such contract, the plaintiff (contractor) may then sue for the value of the labor and materials done and furnished by him in the construction of the building: But ordinary use and possession of the house by the land owner after the termination of the first action does not constitute such acceptance; although taking possession without objection, or under circumstances indicating acquiescence, is evidence thereof, pp. 375-377.

Reaffirmed and extended in Brent v. Head, Westervelt & Co., 138 Iowa 149, 115 N. W. 1107, 16 L. R. A. (New Series) 801, holding further that use and occupation of a building before it is fully completed, does not preclude the land owner when sued for the contract price for its construction, from setting up damages for the failure of or non-performance of the contract by, or the negligence of the contractor.

Cited in Ellwood and Lowrie v. Wilson, 21 Iowa 528, 529, holding that where attorneys at law sue upon contract for services rendered in the Supreme Court in an action therein pending, but which had been settled without their knowledge before the services were rendered, they cannot recover upon the contract, but the judgment in such action will not bar them from thereafter suing and recovering upon *quantum meruit*.

Cited in Hahn v. Miller, 68 Iowa 748, 749, 28 N. W. 52, holding that a judgment concludes the parties upon all questions directly involved in the issue and necessarily determined by it: That the test of whether a former adjudication is a bar to a subsequent action is whether the same evidence is required to maintain both.

Cited in McCullough v. Connelly, 137 Iowa 686, 114 N. W. 302, 15 L. R. A. (New Series) 823, holding that in order to make the plea of *res adjudicata* applicable, the actual point in issue in a subsequent action must have been determined *on its merits* in a former action between the same parties.

(Note.—See further on this question, Brown v. Curtis, 111 Iowa 542, 82 N. W. 945; Sioux City S. G. Co. v. Sioux City P. Co., 110 Iowa 396, 81 N. W. 712; Allison, Smith & Johnson v. Vaughn, 40 Iowa 425; Kilbourne v. Jennings, 40 Iowa 473; Mitchell v. Wiscotta Land Co., 3 Iowa 209, important cases intimately connected with, but not citing the text.—Ed.)

Cross reference. See rule 2 hereof.

"Res Adjudicata"—See annotations under Griffin v. Seymour (15 Iowa 30) ante. p. 299.

2. Amount to be Recovered in Second Action of Rule 1.—In the second action for labor done and materials furnished, set out in

Rule 1 hereof, the plaintiff (contractor) should recover only the contract price for constructing the building, p. 378.

Special cross reference. For cases citing, sustaining, extending and qualifying the text, and many others on the question, see annotations under Rules 1 and 2 of *Pixler v. Nichols* (8 Iowa 106) Vol. I, p. 497.

MACKLOTT v. CITY OF DAVENPORT, 17 IOWA 379

1. Taxes—Levy on Property for Taxes Levied Under Unconstitutional Law, or Without Authority of Law—Remedies of Owner of Property.—Where property is seized to satisfy a tax levied under an unconstitutional law, or levied without authority of law, the owner of the property may bring replevin, for his property, or, where matters of equitable cognizance are also involved in the case, may restrain the collection thereof, p. 385.

Reaffirmed in *Zorger v. Township of Rapids*, 36 Iowa 180, holding that injunction lies to restrain the illegal collection of taxes.

Reaffirmed and explained in *Litchfield v. Polk County*, 18 Iowa 72; *Fort Dodge Electric Light & Power Co. v. City of Fort Dodge*, et al, 115 Iowa 573, 89 N. W. 9, holding that injunction lies to restrain the sale of property for taxes illegally assessed.

Cross reference. See Rule 2 in this connection.

Reaffirmed and explained in *Fulton v. City of Davenport*, 17 Iowa 408; *Rood v. Board of Supervisors of Mitchell County*, 39 Iowa 446; *Brandirff v. Harrison County*, 50 Iowa 169; *Smith & Funk v. Osburn*, 53 Iowa 475, 5 N. W. 681; *Wangler Bros. v. Black Hawk County*, 56 Iowa 386, 9 N. W. 315; *C. M. & St. P. Ry. Co. v. Phillips*, county treasurer, 111 Iowa 380, 381, 82 N. W. 788, holding that if a tax is illegal, and not merely irregular or erroneous, its enforcement will be restrained by injunction.

Reaffirmed and extended in *Buell v. Ball*, marshal, 20 Iowa 288, 289, holding further that lands situated within the original boundaries of a city and which are used for agricultural purposes, are not subject to city taxation; and that the question can be raised in an action of replevin against an officer who levies upon personal property in seeking to collect it.

Reaffirmed and extended in *Richards v. Wapello County*, 48 Iowa 510, holding that one who, under protest, pays county taxes which is assessed on his property which is not subject to taxation, may recover the amount paid from the county, after the board of supervisors thereof has refused to refund it— But see *Brownlee v. Marion County*, 53 Iowa 489, 5 N. W. 612, (distinguishing text), holding that where real estate is assessed for county taxes in the name of a person not the owner, the owner may recover of the county the amount he paid to redeem it from a sale under such illegal and void assessment;

and is not required to apply to the county board of supervisors before bringing his action therefor— And see *Wangler Bros. v. Black Hawk County*, 56 Iowa 386, 9 N. W. 315, holding that where personal property is assessed in the name of a person not the owner, injunction lies upon complaint of the owner to restrain the collection of the tax.

Reaffirmed and extended in *Layman v. Iowa Telephone Co.*, 123 Iowa 599, 600, 99 N. W. 208, holding further that an assessment for taxation which is void, may be collaterally attached.

Cited in *Key City Gas Co. v. Munsell*, 19 Iowa 309, not in point, but on analogy.

(Note.—See further, *Remey v. Board of Equalization of City of Burlington*, 80 Iowa 470, 30 N. W. 808, 59 Am. Rep. 444; *Standard Coal Co. v. Indep. Dist. of Angus*, 73 Iowa 304, 34 N. W. 870; *Barber v. Farr*, 54 Iowa 57, 6 N. W. 134; *Cattell v. Lowry*, 45 Iowa 478, important cases on this question, not citing the text.—Ed.)

Cross references. See other Rules hereof. See further, annotations under *Langworthy v. City of Dubuque*, (13 Iowa 86) ante. p. 121.

2. Revenue and Taxation—Erroneous Assessment—Remedy of Property Owner.—One whose property is *erroneously* assessed, or assessed too much, for taxation must pursue only the remedy prescribed by statute for its correction, pp. 385, 387.

Reaffirmed in *Nugent v. Bates*, 51 Iowa 80, 33 Am. Rep. 117; *Powers v. Bowman*, 53 Iowa 361, 362, 5 N. W. 567, 568; *Smith & Funk v. Osburn*, 53 Iowa 475, 5 N. W. 681; *Dickey v. Polk County*, 58 Iowa 290, 12 N. W. 292; *Wilson & Co. v. Cass County*, 69 Iowa 148, 28 N. W. 484; *Mo. Val. & Blair Ry. & Bridge Co. v. Harrison County*, 74 Iowa 285, 37 N. W. 373; *Van Wagenen v. Supervisors of Lyon County*, 74 Iowa 717, 718, 39 N. W. 106; *Smith v. City of Marshalltown*, 86 Iowa 517, 53, N. W. 286; *Collins v. City of Keokuk*, 118 Iowa 34, 91 N. W. 791.

Reaffirmed in *Ingersoll v. City of Des Moines*, 46 Iowa 554, 555, holding that under Sec. 831 of the Code of 1873, an appeal lies to the circuit court from the action of a city council, acting as a board of equalization, in increasing the assessment of a tax payer: That in such case it is not necessary for the tax payer before he appeals, to bring the question again before the council for the purpose of pointing out the error in its former action.

Reaffirmed and explained in *Bilbo v. Henderson*, treasurer, 21 Iowa 58; *Buell v. Schaale*, 39 Iowa 294, holding that replevin does not lie to obtain possession of personal property seized to satisfy an *erroneous* or *irregular* assessment of taxes.

Reaffirmed and explained in *McConn v. Roberts*, treasurer, 25 Iowa 155; *Wilson & Co. v. Cass County*, 69 Iowa 148, 28 N. W. 484; *Collins v. City v. Keokuk*, 118 Iowa 34, 91 N. W. 791, holding that

injunction does not lie to obtain relief from an erroneous assessment for taxation.

Reaffirmed and explained in Dist. Township of West Bend v. Brown, 47 Iowa 26, 27, holding that injunction does not lie to obtain relief from the action of the county board of supervisors equalizing taxes among the several townships thereof, of the determination of exemptions: That such proceedings must be reviewed either upon appeal, or by *Certiorari*.

Reaffirmed and extended in Harris v. Fremont County, 63 Iowa 640, 19 N. W. 827, holding that Sec. 870 of the Code of 1873, providing for recovery from the county for taxes "erroneously or illegally exacted or paid," has no application to an erroneous assessment made in the exercise of lawful authority; and that in such a case the tax payer must pursue the remedy provided by Sec. 831 of the Code of 1873, by application for the correction of the assessment before the board of equalization and by appeal from such board's action thereon.

Reaffirmed and extended in Van Wagenen v. Supervisors of Lyon County, 74, Iowa 717, 718, 39 N. W. 106, holding further that when the county board of supervisors rebate taxes erroneously assessed, such action is illegal and void, and its validity may be tested and reviewed by *Certiorari* at the instance of any tax payer of the county.

Reaffirmed and extended in Tuttle v. Polk & Hubbell, 92 Iowa 446, 60 N. W. 733, holding further that the fact of an erroneous assessment by a city for pavements, cannot be set up in an action against a lot owner arising thereon; that such lot owner must, in such an instance, pursue the remedy allowed by law for the correction of such assessment— And see *Nixon v City of Burlington*, 141 Iowa 320, holding that injunction does not lie in such case in favor of a lot owner, unless the assessment be void *ab initio*.

Reaffirmed and extended in Crawford v. Polk County, 112 Iowa 119, 83 N. W. 825, holding further that an excessive assessment fraudulently made, and for county taxes, must be corrected as by statute provided, and an action will not lie therefor.

Reaffirmed and varied in Keck v. Board of Supervisors of Keokuk County, 37 Iowa 549, 550, holding that a writ of *Certiorari* lies where a town assessor refuses to correct assessment books as ordered by the board of trustees, and delivers such books, uncorrected, to the county auditor.

Reaffirmed and varied in Henkle v. Town of Keota, 68 Iowa 341, 27 N. W. 254, holding that where a board of equalization raise an assessment of a tax payer, without notice to him as prescribed by Sec. 831 of the Code of 1873, as amended by Chap. 109 of the Acts of the Eighteenth General Assembly, such action is illegal and void; and *Certiorari* will lie in such case to test the legality of the act of the board: Holding, however, that in such a case if the tax payer appears and is heard on such question, he thereby waives the failure to give notice.

Cited in Koehler & Lange v. Hill, 60 Iowa 578, 14 N. W. 755, (dissenting opinion) the majority court holding that the enrolled bill of a statute, when properly signed, and approved, is the conclusive expression of the Legislative will, and that it prevails over anything found in prior proceedings in connection with and inconsistent therewith as shown by the journals, etc.

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Cross references. See other Rules hereof. See further annotations under Rule 2 of Cole v. City of Muscatine (14 Iowa 296) ante. p. 240.

JONES v. CROSTHWAITE, 17 IOWA 393

1. **Principal and Surety—Surety for One Incapable of Contracting—Absolute Liability of.** Where a person *sui juris* guarantees the obligation of, or becomes surety for, a person under disability, such as a married woman, minor, or other such person, he is liable thereon, although the principal be released by operation of law, upon plea; and this rule applies in the case of a surety for such person on a promissory note or any other obligation, p. 396.

Reaffirmed and varied in Allen v. Berryhill, 27 Iowa 539, 1 Am. Rep. 309, holding that one contracting with a person of unsound mind cannot set up such fact in an action thereon by the guardian of the insane person.

Reaffirmed and qualified in Keokuk County State Bank v. Hall, 106 Iowa 542, 76 N. W. 832; Seeley v. Seeley—Howe—Le Van Co., 128 Iowa 302, 103 N. W. 964, holding that where one becomes surety for an infant on his note for the purchase of property, and the infant upon arriving at majority, disaffirms the contract and restores to the vendor and payee of the note, the consideration received, the surety is thereby discharged. This last case holding, however, that in such case the surety is not discharged as against a *bona fide* purchaser of such note, for value and without notice of the disaffirmance by the infant.

Cited in Watson v. Chesire, 18 Iowa 208, 87 Am. Dec. 382, not in point.

2. **Husband and Wife—Contractual Rights of Wife under Codes of 1851 and 1860.**—The provisions of the codes of 1851 and 1860, as to the rights, powers, remedies and liabilities of married women, were intended to protect them in their property and not to invest them with the powers of a *feme sole*.

Under such provisions a wife has only the power to sell or mortgage her real estate for her own or her husband's debts, and

to make contracts in relation thereto; but has no authority to make an executory contract to purchase property, and such a contract is not enforceable at law.

Such provisions were not intended to give a married woman power to make contracts of all kinds, sign notes, become a surety for her husband, and engage in business generally, pp. 401, 402.

Reaffirmed and explained in Johnson County v. Rugg, 18 Iowa 138, holding that in an action to foreclose a mortgage executed by a wife on her real estate to secure her husband's debt, the court may properly order a foreclosure and sale of the property, but cannot direct that a general execution issue against her, if the mortgaged property fails to satisfy the debt.

Reaffirmed and explained in Wolff v. Van Metre, 19 Iowa 135, 136; First Nat'l Bank of Fort Dodge v. Haire, 36 Iowa 446, holding that a wife may mortgage her separate property to secure the debt of her husband, and equity will enforce the mortgage; but that a wife is not bound personally or beyond the mortgage for such a debt.

Reaffirmed and explained in Green & Densmore v. Scrannage, 19 Iowa 464-466, 87 Am. Dec. 447, holding that false representations made to the wife by the husband, or undue influence exerted by him to induce her to execute a mortgage, where she afterwards duly acknowledges it, does not affect or prejudice the mortgagee, if the conduct of the husband was without the instigation, procurement, knowledge or consent of the mortgagee; and that in such case, fraud must be brought home to the latter party.

Reaffirmed and explained in Mitchell & Sons v. Sawyer and Wife, 21 Iowa 583, holding further that where a wife has separate property, she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of her husband: Holding further, however, that money earned by a wife, and real estate therewith purchased, is subject to the satisfaction of her husband's debt.

Reaffirmed and extended in Laing v. Cunningham, 17 Iowa 513, holding that money earned by a wife, and real estate purchased therewith, is subject to the satisfaction of the debts of her husband.

Reaffirmed and extended in Wolf v. Van Metre, 23 Iowa 403, 404, holding that when a wife signs a note as surety for her husband, and executes a mortgage on certain real estate belonging to her to secure it, she is not personally bound thereby; the creditor must look to the property mortgaged for the payment thereof, and cannot look to other property of the wife, or complain of a subsequent voluntary conveyance by her of other property.

Reaffirmed and extended in Richmond v. Tibbles and Husband, 26 Iowa 477, 479, 481, 482, holding further that a wife is liable

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JONES v. CROSTHWAITE, 17 IOWA 393

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Reaffirmed and extended in Richmond v. Tibbles and Husband, 26 Iowa 477, 479, 481, 482, holding further that a wife is liable

under the Code of 1860, for breach of covenants contained in a deed to her own land.

Reaffirmed and extended in McKee v. Reynolds, 26 Iowa 582, 585, 589, holding further that as a general rule a contract between a husband and wife made during coverture, whereby one of them releases dower in the real estate of the other, is unenforceable at law, although enforceable under equitable circumstances in equity; but deeds for the separation of husband and wife are valid and effectual, both at law and in equity, provided their object be an actual and immediate separation; and if a husband in pursuance of an agreement to separate makes a grant to his wife of his right of dower in her property, and she pays him the consideration therefor, it is binding at law; but not if she only executes a note therefor which she never pays; and such note is unenforceable at law.

Reaffirmed and extended in Van Metre v. Wolf, 27 Iowa 345, holding further that where a married woman suffers default judgment to be entered against her in an action on a note on which she is surety for her husband, she cannot thereafter avoid such judgment on the ground of coverture: Holding further that a judgment against a married woman in such case, is conclusive as to the binding force of the contract, and of the right of the creditor to enforce it against her separate property: That a judgment at law against a married woman upon a contract which she was legally empowered to make is enforceable as other personal judgments at law.

Reaffirmed and extended in Sweazy v. Kammer, 51 Iowa 643, 2 N. W. 507, holding further that a married woman is not (under the Code of 1860) personally bound on a note signed by her as surety for her husband, and that her separate property cannot, in equity, be subjected to its satisfaction.

Reaffirmed and extended in Heacock v. Heacock, 108 Iowa 542, 545-547, 79 N. W. 354, 75 Am. St. Rep. 273, holding further that a note given by a husband to his wife is (under the Code of 1873) unenforceable by her, unless she pleads and proves in her action thereon that it was given as a consideration for, or in relation to, her separate money or property.

Reaffirmed and qualified in Patton v. Kinsman, 17 Iowa 432, 433, 435, holding that where a wife signs a note for her son in consideration of a purchase of property by him and with the understanding with the vendor that it is to be paid out of the proceeds of a note secured by mortgage on land which is held by her, and such mortgage is afterwards foreclosed, the wife becomes the purchaser and assigns her certificate of sale to the son's vendor, such agreement and transaction constitutes an equitable mortgage and is enforceable in equity as against the mortgaged property.

Reaffirmed and qualified in Hawke v. Urban, 18 Iowa 85, holding that an equitable action may (under Sec. 2007 of the Code of 1860) be brought against both husband and wife to subject the property of either or both for the satisfaction of a debt created for the expenses of the family, the education of their children and such other objects as come within the equity of that provision.

Reaffirmed and qualified in Simms v. Hervey, 19 Iowa 283, 297, 298, holding that a deed or mortgage, of lands by a husband and wife, intended to circulate or float in business channels and when it finds an owner to have her name inserted in the absence of the grantor (wife) is not effective as a conveyance, without authority in writing for the insertion of such name, though the transaction may, in certain cases, give equitable right; but no equity will exist in favor of the owner of such an instrument, when the grantor (wife) receives and retains no benefits therefrom, and does not ratify the negotiation of the instrument and the filling in of the blank.

Reaffirmed and qualified in Shields v. Keys, Adm'r., 24 Iowa 311-313, holding that a wife may (under the Code of 1860) acquire real estate, relying upon receiving and paying therefor with money received from her son, such property not being subject to the satisfaction of the debts of her husband.

Reaffirmed and qualified in Miller v. Hollingsworth, 36 Iowa 165, 166, holding that equity will enforce a lien on real estate of a wife for the amount of lumber and other materials purchased by her husband and used in the improvement of such realty, with the full knowledge and acquiescence of the wife, when it is further shown in the action that the materials and lumber were not furnished on the credit of the husband alone.

Cited in McLaren v. Hall, 26 Iowa 306, the court holding that a husband may act as the agent of his wife, or she may ratify his acts in relation to her property, if such ratification is with full knowledge.

Cited in Fyffe v. Beers, 18 Iowa 9, 85 Am. Dec. 577, not in point.

FULTON v. CITY OF DAVENPORT, 17 IOWA 404

1. **Municipal Taxation—Agricultural and Other Land in City Limits Exempt from—When—Injunction to Restrain Collection of Tax.**—Land lying within the boundary of a city but which is used for agricultural, mining or other such purpose, and which is not benefited and enhanced in value by municipal improvements and does not receive the advantages and protection of the city, is not subject to taxation therein: And injunction lies in favor of such

a land owner to restrain the collection of such taxes, pp. 407, 410, 412.

Reaffirmed in Davis v. City of Dubuque, 20 Iowa 459; Deeds v. Sanborn, 22 Iowa 217.

Reaffirmed and explained in Deiman v. City of Fort Madison, 30 Iowa 548-550; Durant v. Kauffman, marshal, 34 Iowa 195; Taylor v. City of Waverly, 94 Iowa 662, 63 N. W. 347, holding that lands within a city limits which are used exclusively for agricultural purposes, and receive no benefits from the city, are not subject to city taxation.

Reaffirmed and extended in Buell v. Ball, marshal, 20 Iowa 288, holding further that lands situated within the boundaries of a city and which are used for agricultural purposes, are not subject to city taxation; and that the question can be raised in an action of replevin against an officer who levies upon personal property in seeking to collect it.

Reaffirmed and varied in O'Hare v. City of Dubuque, 22 Iowa 145, 146; Brooks v. Polk County, 52 Iowa 461, 462, 3 N. W. 495; Perkins v. City of Burlington, 77 Iowa 555, 42, N. W. 441, holding that where agricultural, or mining land is situated in a city limits on a street thereof, and receives the advantages and benefits of the city and is thereby enhanced in value, it is subject to city taxation.

Reaffirmed and varied in Hayzlett v. City of Mount Pleasant, 33 Iowa 232, holding that inhabitants of a town and of adjoining territory cannot by a petition for incorporation, exempt property from city taxation which is otherwise subject thereto; and that if, in such case, any property lying within the new corporate limits, enjoys the advantages, benefits and protection of the city, it is subject to such municipal taxation.

Reaffirmed and qualified in Sears v. Iowa Midland R. R. Co., 39 Iowa 418, 419, holding that farm lands in a city limits may be taxed in aid of a railroad, where the tax is properly voted.

Reaffirmed and qualified in Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 293-295, 66 N. W. 179, 35 L. R. A. 63; Allen v. City of Davenport, 107 Iowa, 103, 77 N. W. 537, holding that in order for land within a city boundary to be exempt from taxation for municipal purposes it must be used in good faith for agricultural purposes: Holding further that a taxation or assessment for pavements, is not "taxation for city purposes" within the meaning of the exemption.

Cited in Grant v. City of Davenport, 36 Iowa 405, holding that the provision of Chap. 78, Laws of 1872, (in reference to the power of cities to levy a special tax for the construction and maintaining water-works) that the tax shall not "be levied upon the taxable

property of said city which lies wholly without the limits of the benefit or protection of such works," is constitutional.

Unreported citation, 109 N. W. 798.

Cross references. See further on this question, annotations under *Langworthy v. City of Dubuque* (13 Iowa 86), ante. p. 121; Rules 4 & 5 of *Morford v. Unger* (8 Iowa 82), Vol. I, p. 495

2. **Municipal Taxation—Road, or School District—Land in City as Part of, Subject of Taxation for.** Where a city or town is part of a road or a school district, all land and realty lying within the district, is subject to district taxation, p. 412.

Cited in *Slutts v. Dana*, 138 Iowa 257, 115 N. W. 1121 (dissenting opinion), the majority court partially overruling the text, and holding that the property of a city of the first class is not (under Sec. 1303 of the Code of 1897) taxable for building and repairing county bridges, or for the payment of county bonds therefor.

WHITE v. POLK COUNTY, 17 IOWA 413

1. **District Attorney—Appointment of Pro tem. by District Court, when—Compensation of—County Liable for.**—The district court has authority to appoint a district attorney *pro tem.* when the district attorney is temporarily or necessarily absent, and the county is liable to such *pro tem.* attorney for a reasonable compensation for his services while so acting, pp. 414, 416.

Reaffirmed and extended in *Hyatt v. Hamilton County*, 121 Iowa 293, 296, 297, 96 N. W. 856, 100 Am. St. Rep. 354, 63 L. R. A. 614, holding further that an attorney appointed by the district court to prosecute disbarment proceedings against another attorney, is entitled to a reasonable compensation from the county for services therein and thereon rendered.

Cited in *Sanford v. Lee County*, 49 Iowa 150, holding that the county is not liable for compensation of a stenographer in taking down the evidence in a preliminary examination in a criminal case before a justice of the peace and under appointment by such justice.

Distinguished and narrowed in *Davis v. Linn County*, 24 Iowa 508, holding that a justice of the peace has no power to appoint an attorney to prosecute criminal cases in his court, and the county is not liable to such attorney for compensation for services rendered under such appointment.

Distinguished and narrowed in *Seaton v. Polk County*, 59 Iowa 628, 13 N. W. 726, holding that, under the Code of 1873, the district court has no authority to appoint an attorney to assist the district attorney in the prosecution of criminal cases therein; and in such case the county is not liable to such appointed attorney for compensation for his services so rendered: That under Sec. 205 of the Code of 1873, the county board of supervisors

may employ additional counsel to assist the district attorney when the board deems it necessary: That the inherent power of the district court to appoint an attorney to prosecute criminal cases and subject the county to liability therefor, can only be invoked in order that justice do not fail.

(Note.—See further, *Korf v. Jasper County*, 132 Iowa 684, 108 N. W. 1031; *Foster & Foster v. Clinton County*; 51 Iowa 541; *Tatlock & Wilson v. Louisa County*, 46 Iowa 138; *Evans v. Story County*, 35 Iowa 126; *Hall v. Washington County* 2 G. Greene, 473, some important cases on this question, not citing the text.—Ed.)

2. Counties—Claims Against—Presentation to Board of Supervisors—Failure or Refusal of Board to Act on—Action on Claim. Where, under Chap. 93, Laws of 1862, a creditor having an unliquidated claim against a county, presents it to the county board of supervisors, and the board fails or refuses within a reasonable time thereafter, to allow or refuse payment thereof, the creditor may then institute an action thereon, which will not be affected by the failure of the board to act, pp. 417, 418.

Reaffirmed and extended in *Ferguson v. Davis County*, 57 Iowa 603, 10 N. W. 907, holding that in an action on an unliquidated claim against a county under the circumstances set out in the text, the fact that such claim was presented to the board of supervisors and payment demanded as prescribed by Sec. 2610 of the Code of 1873 (Law of the text) may be proved by the person who so presented the claim and demanded payment.

Reaffirmed and extended in *Armstrong v. Tama County*, 34 Iowa 313, holding further that when an ordinary claim against a county (in this case medicines furnished a pauper upon the order of the proper district township trustees) is refused payment by the county board of supervisors, action may be commenced thereon, and the creditor is not required to appeal from the action of the board—And to the same effect is, *Curtis v. Cass County*, 49 Iowa 423 (reaffirming the text), an action on another kind of claim against the county after rejection by the board of supervisors.

Reaffirmed and extended in *Ross v. Hardin County*, 94 Iowa 253, 254, 62 N. W. 845, holding further that in an action against a county on an unliquidated claim, which the board of supervisors failed or refused to allow, the question of whether or not the plaintiff waited a reasonable time after presentation to and demand of payment of the board before commencing action thereon, is one of facts, cannot be determined by the Supreme Court upon certificate such an action can be abated by the county under a given state of facts, cannot be determined by the Supreme Court upon certificate of the trial judge.

Reaffirmed and varied in *Baker v. Johnson County*, 33 Iowa 155, holding that the statute of limitation begins to run against

an unliquidated claim against a county from the time the claim accrues or is due, and not from the time presentment to the board of supervisors and demand of payment is made.

Distinguished in Sanford v. Lee County, 49 Iowa 149, 150, holding that where a physician makes a *post mortem* examination under the direction of the coroner, and such officer certifies that the amount charged therefor is reasonable and recommends that the claim as charged be allowed by the board of supervisors. such acts of the coroner constitute an allowance of the claim, and action may be brought thereon without presentation to the board and demand of payment of it; and that if, in such case, the physician so presents and demands such payment to and of the board, he is not to be prejudiced by any action which it may take thereon.

DAVIS, SAWYER & Co. v. STROHM, 17 IOWA 421

1. **Written Instruments—Parol Evidence of—When Admissible.** When a written instrument is shown by preliminary proof to have been lost or destroyed, parol evidence of its contents is admissible in any case wherein the instrument itself might be admitted in evidence, pp. 424, 427.

Reaffirmed in In re Devoe's Estate, 113 Iowa 10, 11, 84 N. W. 926.

2. **Trial—Instructions—Certainty Required.** Instructions to the jury ought to be clear and certain and incapable of two constructions, p. 426.

Reaffirmed and explained in Muldowney v. Ill. Cent. R. R. Co., 32 Iowa 180, holding that each party to an action has the right to have the jury instructed upon the law of the case, clearly and pointedly, and so as to leave no ground for misapprehension or mistake; and an instruction which is not in clear and unmistakable language, is reversible error upon appeal.

Reaffirmed and extended in State v. Green, 20 Iowa 427; Vanslyck v. Mills & Co., 34 Iowa 379, holding further that instructions to the jury which are capable of misconstruction, and tend to mislead or confuse the jury will, if properly excepted to, be cause for reversal upon appeal.

Cited with approval in Almond v. Nugent, 34 Iowa 305, 11 Am. Rep. 147, concurring opinion.

3. **Evidence of Title to Real Estate—When Parol, Admissible.** As a general rule parol evidence is inadmissible to prove the title to real estate; but if the paper title is lost or destroyed, or if there has been a parol purchase of real estate followed by the payment of the purchase money, or by the taking possession thereof by the purchaser, under the contract, or if the vendor himself when called

Reaffirmed and qualified in Dickey v. Polk County, 58 Iowa 290, 291, 12 N. W. 292, holding that a tax payer may (under Sec. 870 of the Code of 1873) recover from the county taxes illegally exacted by a county and paid by him, together with interest, and costs actually paid thereon; and his failure to pursue remedies allowed to him for correction of or relief from such taxes before he makes payment, does not affect his right to so recover.

Reaffirmed and narrowed in Smith v. McQuiston, auditor, et al, 108 Iowa 367, 79 N. W. 130, holding that where the county assessor assesses property at a certain amount, and it is copied by mistake on the assessment roll as a larger amount, mandamus lies to compel the county auditor to correct such clerical mistake as provided by Sec. 841 of the Code of 1873: That if, in such case, the tax payer pays the taxes on the erroneous amount under protest, he may recover from the county the taxes on the valuation in excess of the true amount assessed by the assessor: That the tax payer is not required to seek relief before the board of equalization under such circumstances.

Reaffirmed and narrowed in Layman, county treasurer v. Iowa Telephone Co., 123 Iowa 599, 600, 99 N. W. 208, holding that a void assessment may be collaterally assailed.

Cited with approval in Fulton v. City of Davenport, 17 Iowa 408, a case involving the question of whether or not taxes were illegal and not erroneous.

Cited in 146 Iowa 385, 386, 125 N. W. 257.

Distinguished and narrowed in Richards v. Wapello County, 48 Iowa 509, 510, holding that one who, under protest, pays county taxes which is assessed on his property which is not subject to taxation, may recover the amount paid from the county, after the board of supervisors thereof has refused to refund it—But see Brownlee v. Marion County, 53 Iowa 489, 5 N. W. 612; (distinguishing the text—holding that where real estate is assessed for county taxes in the name of a person not the owner, the owner may recover of the county the amount he paid to redeem it from a sale under such illegal and void assessment; and is not required to apply to the county board of supervisors before bringing his action therefor—And see Wangler Bros. v. Black Hawk County, 56 Iowa 386, 9 N. W. 315, (distinguishing the text), holding that where personal property is assessed in the name of a person not the owner, injunction lies upon complaint of the owner to restrain the collection of the tax.

Distinguished and narrowed in Remey v. Board of Equalization of Burlington, 80 Iowa 474, 475, 45 N. W. 900, holding that where a board of equalization raises an assessment, or assesses personal property of a resident of another state, such action is illegal and void, and may be reviewed and set aside by *Certiorari*; and that in such case the non-resident is not required to appeal from the action of the board; that an appeal in such case, is not the proper remedy.

Unreported Citation, 115 N. W. 241.

(Note.—See further, *Comstock v. Eagle Grove*, 133 Iowa 589, 111 N. W. 51; *Stevens v. Carroll*, 130 Iowa 465, 104 N. W. 433; *Owens v. Marion*, 127 Iowa 469, 103 N. W. 381; *Getchell v. Supervisors of Polk County*, 51 Iowa 107; *Royce v. Jenny*, 50 Iowa 679; *Harney v. Supervisors of Mitchell County*, 44 Iowa 203; *Cassett v. Sherwood*, 42 Iowa 623, some important cases on this question, not citing the text.—Ed.)

Cross reference. See Rules 1 & 3 hereof, in connection herewith.

3. Remedies Provided by Statute to be Had Before Special Tribunal—When Statute Exclusive.—When a statute provides a tribunal to determine questions connected with a particular subject, the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested by the statute, p. 387.

Reaffirmed in *Hatch, Holbrook & Co. v. Pottawattamie County*, 43 Iowa 444; *Newton v. McKay*, county treasurer, 130 Iowa 599, 102 N. W. 828.

Reaffirmed and extended in *Lease v. Vance*, 28 Iowa 511, holding further that where, without any agreement, or facts by which an agreement might be implied, one land owner voluntarily builds the entire division fence between his land and another's, he cannot recover of such other person the value of one-half the cost of building: That in such case, the statute, Chap. 61 of the Revision of 1860, in the absence of prescription or agreement, creates the obligation and prescribes the method of settling all controversies as to division fences, which is by applying to the fence viewers, and such method must be pursued.

Reaffirmed and extended in *Lyman v. Plummer*, 75 Iowa 355, 39 N. W. 528, holding further that when a statute confers the power to a city to prescribe by ordinance the manner in which a charge for street improvements shall be made on the owners of real estate, it embraces the right to the city to do all things necessary to make an assessment therefor a valid charge against the owners of property abutting on its streets so improved; and where such a statute does not prescribe the kind of notice to be given such lot owners, the city may so prescribe by ordinance, and a notice by publication in a newspaper and pursuant thereto, is sufficient.

Reaffirmed and extended in *Richards v. Wapello County*, 48 Iowa 509, 510, holding that one who, under protest, pays county taxes which is assessed on his property which is not subject to taxation, may recover the amount paid from the county, after the board of supervisors thereof has refused to refund it.

Cross reference. See further, annotations under Rules 1 & 2, in this connection.

Cited in Koehler & Lange v. Hill, 60 Iowa 578, 14 N. W. 755. (dissenting opinion) the majority court holding that the enrolled bill of a statute, when properly signed, and approved, is the conclusive expression of the Legislative will, and that it prevails over anything found in prior proceedings in connection with and inconsistent therewith as shown by the journals, etc.

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JONES v. CROSTHWAITE, 17 IOWA 393

1. **Principal and Surety—Surety for One Incapable of Contracting—Absolute Liability of.** Where a person *sui juris* guarantees the obligation of, or becomes surety for, a person under disability, such as a married woman, minor, or other such person, he is liable thereon, although the principal be released by operation of law, upon plea; and this rule applies in the case of a surety for such person on a promissory note or any other obligation, p. 396.

Reaffirmed and varied in Allen v. Berryhill, 27 Iowa 539, 1 Am. Rep. 309, holding that one contracting with a person of unsound mind cannot set up such fact in an action thereon by the guardian of the insane person.

Reaffirmed and qualified in Keokuk County State Bank v. Hall, 106 Iowa 542, 76 N. W. 832; Seeley v. Seeley—Howe—Le Van Co., 128 Iowa 302, 103 N. W. 964, holding that where one becomes surety for an infant on his note for the purchase of property, and the infant upon arriving at majority, disaffirms the contract and restores to the vendor and payee of the note, the consideration received, the surety is thereby discharged. This last case holding, however, that in such case the surety is not discharged as against a *bona fide* purchaser of such note, for value and without notice of the disaffirmance by the infant.

Cited in Watson v. Chesire, 18 Iowa 208, 87 Am. Dec. 382, not in point.

2. **Husband and Wife—Contractual Rights of Wife under Codes of 1851 and 1860.**—The provisions of the codes of 1851 and 1860, as to the rights, powers, remedies and liabilities of married women, were intended to protect them in their property and not to invest them with the powers of a *feme sole*.

Under such provisions a wife has only the power to sell or mortgage her real estate for her own or her husband's debts, and

to make contracts in relation thereto; but has no authority to make an executory contract to purchase property, and such a contract is not enforceable at law.

Such provisions were not intended to give a married woman power to make contracts of all kinds, sign notes, become a surety for her husband, and engage in business generally, pp. 401, 402.

Reaffirmed and explained in Johnson County v. Rugg, 18 Iowa 138, holding that in an action to foreclose a mortgage executed by a wife on her real estate to secure her husband's debt, the court may properly order a foreclosure and sale of the property, but cannot direct that a general execution issue against her, if the mortgaged property fails to satisfy the debt.

Reaffirmed and explained in Wolff v. Van Metre, 19 Iowa 135, 136; *First Nat'l Bank of Fort Dodge v. Haire*, 36 Iowa 446, holding that a wife may mortgage her separate property to secure the debt of her husband, and equity will enforce the mortgage; but that a wife is not bound personally or beyond the mortgage for such a debt.

Reaffirmed and explained in Green & Densmore v. Scranage, 19 Iowa 464-466, 87 Am. Dec. 447, holding that false representations made to the wife by the husband, or undue influence exerted by him to induce her to execute a mortgage, where she afterwards duly acknowledges it, does not affect or prejudice the mortgagee, if the conduct of the husband was without the instigation, procurement, knowledge or consent of the mortgagee; and that in such case, fraud must be brought home to the latter party.

Reaffirmed and explained in Mitchell & Sons v. Sawyer and Wife, 21 Iowa 583, holding further that where a wife has separate property, she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of her husband: Holding further, however, that money earned by a wife, and real estate therewith purchased, is subject to the satisfaction of her husband's debt.

Reaffirmed and extended in Laing v. Cunningham, 17 Iowa 513, holding that money earned by a wife, and real estate purchased therewith, is subject to the satisfaction of the debts of her husband.

Reaffirmed and extended in Wolf v. Van Metre, 23 Iowa 403, 404, holding that when a wife signs a note as surety for her husband, and executes a mortgage on certain real estate belonging to her to secure it, she is not personally bound thereby; the creditor must look to the property mortgaged for the payment thereof, and cannot look to other property of the wife, or complain of a subsequent voluntary conveyance by her of other property.

Reaffirmed and extended in Richmond v. Tibbles and Husband, 26 Iowa 477, 479, 481, 482, holding further that a wife is liable

under the Code of 1860, for breach of covenants contained in a deed to her own land.

Reaffirmed and extended in McKee v. Reynolds, 26 Iowa 582, 585, 589, holding further that as a general rule a contract between a husband and wife made during coverture, whereby one of them releases dower in the real estate of the other, is unenforceable at law, although enforceable under equitable circumstances in equity; but deeds for the separation of husband and wife are valid and effectual, both at law and in equity, provided their object be an actual and immediate separation; and if a husband in pursuance of an agreement to separate makes a grant to his wife of his right of dower in her property, and she pays him the consideration therefor, it is binding at law; but not if she only executes a note therefor which she never pays; and such note is unenforceable at law.

Reaffirmed and extended in Van Metre v. Wolf, 27 Iowa 345, holding further that where a married woman suffers default judgment to be entered against her in an action on a note on which she is surety for her husband, she cannot thereafter avoid such judgment on the ground of coverture: Holding further that a judgment against a married woman in such case, is conclusive as to the binding force of the contract, and of the right of the creditor to enforce it against her separate property: That a judgment at law against a married woman upon a contract which she was legally empowered to make is enforceable as other personal judgments at law.

Reaffirmed and extended in Sweazy v. Kammer, 51 Iowa 643, 2 N. W. 507, holding further that a married woman is not (under the Code of 1860) personally bound on a note signed by her as surety for her husband, and that her separate property cannot, in equity, be subjected to its satisfaction.

Reaffirmed and extended in Heacock v. Heacock, 108 Iowa 542, 545-547, 79 N. W. 354, 75 Am. St. Rep. 273, holding further that a note given by a husband to his wife is (under the Code of 1873) unenforceable by her, unless she pleads and proves in her action thereon that it was given as a consideration for, or in relation to, her separate money or property.

Reaffirmed and qualified in Patton v. Kinsman, 17 Iowa 432, 433, 435, holding that where a wife signs a note for her son in consideration of a purchase of property by him and with the understanding with the vendor that it is to be paid out of the proceeds of a note secured by mortgage on land which is held by her, and such mortgage is afterwards foreclosed, the wife becomes the purchaser and assigns her certificate of sale to the son's vendor, such agreement and transaction constitutes an equitable mortgage and is enforceable in equity as against the mortgaged property.

Reaffirmed and qualified in Hawke v. Urban, 18 Iowa 85, holding that an equitable action may (under Sec. 2007 of the Code of 1860) be brought against both husband and wife to subject the property of either or both for the satisfaction of a debt created for the expenses of the family, the education of their children and such other objects as come within the equity of that provision.

Reaffirmed and qualified in Simms v. Hervey, 19 Iowa 283, 297, 298, holding that a deed or mortgage, of lands by a husband and wife, intended to circulate or float in business channels and when it finds an owner to have her name inserted in the absence of the grantor (wife) is not effective as a conveyance, without authority in writing for the insertion of such name, though the transaction may, in certain cases, give equitable right; but no equity will exist in favor of the owner of such an instrument, when the grantor (wife) receives and retains no benefits therefrom, and does not ratify the negotiation of the instrument and the filling in of the blank.

Reaffirmed and qualified in Shields v. Keys, Adm'r., 24 Iowa 311-313, holding that a wife may (under the Code of 1860) acquire real estate, relying upon receiving and paying therefor with money received from her son, such property not being subject to the satisfaction of the debts of her husband.

Reaffirmed and qualified in Miller v. Hollingsworth, 36 Iowa 165, 166, holding that equity will enforce a lien on real estate of a wife for the amount of lumber and other materials purchased by her husband and used in the improvement of such realty, with the full knowledge and acquiescence of the wife, when it is further shown in the action that the materials and lumber were not furnished on the credit of the husband alone.

Cited in McLaren v. Hall, 26 Iowa 306, the court holding that a husband may act as the agent of his wife, or she may ratify his acts in relation to her property, if such ratification is with full knowledge.

Cited in Fyffe v. Beers, 18 Iowa 9, 85 Am. Dec. 577, not in point.

FULTON v. CITY OF DAVENPORT, 17 IOWA 404

1. **Municipal Taxation—Agricultural and Other Land in City Limits Exempt from—When—Injunction to Restrain Collection of Tax.**—Land lying within the boundary of a city but which is used for agricultural, mining or other such purpose, and which is not benefited and enhanced in value by municipal improvements and does not receive the advantages and protection of the city, is not subject to taxation therein: And injunction lies in favor of such

livered when anything remains to be done by the party by whom it is to be delivered. So, where a joint deed to land is signed and acknowledged by one of the grantors and left with a notary public to be delivered to the grantee when the other grantor, or grantors, shall sign and acknowledge it, such delivery to the notary does not constitute a delivery of the deed, and the instrument is ineffective and not binding on any of the parties, p. 490.

Reaffirmed in Hutton v. Smith, 88 Iowa 241, 242, 55 N. W. 327; Haviland v. Haviland, 130 Iowa 615, 105 N. W. 355, 5 L. R. A. (New Series) 281.

Reaffirmed and explained in Sheehy v. Scott, 128 Iowa 557, 104 N. W. 1142, 4 L. R. A. (New Series) 365, holding that a deed will not be regarded as delivered, when anything remains to be done by the parties who propose to deliver it.

BUCHANAN ET AL., EXECUTORS V. MARSH, 17 IOWA 494

1. Injunction by Creditor to Restrain Sale of Land by Debtor—When not Allowed.—Injunction does not lie upon complaint of a creditor to restrain his debtor from selling or conveying real estate, until such creditor has reduced his demand to a judgment which is a lien upon the land, pp. 495, 496.

Reaffirmed in Clark v. Raymond, 84 Iowa 255, 50 N. W. 1069.

Reaffirmed and explained in Bonesteel v. Downs, 73 Iowa 687, 35 N. W. 925, holding that injunction does not lie before judgment to restrain a debtor from disposing of his property; and that this rule applies to liabilities incurred for fines, penalties and costs.

Reaffirmed and explained in Peterson v. Gittings, 107 Iowa 309, 77 N. W. 1057, holding that as a general rule a creditor must have a lien, or be in a situation to perfect a lien, before he may file a bill in equity to subject real estate to the payment of his claim.

Reaffirmed and explained in Wiltse v. Flack, 115 Iowa 53, 55, 87 N. W. 730, holding that it is sufficient, in order to warrant an equitable proceeding to subject real property, that the creditor shall have established the legal validity of his claim by judgment which would support an execution against such property, and have shown that further proceedings at law to enforce the same would be useless.

Reaffirmed, varied and qualified in Goode v. Garrity, 75 Iowa 716, 38 N. W. 151, holding that until a creditor in some manner obtains a lien on his debtor's property, or has exhausted his remedies at law, or done what is equivalent thereto, he cannot question, in equity, a fraudulent conveyance or incumbrance of his property made by such debtor, and have it set aside.

Reaffirmed and qualified in Crary, trustee, v. Kurtz, 132 Iowa 111-113, 105 N. W. 592, 119 Am. St. Rep. 549, holding that a trustee in bankruptcy may, when necessary to pay debts of a bankrupt, bring suit to set aside fraudulent conveyances of the bankrupt to land, without reducing the claims to be paid, to judgment.

Cited with approval in Hansen's Empire Fur Factory v. Teabout, 104 Iowa 368, 73 N. W. 877, a case turning on other questions.

Distinguished in Hill v. Denny, 106 Iowa 727, 730, 77 N. W. 473, 474, holding that pending an attachment on lands of a debtor, the attaching creditor may maintain a bill in equity to set aside and cancel a fraudulent mortgage of the debtor thereon, and a fraudulent assignment of the mortgage by the fraudulent grantee in such instrument.

Distinguished and narrowed in Joseph v. McGill, 52 Iowa 128, 129, 2 N. W. 1008, holding that pending an action by a creditor against his debtor wherein certain land is attached, the creditor may enjoin an alleged fraudulent grantee of such land from conveying it to an innocent purchaser in fraud of such creditor's rights.—Such injunction to be granted upon bill setting out such facts, that the debtor fraudulently conveyed to the grantee, and that he (the grantee) is about to convey to an innocent purchaser in fraud of the grantor's (debtor's) creditors and of the plaintiff (creditor).

(Note.—See further, Blackman v. Baxter, 125 Iowa 118, 2 A. & E. Am. Cas. 707, 100 N. W. 75, 70 L. R. A. 250; Ware v. Delahaye, 95 Iowa 667, 64 N. W. 640; Melhop v. Ellsworth, 95 Iowa 657, 64 N. W. 638; Boggs v. Douglass, 89 Iowa 150, 56 N. W. 412; Taylor v. Branscombe, 74 Iowa 534, 38 N. W. 400; Schaller v. Wright, 70 Iowa 667, 28 N. W. 460; Goodenow v. McCoid, 44 Iowa 659; Doe v. Clark, 42 Iowa 123; Cooley v. Brown, 30 Iowa 470; Harlin v. Stevenson, 30 Iowa 371; some important cases on this question, not citing the text.—Ed.)

GLENN v. GLENN, 17 IOWA 498

1. **Fraudulent Conveyance of Land by Father to Children—Evidence to Sustain—Badges of Fraud.**—In an action by a creditor to set aside a conveyance of land by a father to his children on the ground that it was made for the purpose of hindering and delaying such creditor, which fraud was participated in by both grantor and grantees, the facts that the grantor was in greatly embarrassed financial circumstances, was anticipating suits being brought against him, and that the conveyance was executed on the same day that suits were instituted against the grantor; that the conveyance comprised all the property of the grantor; that the grantees were the children of the grantor and were financially or legally irresponsible; that the property was sold on credit, and that no money, or only

a small or colorable amount was paid, and that the grantor took no mortgage to secure the apparent purchase price, are all circumstances constituting badges of fraud, and, if not satisfactorily explained by the parties, will authorize a judgment for the creditor, setting aside such conveyance as fraudulent, pp. 501, 502.

Cited with approval in Baldwin v. Tuttle, 23 Iowa 74; Corn Exchange Bank v. Applegate, 91 Iowa 416, 59 N. W. 269; Dunning v. Bailey, 120 Iowa 734, 95 N. W. 250, cases wherein conveyances were set aside as fraudulent as to an existing creditor of the grantors under similar facts and circumstances.

Unreported Citation, 103 N. W. 471.

2. Fraudulent Conveyance—Failure of Parties to Explain Circumstances and Facts Evidencing—Effect.—Where in an action by a creditor of a grantor to set aside a conveyance by the latter as fraudulent, the plaintiff proves facts and circumstances constituting, if unexplained, badges or evidence of fraud, and the parties to the alleged fraudulent conveyance fail to become witnesses and satisfactorily explain such evidence, it will be sufficient to authorize the setting aside of the conveyance, p. 502.

Reaffirmed in Corn Exchange Bank v. Applegate, 91 Iowa 415, 416, 59 N. W. 269; Brittain Dry Goods Co. v. Plowman, 113 Iowa 627, 85 N. W. 811; Dunning v. Baily, 120 Iowa 733, 734, 95 N. W. 250; Hickey v. Davidson, et al, 129 Iowa 395, 396, 105 N. W. 682.

ISSETT & BREWSTER v. LUCAS, 17 IOWA 503, 85 AM. DEC. 572

1. Mortgage to Secure Several Notes—Order of Payment—Effect of Assignment—Separate Mortgages to Secure Different Installments of Same Debt.—Notes or a debt payable at different times and secured by mortgage, take priority and are to be paid in the order in which they fall due, whether in the hands of the mortgagee, or assigned in whole or in part by him: And the rule is applicable where separate mortgages are executed to secure each note or installment of the same debt: But this rule may be varied or abrogated by express agreement or stipulation to the contrary, pp. 506, 507.

Reaffirmed and extended in Leavitt & Johnson v. Reynolds, 79 Iowa 350, 44 N. W. 568, 7 L. R. A. 365, holding further that a provision in a mortgage that default in payment of any of the principal and interest when due, shall cause the entire sum or notes remaining unpaid to become due, does not change the rule.

Cross references. See further on this question, annotations under Rule 4 of Grapengether v. Fejervary (9 Iowa 163); Rankin v. Major (9 Iowa 297) Vol. I, pp. 556 and 578, respectively.

2. Evidence—Parol Evidence Inadmissible to Vary Legal Effect of Mortgage.—Parol evidence of an agreement varying or controlling the legal effect of a mortgage, is inadmissible, p. 507.

Reaffirmed, explained and qualified in Dunbar v. Stickler, 45 Iowa 386, holding that in the absence of fraud, accident or mistake, parol evidence is inadmissible to vary or control the legal effect of a deed.

Reaffirmed and extended in Allen v. Bryson, 67 Iowa 595, 25 N. W. 822, 56 Am. Rep. 358, holding further that a bill of sale cannot be varied or limited by proof of a contemporaneous parol agreement by which it was in fact a bailment.

(Note. In the present case and in the last citing case, neither fraud, accident or mistake, was pleaded or proved.—Ed.)

3. Judgment—What is—Assignment of—Rights of Assignee. A judgment is an assignable chose in action, and an assignee thereof takes it subject to and charged with all the equities that it would be subject to and charged with in the hands of his assignor, p. 507.

Special Cross reference. For cases citing the text, and many others on the question, see annotations under Burtis v. Cook & Sargent (16 Iowa 194), ante. p. 427.

LAING v. CUNNINGHAM, 17 IOWA 510

1. Husband and Wife—Earnings of Wife Property of Husband under Code of 1860.—Under the Code of 1860, the earnings of the wife during coverture, or property in which such earnings are invested, become the property of her husband, and can be subjected to the satisfaction of his debts, p. 513.

Special Cross reference. For cases citing, etc., and impliedly overruling the text, and others on the question, see annotations under Duncan v. Roselle (15 Iowa 501) ante. p. 372.

Cross reference. See further in this connection, annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

2. Homestead Subjection to Debts Created Prior to Its Acquisition—Foreign and Domestic Debts.—Homestead is subject to the satisfaction of debts created before it was acquired, whether the debts are those of resident or non-resident creditors, p. 513.

Reaffirmed in Brainard v. Van Kuran, 22 Iowa 264.

3. Husband and Wife—Real Estate Purchased with Husband's Funds Taken in Name of Wife—Fraud.—Where real estate is purchased with money of the husband or that which in legal effect belongs to him, as earnings of the wife, and the title is taken in the name of the wife, such conveyance is fraudulent as to the creditors of the husband, pp. 512, 513.

Reaffirmed and explained in Brainard v. Van Kuran, 22 Iowa 265-268, holding that the question of whether or not a conveyance is fraudulent and made with intent of the parties to hinder and delay creditors, is one of fact, and the verdict of a jury, or finding of the court in such a case will not be disturbed upon appeal, unless clearly against the weight of the testimony.

Reaffirmed and explained in Hamilton v. Lightner, 53 Iowa 473, 5 N. W. 606, holding that property acquired by a wife by the use of her husband's money or property is subject to the latter's debts, the acquisition thereof being fraudulent as to the creditor's of the husband.

Cited in Baldwin v. Tuttle, 23 Iowa 74, the court holding that where a conveyance of land to a wife recites that it is for the consideration of "love and affection" and a sum of money, it is, on its face, fraudulent as against a creditor of the grantor at the time of its execution.

Cited in Presnall v. Herbert, 34 Iowa 543, holding that personal property of a wife under the control of her husband at the time he contracts a debt, is subject to be taken under execution or attachment therefor, although the wife files notice of her ownership of record (as provided by Secs. 2499-2503 of the Code of 1860) before the issuance of the writ.

Cross references. See further on this question, annotations and cross references under Hook v. Mowre (17 Iowa 195), ante. p. 516; Rule 4 of Ticonic Bank v. Harvey (16 Iowa 141), ante. p. 418.

LUCAS v. SAWYER, 17 IOWA 517

1. Dower—When Becomes Vested Right—Power of Legislature to Change, etc.—The wife is entitled to dower in her husband's real estate according to the law in force at his death.

The dower of the wife becomes a vested right upon the death of her husband; and until such time it is inchoate only, and the Legislature may enlarge, abridge or entirely take it away, pp. 521-523.

Reaffirmed in Foley v. Kane, 53 Iowa 68, 4 N. W. 824; Parker v. Small, 55 Iowa 733, 8 N. W. 662; Cunningham v. Wilde, 56 Iowa 369, 370, 9 N. W. 304.

Reaffirmed and explained in Sturdevant v. Norris, 30 Iowa 69-71, holding that the law acts upon the status of the parties at the time of the husband's death, when the dower interest, if any, vests, and upon the property in which her husband during the coverture had a legal or equitable interest, in which she has not relinquished her rights, or in which her rights have not been extinguished in the manner provided by law.

Reaffirmed and qualified in Moore v. Kent, 37 Iowa 22, 23, 25, 18 Am. Rep. 1; Craven v. Winter, 38 Iowa 481; Purcell v. Lang, 97 Iowa 612, 613, 615, 66 N. W. 888, holding that where a husband during his life conveys real estate, in which instrument the wife does not join, she is entitled to dower in such property after his death, according to the law in force at the time of the execution of such conveyance by her husband.

Cited in 146 Iowa 304, 125 N. W. 235.

Cited in Newman v. Samuels, 17 Iowa 554, not in point, but upon analogy.

Unreported citation, 129 N. W. 481.

(Note.—See further, Swartz v. Andrews, 137 Iowa 266, 114 N. W. 890; Sawyer v. Biggart, 114 Iowa 491, 87 N. W. 426; Shawhan v. Loffer, 24 Iowa 226; Burke v. Barron, 8 Iowa 132, important cases on this question, not citing the text.—Ed.)

DESMOND v. MCCARTHY, 17 IOWA 525

1. Office and Officer—Proceeding to Test Right to Office—Replevin, not Proper—Quo Warranto.—The right or title to an office can only be determined by a proceeding in the nature of *Quo Warranto*, or by an information as provided by Chap. 151 of the Code of 1860, or possibly by mandamus; and cannot be adjudicated in an action of replevin by one claimant thereto against the other for possession of the books or other property of the office, or by other civil action between such claimants, pp. 527, 528.

Reaffirmed in Daniels v. Newbold, mayor, et al, 125 Iowa 195, 196, 100 N. W. 1120, holding that *Quo Warranto* is the proper proceeding to test the right to office.

Reaffirmed and qualified in McCue v. Circuit Court of Wapello County, 51 Iowa 67, 68, holding that where no *Quo Warranto* proceeding is instituted, a court may decide which one of two persons claiming to be sheriff is the *de jure* officer to serve his process and act as sheriff in his court.

Cited with approval in Metropolitan Nat'l Bank v. Commercial State Bank, 104 Iowa 687, 74 N. W. 28, holding that the acts of officers *de facto* are as valid and effectual, where they concern the public or the rights of third persons, as though they were officers *de jure*, and that their authority to act cannot be questioned in collateral proceedings.

Unreported citation, 50 N. W. 490.

NEWMAN v. SAMUELS, 17 IOWA 528

1. Deed of Trust with Power to Sell—Treated as Mortgage in Equity.—A deed of trust to land to secure the payment of a debt, with power of the trustee to sell in case of default in pay-

ment of the indebtedness by the grantor, will be treated in equity as a mortgage, and will be governed by the rules of law applicable to the latter, pp. 535, 536.

Reaffirmed and extended in *Lowe v. Grinnan*, 19 Iowa 197, holding further that a valid sale of land under a trust deed cuts off the rights of a mortgagee under a mortgage executed prior to the trust deed: This, says the court, is the established rule, in the absence of a statute allowing the right of redemption by such mortgagee, after sale, or of some extrinsic equity.

2. Deed of Trust—Rights of Purchaser at Sale under.—A purchaser of real estate at a trustee's sale under a trust deed executed to secure a debt is not bound to see to the proper application of the purchase price by the trustee: But a purchaser at such a sale under a trust deed made for the purpose of raising a fund to pay debts of the grantor, must, in order to obtain a perfect title, see to the proper application of the purchase price fund by the trustee.

In the first class of cases the trustee is bound by and limited by his authority to act in the premises, and must pursue his authority strictly in making the sale, pp. 536, 537.

Reaffirmed and explained in *Waterman v. Baldwin*, trustee, 68 Iowa 259, 260, 26 N. W. 437, holding that there is a recognized difference between a conveyance which vests the legal title in a trustee for the purpose of raising a fund to pay debts, and a conveyance to a trustee for the purpose of securing a debt; that in the former the title will pass, although the conveyance by the trustee is in violation of the conditions of the trust; while in the latter the title will not pass by such a conveyance, unless the terms and conditions of the trust have been at least substantially pursued.

Reaffirmed and explained in *Livermore v. Maxwell*, 87 Iowa 711, 55 N. W. 39, holding that a trustee has no powers except those conferred by the instrument creating the trust; that persons dealing with the subject of the trust must take notice of the extent and limitations of the powers conferred; and that those given must be strictly pursued.

3. Trust Deed Sale—Estoppel of Creditor Secured, to Attack as Against Purchaser.—Where the creditor secured by a trust deed assents to the validity of a sale of land thereunder and that the purchase price fund be applied other than to the satisfaction of his debt, he is thereby estopped to attack the validity of the sale as against the purchaser thereat, pp. 545-548.

Reaffirmed and varied in *Drefahl v. Tuttle*, 42 Iowa 181, holding that where an execution creditor becomes a purchaser at a sale thereunder with full knowledge of all facts constituting such sale invalid, and the execution debtor does not accept any of the benefits thereof, the latter is not estopped by any other acts prior there-

to, and which do not induce the execution creditor to act to his prejudice, from assailing its validity.

Unreported citation, 129 N. W. 318.

4. Conveyances—Sufficiency of Certificate of Acknowledgment—Constructive Notice.—A certificate of acknowledgment to a conveyance, which fails to state that it was the *voluntary* act and deed of the parties, is fatal; and such an instrument and certificate when recorded, imparts no constructive notice, p. 548.

Reaffirmed, explained and qualified in Kreuger v. Walker, 80 Iowa 736, 45 N. W. 872, holding that where a certificate of acknowledgment fails to show that the deed was the *voluntary* act of the grantor, such deed imparts no constructive notice, when recorded, to a subsequent purchaser, and is inadmissible in evidence for plaintiff in an action by the grantee against such a purchaser: That the omission of the word "voluntary" or its equivalent, in reference to the act of the grantor in such a certificate is fatal.

Cross reference. See further on this question, annotations under Rule 2 of Bell v. Evans (10 Iowa 353), Vol. I, p. 703.

5. Constitutional Law — Retrospective Statutes — Constitutionality—Curative Acts.—A curative statute, retrospective in character is unconstitutional only in so far as it interferes with vested rights. So, the Act of 1858 (Chap. 30, Laws of that Year), curing defects in acknowledgments to deeds before its taking effect, is not unconstitutional as impairing the obligation of contracts, but is invalid as affecting rights vested before its passage, p. 549.

Reaffirmed in Iowa R. R. Land Co. v. Soper, 39 Iowa 117; Palmer v. Howard County, 45 Iowa 64.

Special Cross reference. For further cases citing the text, and many others on the question, see annotations under Rule 2 of Brinton v. Seevers (12 Iowa 389), ante. p. 64.

CRAWFORD AND KIMBALL, EXECUTORS v. WHITE, 17 IOWA 560

1. Foreign Judgments Entered by Fraud and Want of Authority of Attorney for Defendant—Action on in This State—Insufficient Equitable Defense.—Where in an action in this state on a foreign judgment, the defendant files an answer in the nature of an equitable defense and seeking to set the judgment aside or have it adjudged invalid, alleging as a ground therefor that it was obtained by fraud and collusion between the plaintiff's attorney and his own, and no allegation is made therein that the defendant is not indebted to the plaintiff to the amount of the judgment, such answer is insufficient, p. 561.

Reaffirmed and extended in Taggart & Taggart v. Wood, 20 Iowa 238, holding further that equity will not restrain the collection of a judgment valid and regular on its face, unless it appears that the

defendant (complainant) has a defense to the action wherein it was rendered.

Reaffirmed and extended in Parsons v. Nutting, 45 Iowa 405, 406, holding further that where a defendant seeks to enjoin the collection of a judgment improperly entered, he must tender or offer to pay the amount which he admits to be justly due.

Reaffirmed and extended in Uehlein v. Burk, 119 Iowa 745, 746, 94 N. W. 244, holding further that where a person seeks in an equitable action to set aside a void judgment *in rem*, he must allege and prove some special equity entitling him to the relief.

BYINGTON v. ROBERTSON, 17 IOWA 562

1. **Pleadings—Motion to Make more Specific—Demurrer.**—Where statements in a pleading are not sufficiently definite, such defect must be reached by a motion to make more specific and not by demurrer, p. 563.

Reaffirmed in Snyder v. Fort Madison Street Ry. Co., 105 Iowa 291, 75 N. W. 182, 41 L. R. A. 345.

LEONARD v. HALLEM, 17 IOWA 564

1. **Justice's Court—Writ of Error to Correct Error in—Necessity for Motion to Correct before Issuance of the Writ.**—Where an error in a justice's court is capable of being corrected by a motion therefor therein (in this case the entry of a judgment on a defective service of notice) such motion must be made before a writ of error may issue to correct it, p. 566.

Reaffirmed in Smith v. Parker, 28 Iowa 360, being upon a state of facts the same as this present case.

Distinguished and narrowed in Johnson v. Dodge, 19 Iowa 108, holding that where a judgment by default is erroneously entered in a justice's court, the defendant is entitled to a writ of error to correct such error and set the judgment aside, unless it appears that the defendant knew of such error in time to have applied for its correction within the six days allowed by statute therefor, in which last case the defendant must move for its correction before the justice before the issuance of the writ.

Distinguished and narrowed in Holmes v. Hull, 48 Iowa 180, holding that the rule is inapplicable where a judgment is entered in a justice's court having no jurisdiction (in this case for want of the service of any notice upon the defendant), and that in such case the defendant must proceed by writ of error if he has knowledge of the judgment within the time allowed for its issuance, and if not he may proceed by action aided, if necessary, by injunction to have it set aside.

Special Cross reference. For further cases citing the text, and others, see annotations under *Pigman v. Denney* (12 Iowa 396), ante. p. 66.

McKAY v. LEONARD, 17 IOWA 569

1. Sheriffs—Liability of Succeeding Sheriff and his Sureties for Property taken under writ by his predecessor.—A succeeding sheriff and his sureties are not liable for loss or damage to property taken under a writ by his predecessor, unless he gives a receipt therefor, the property is actually delivered to the former, or he waives such delivery and agrees to be liable therefor: A mere transfer of the writ to the new sheriff will not make him liable for the care and control of the property: But the mere failure of an outgoing sheriff to take a receipt for such property actually delivered to his successor, will not render the retiring sheriff or his bondsmen liable for subsequent want of care and consequent loss or damage, p. 571.

Special Cross reference. For cases citing the text, see Rule 1 of *McKay v. Thorington* (15 Iowa 25), ante. p. 298.

FERRIER v. SCOTT'S ADMINISTRATOR AND HEIRS, 17 IOWA 578

(Abstract.)

1. Usury—What Constitutes—Note in Consideration of Extension of Time on Another Note.—A note given in consideration of the extension of time of payment of another note or indebtedness, and for an amount in excess of the ten per cent. per annum the original note or indebtedness is drawing, is usurious and void, p. 578.

Reaffirmed in *Kendig v. Linn and Hanson*, 47 Iowa 63.

CARLETON v. BYINGTON, 17 IOWA 579

(Abstract. Later appeals, 18 Iowa 483, 24 Iowa 172.)

1. Action to Foreclose Mortgage—How Tried—Review on Appeal.—Under Secs. 2099 and 3000 of the Code of 1860, an action to foreclose a mortgage is to be tried in the district, and reviewed in the Supreme Court as an action at law; and the same rules govern practice in such an action as in any other law action. A judgment in such an action will not be reviewed upon appeal, where no motion for a new trial, or motion to correct the judgment was made in the trial court, p. 580.

Special cross reference. For cases citing the text, and others on the question, see annotations under *Docterman v. Webster* (15 Iowa 522), ante. p. 378.

2. Erroneous Judgments and Orders of District Court—Necessity for Motion to Correct, etc., before Appeal.—In an action at law

where the action is tried by the district court, a motion for a new trial must be made setting out the errors, or a motion be made to set aside or modify an erroneous order or judgment, or the errors therein will not be reviewed upon appeal: Specific objection and exception must, in actions at law, be made and taken in the district court, in order that that court may correct errors without an appeal, p. 580.

Special cross reference. For cases citing the text, and others on the question, see annotations under *Pigman v. Denney* (12 Iowa 396), ante. p. 66.

3. Actions—Practice—Judicial Discretion of District Court on Questions of—Granting Default—Abuse of Discretion—Reversal.—In deciding upon all questions of practice the district court has a large judicial discretion, and his decision on such a matter will not be reversed upon appeal, except where he has manifestly abused it. The rule applies to the granting of a default for failure to file an answer, and refusing to set such default aside, p. 580.

Reaffirmed in *Clute, Bros. & Co. v. Hazleton*, 51 Iowa 358, 1 N. W. 675.

Cross reference. See further on this question, annotations and cross references under *Bolander v. Atwell* (14 Iowa 35), ante. p. 200.

4. Actions—Defendant in Default—Assessment of Damages—Right of Defendant in Default.—In an action wherein damages are to be assessed the defendant who is in default is not entitled to demand a jury to so assess. In such case the defendant has only the right (under Sec. 3152 of the Code of 1860) to cross examine the witnesses against him, p. 580.

Reaffirmed and extended in *Free v. Western Union Telegraph Co.*, 135 Iowa 79, 110 N. W. 147, holding further that under Sec. 3792 of the Code of 1897, a party in default may only cross examine the witnesses introduced by the successful party on the assessment of damages: He cannot object to the introduction of evidence by his opponent, introduce evidence himself, cross examine witnesses on matters not touched on in chief, nor can he move in arrest of judgment, without first having the default set aside.

Special cross reference. For further cases citing the text, and others, see annotation under *Wilkins v. Treynor* (14 Iowa 391), ante. p. 252.

(Note.—See further, *Lyman & Co. v. Bechtell & Ross*, 58 Iowa 755, 12 N. W. 273 (abstract); *Wright v. Lacy*, 52 Iowa 248, 3 N. W. 47; *Clute Bros. & Co. v. Hazleton*, 51 Iowa 355, 1 N. W. 675; *Loeber v. Delahaye*, 7 Iowa 478; *Cook v. Walters*, 4 Iowa 72, some important cases on this question, not citing the text.—Ed.)

ARMSTRONG v. CATLIN, 17 Iowa 581

(Abstract.)

1. Actions—Defendant in Default—Assessment of Damages—Right of Defendant in Default. In an action wherein damages are to be assessed, the defendant who is in default is not entitled to demand a jury to so assess. In such case the defendant has only the right (under Sec. 3152 of the Code of 1860) to cross examine the witnesses against him, p. 581.

Special cross reference. For cases citing the text, and others, see annotations under Wilkins v. Treynor (14 Iowa 391), ante, p. 252.

Cross reference. See Rule 4 of Carleton v. Byington, next preceding this case.

MCNULTY v. EVERETT & MORE, 17 Iowa 581

(Abstract.)

1. Default Judgment—Motion to Set Aside—Judicial Discretion of Trial Court—Reversal for Abuse.—The trial court has a large judicial discretion in acting upon a motion to set aside a judgment by default made at the term at which it is entered, and his ruling thereon will not be reversed upon appeal, except in case of abuse of such discretion, p. 582.

Reaffirmed in Capital Savings Bank & Trust Co. v. Swan. 100 Iowa 721, 722, 69 N. W. 1066.

Reaffirmed in Ellis & Ellis v. Butler, 78 Iowa 636, 43 N. W. 461, a case wherein the court's ruling in refusing to set aside a judgment by default was reversed for abuse of discretion.

Reaffirmed and extended in Ordway v. Suchard & Gebhard, 31 Iowa 487, holding further that the judicial discretion of the trial court in acting upon a motion to set aside a judgment by default should never be exercised in favor of a party who is in default through the negligence of himself or his attorney.

Cross reference. See further on this question, annotations and cross references under Bolander v. Atwell (14 Iowa 35) ante. p. 200.

SANSEE v. WILSON, 17 Iowa 582

(Abstract.)

1. Sales of Personal Property—Rights of Creditor of Vendor under Subsequent Levy of Execution.—Where before the levy of an execution upon a buggy, the execution debtor in good faith sells it, and delivers possession of certain of its parts to the purchaser, the rights of the latter are paramount to those of the subsequently levying execution creditor, pp. 582, 583.

Special cross reference. For cases citing the text, and many others on the question, see annotations under *Thomas v. Hillhouse* (17 Iowa 67), ante. p. 495.

REYNOLDS *v.* MEELICK, 17 Iowa 585

(Abstract.)

1. Written Contract—Mistake—Reforming in Equity.—Where a written contract, by mutual mistake of the parties, fails to state the actual agreement, it will be reformed in equity, pp. 585, 590.

Reaffirmed in *Stafford v. Fetters*, 55 Iowa 487, 8 N. W. 324.

Annotations to Decisions Reported in Volume 18 Iowa.

GWYNN v. TURNER, 18 IOWA 1

1. Actions in Equity—Relief not Prayer for not Granted. In an action in equity it is improper for the chancellor to grant relief not claimed and prayed for in the pleadings. p. 4.

Distinguished and narrowed in Phoenix v. Lamb, 29 Iowa 354, holding that in an action at law it is the court's duty to require parties to so plead as to state and show from the pleadings, the issue or issues joined; but where the pleadings are loose and obscure as to the cause of action and defense, but it appears upon appeal that a fair trial was properly had, and the complaining party was not taken by surprise, the judgment will not be disturbed for such reason.

Cross references. See further on this question, annotations under Rule 2 of Massie v. Wilson (16 Iowa 390), ante. p. 447; Rule 1 of Singleton v. Scott (11 Iowa 589), Vol. I, p. 865.

FYFFE v. BEERS, 18 Iowa 4, 85 Am. Dec. 577

1. Homestead—Abandonment—What Constitutes—Temporary Absence is not—Proof.—Temporary removal or absence from his homestead by the head of a family with an intention to return to and again occupy it, does not divest the realty of its homestead character; but removal or absence from the homestead by its owner without an intention to return, constitutes an abandonment thereof.

Where the absence from the homestead by its owner is prolonged, his intention to return thereto and again occupy it, must be clearly and unmistakably proved in order to prevent an abandonment thereof.

The question of what removal and absence from a homestead does or does not constitute an abandonment thereof, is one of fact to be determined from the facts and circumstances of each case, pp. 7, 8, 10, 11.

Reaffirmed in Morris v. Sargent, 18 Iowa 102; Cotton v. Hamil & Co., 58 Iowa 597, 12 N. W. 609; Shirland v. Union Nat'l Bank of Massillon, Ohio, 65 Iowa 100, 21 N. W. 203; Benbow v. Boyer, 89 Iowa 497, 56 N. W. 545.

Reaffirmed and explained in Dunton v. Woodbury, 24 Iowa 76; Newman, trustee v. Franklin, 69 Iowa 247, 28 N. W. 581, holding that while length of absence from a homestead is not conclusive on the question of its abandonment, still, where there are no circumstances, or acts of the party claiming it which manifest a purpose to return and

occupy it as such, that fact becomes important in determining the intention.

Reaffirmed and explained in Orman v. Orman, 26 Iowa 362, holding that abandonment in order to forfeit homestead must be permanent, and not a temporary absence with an intention by the owner to return to and occupy it as a home.

Reaffirmed and extended in Stewart v. Brand, 23 Iowa 482, holding further that a temporary lease or rental of homestead by the owner, does not work an abandonment thereof.

Reaffirmed and extended in Booth v. Brewster, 75 Iowa 633, 36 N. W. 650, 9 Am. St. Rep. 515; Maguire v. Hanson, 105 Iowa 217, 218, 74 N. W. 776, 777, holding further that homestead once acquired is presumed to continue, and the burden of proving an abandonment thereof, is on the creditor seeking to subject it to the satisfaction of his debt.

Reaffirmed and extended in Booth v. Brewster, 75 Iowa 633, 36 N. W. 650, 9 Am. St. Rep. 515; Jones v. Blumenstein, 77 Iowa 365, 366, 42 N. W. 323, holding further that the length of time a debtor is absent from his homestead is entitled to consideration, but is not conclusive, on the question of abandonment thereof by him.

Reaffirmed and qualified in Wapello County v. Brady, 118 Iowa 485, 486, 92 N. W. 718, 719, holding that a vague intention to return to a homestead at some future time, or to return upon the happening of contingencies, is not sufficient to retain homestead in land abandoned.

Cross reference. See further on this question, annotations under Davis, Moody & Co. v. Kelley (14 Iowa 523), ante. p. 279.

2. Homestead—Land Purchased by and Taken Possession of under Parol Contract.—Where land purchased by a parol contract is taken possession of thereunder and actually occupied and used as a homestead, it is exempt from debts created by its owner (purchaser) after such purchase and taking of possession and before the execution of a deed by the vendor, p. 11.

Reaffirmed and explained in Neal v. Coe, 35 Iowa 409, holding that actual use and occupancy of land by the head of the family fixes the homestead in it.

Cross reference. See further on this question, annotations under Christy v. Dyer (14 Iowa 438), ante. p. 263.

3. Husband and Wife—Wife's Contract for Purchase of Land—Action Foreclosing Purchase Money Lien Note—Personal Judgment.—In an action by the vendor under a contract of purchase of land by a married woman, to foreclose the purchase money lien notes, it is questionable whether the plaintiff is entitled to a personal judgment and general execution against the defendant (married woman) for the balance of the notes the sale of the land fails to satisfy, pp. 6, 9.

Cited in Wolf v. Van Metre, 19 Iowa 135, holding that a wife may mortgage her separate property to secure the debt of her husband, and equity will enforce the mortgage; but that a wife is not bound personally or beyond the mortgage for such a debt.

Cross reference. See further on this question, annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

McNEAR v. McCOMBER, 18 Iowa 12

1. **Deeds—Covenants—Breach.**—When in a deed to land the grant is of certain real estate, describing it, even although it is accompanied with the explanation that the grantor means thereby only to convey his right, title and interest in the premises, followed with a general warranty of title, a breach of the latter covenant occurs upon the failure of the title to, and eviction from the land. But when the grant is simply of the right, title and interest of the estate sold and conveyed, it passes no other estate or interest than what the party possessed at the time, that is to say the covenant of warranty does not have the effect to enlarge the estate granted, but is qualified and limited to just what interest the grantor had in the premises, and a failure of such a title and eviction do not constitute a breach of the warranty, p. 14.

Reaffirmed in Henderson v. Beatty, 124 Iowa 166, 167, 99 N. W. 717; McBride v. Caldwell, 142 Iowa 234, 119 N. W. 743.

Reaffirmed and explained in Corbett, Adm'r v. Berryhill, 29 Iowa 165, holding that where one undertakes by contract to convey by good and sufficient deed the interest in realty conveyed to him by a certain deed, and without an express stipulation to warrant title, he is only required to convey his interest therein.

Reaffirmed and varied in Scofield v. Moore, 31 Iowa 244, holding that where one transfers "all right, title and interest in" a judgment "whatever that may be," he does not thereby become a guarantor of the amount due thereon.

Cross reference. See Rule 2 hereof.

2. **Deeds—Construction of.**—Where the granting clause in a deed sells and conveys to the grantee "the following premises, to wit, all our (the grantors') right, title and interest in and to lot No. 96, in the city of D., etc.," it grants only the interest which the grantor had at the time of its execution, and a covenant of warranty therein only applies to such interest or title, pp. 15, 16.

Cited in Williamson v. Test, 24 Iowa 140, holding that where a deed based upon a valuable consideration, recites that the grantor "sells, conveys and quit-claims," and then after describing the land sold, covenants to "warrant and defend the said premises against the lawful claims of all persons whomsoever, except the United States."

the grantor is liable to the grantee on the breach of covenant of failure of the title thereto.

Cross reference. See Rule 1 hereof.

GELPCKE, WINSLOW & CO. v. LOVELL, 18 Iowa 17

1. **Trial—Practice—Objection to Evidence.**—The ground of an objection to testimony must be distinctly stated on a motion to rule it out, and the fact that it is not so stated is a sufficient reason to overrule the motion, p. 18.

Reaffirmed and qualified in Clark v. Connor, 28 Iowa 314, holding that where the party appealing to the Supreme Court, has made a general objection to the admission of evidence which was overruled, and the record fails to show the ground of such objection the trial court's ruling thereon will not be reviewed; but where the successful party makes a general objection to the admission of evidence below, which is sustained by the trial court, then if the unsuccessful party shows upon appeal that there is no legal or possible ground upon which the trial court's ruling thereon can be sustained, he is entitled to a reversal of the judgment therefor.

HALE v. VAN SAUN & HUNT, 18 Iowa 19

1. **Actions—Appearance—Waiver by.**—Where a party files an answer, or otherwise enters his appearance to an action, he thereby waives defects in the service of original notice, p. 20.

Reaffirmed and extended in Childs v. Limback, 30 Iowa 399, holding that the entry of his appearance to an action by the defendant, waives defects, if any, in the original notice.

Reaffirmed and extended in Danforth v. Thompson, 34 Iowa 245; Conklin v. Johnson, 34 Iowa 268; Rahn v. Greer, 37 Iowa 630, holding further that an appearance by defendant for any purpose connected with the action, is a full appearance and is a complete waiver of notice.

Cross reference. See further in this connection, annotations under Rule 2 of Dicks v. Hatch (10 Iowa 380), Vol. I, p. 708.

2. **Partnership—Action Against After Dissolution—Service of Original Notice on One Member.**—In an action against a partnership after its dissolution, service of original notice on one member authorizes a judgment against the firm, to be satisfied out of its joint property, or out of the separate property of the partner served with the notice, p. 20.

Reaffirmed, explained and varied in Baxter v. Rollins, 110 Iowa 312, 81 N. W. 586, holding that in an action against a partnership, the notice must be addressed to the firm; that a judgment in favor of a partnership will not be reviewed upon appeal, where the firm is not served with notice of the appeal.

Reaffirmed and qualified in Newlon v. Heaton, 42 Iowa 597, 598, holding that a partner who is served with notice in an action, after dissolution of the firm, cannot implicate his co-partner who is not served with notice, by voluntarily appearing for, or employing counsel for him; and in such case a judgment rendered against a member of the defunct partnership who is not personally served with notice, is void.

Reaffirmed and qualified in Harford, Thayer & Co. v. Street, 46 Iowa 595, 596, holding, however, that service of original notice upon one member of a partnership after dissolution thereof, does not authorize a judgment against the member or members not served therewith.

Cross reference. See further on this question, annotations and note under Stephens v. Parkhurst & Pence (10 Iowa 70), Vol. I, p. 644.

HERSHEY v. HERSHEY, 18 Iowa 24

1. Contract for Sale of Land—Purchase Price to be Paid at Future Time—Interest to be Paid Semi-Annually—Recovery for Interest before Principal Due—Remedies of Vendor.—Where a contract for the purchase of land provides that the purchase price is to be paid in a given number of years, to bear interest at a given legal rate, which is to be paid by the purchaser semi-annually, the interest is due and payable semi-annually, and the vendor may recover any such interest after its maturity without waiting until the principal becomes due. In such case the vendor may (under Sec. 3671 of the Code of 1860), proceed in equity to foreclose his lien on the land for the satisfaction of such interest, as in case of a mortgagor, or he may recover therefor in an action at law, pp. 26, 27.

Reaffirmed in James v. Day and Close, 37 Iowa 167.

Reaffirmed and extended in Powesheik County v. Dennison, 36 Iowa 247-249, 14 Am. Rep. 521, holding further that where land is sold under a decree of foreclosure for an unpaid installment of purchase money, or for interest due prior to the maturity of the principal, and the decree of foreclosure is general and directs "a sale of the land for the purpose of satisfying the judgment," and the land is sold thereunder without limitation, condition or reservation, a purchaser thereat takes the land discharged of the lien for the balance, if any, of the purchase money.

Reaffirmed and varied in Moores v. Ellsworth, 22 Iowa 300, 301, holding that a mortgage lien is not extinguished until the debt is paid; and that the fact that a mortgage creditor, or lienholder, presents his claim against a decedent (mortgagor) and has it approved and allowed, does not bar his right to sue in equity and foreclose the lien.

Reaffirmed and varied in Ragan v. Day, 46 Iowa 240, the court allowing interest on interest at the rate of ten per cent. per annum,

where the note provided that it was to bear "interest at the rate of ten per cent. payable quarterly. All interest not paid when due to bear interest at the rate of ten per cent."

Distinguished in Prichard v. Mulhall, 127 Iowa 549, 550, 4. A. & E. Am. Cas. 789, 103 N. W. 775, holding that the measure of damages, at least in the absence of proof showing a plain contrary intention, for breach of an executory contract for the sale of land, is the difference between the contract price and its market value at the time of the breach, less the portion of the purchase price, if any, previously paid.

Cross references. See further on this question, annotations under Rule 1 of Dubuque County v. Koch (17 Iowa 229), ante. p. 521; Wahl v. Phillips (12 Iowa 81), ante. p. 16.

TREIBER v. SHAFER, 18 Iowa 29

1. Pleadings—Answer—Cross-bill—Nature of — Notice on. — Under the former equity practice (under Code of 1851) a cross-bill was a defensive proceeding and is defined as "an instrument of defense for the defendant in the original suit." Under such former Code and practice it was discretionary with the chancellor whether or not notice thereon be served on the plaintiff. But under the Code of 1860 (Secs. 2880, 2883) an answer takes the place and performs the functions of the cross-bill, and no notice is required to issue thereon, pp. 32-34.

Cited in Hawley v. Griffin, 121 Iowa 702, 704, 97 N. W. 90, 91, (dissenting opinion), the majority court opinion not in point, but involving a question of pleading.

2. Actions Against Infants—Appointment of Guardian Ad Litem—Defense by Mother—When Sufficient.—When in an equitable action wherein infants are defendants, their mother is permitted by the court to defend as their guardian, and the makes such defense, the testimony is taken and the cause is tried thereunder, it is a sufficient compliance with the Code of 1851, as to the appointment of a guardian *ad litem* in such cases, and the decree will not be reversed because there is no formal record entry of the appointment of a guardian *ad litem*, pp. 34, 35.

Distinguished and narrowed in Dohms v. Mann, 76 Iowa 727, 39 N. W. 825, holding that where in an action to foreclose a mortgage on land of a minor, he is not served with notice, and no defense is made by his guardian before decree, as required by Sec. 2566 of the Code of 1873, such decree in such action and all proceedings had thereunder are void *ab initio*.

3. Mortgage on Land—Decree in Action of Foreclosure—Sufficiency of Recitals in as to Sale of Property.—Although a decree of foreclosure of a mortgage on land must order that *so much thereof* be sold as is necessary to satisfy the debt, interest and costs, still a

decree in such case which orders the mortgaged land to be sold under special execution "according to law," is sufficient; as in such case it is the sheriff's duty to sell only so much as is necessary to satisfy the debt, interest and costs.

Reaffirmed in Southard v. Perry and Townsend, 21 Iowa 493, 89 Am. Dec. 587.

Reaffirmed and qualified in Polk County for use of School Fund v. Sypher, 17 Iowa 362-364, 85 Am. Dec. 568, holding that where a decree foreclosing a mortgage on land directs the sheriff to sell it in separate parcels, and the sheriff sells more of the parcels than is necessary to satisfy the decree, a junior lienholder who moves that the surplus of the proceeds of the sale be applied to the payment of his debt, thereby waives the irregularity, if any, in the sale; That when lands are sold under an execution to satisfy a prior judgment and there are other liens upon it, the liens follow the surplus, in equity, and the surplus will be distributed in the order and according to priority of liens, whether they be judgment or mortgage; and in such case it is not in the power of the debtor to assign the surplus and defeat the lienholders, and the sale of such surplus under execution in favor of a junior lienholder is, in operation of law such an assignment: That where a sheriff, without actual notice of liens of creditors, pays over the surplus in his hands arising from an execution sale, to the judgment debtor, he is not liable to the creditors of such debtor holding liens on such surplus.

Cross reference. See further on this question, annotations and cross reference under Rule 1 of Malony v. Fortune (14 Iowa 417), ante. p. 259.

4. Appeal—Clerical Errors or Omissions in Record—Necessity of Motion to Correct in Trial Court before Appeal.—Clerical errors, or omissions in a record entry, or decree should be corrected on motion in the trial court; and where a party fails to move for such correction in the trial court, before appeal, he cannot complain thereof thereon, p. 35.

Reaffirmed in Finch v. Billings, 22 Iowa 230; Sanders v. Lowe, 25 Iowa 599, (abstract), holding that unless exception is taken to an order, decree, or other record entry, or a motion is made for its correction in the trial court, it is unavailing upon appeal.

Cross reference. See further on this question, annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66.

PEARSON v. MINTURN, 18 IOWA 36

1. Trial—Finding of Facts by Court—How Treated upon Appeal—Finding Against Evidence—Reversal, when.—Upon an appeal to the Supreme Court a finding of facts by the trial court is treated as a verdict of a jury, and a judgment will not be reversed because a

finding is against the evidence, unless it is clearly and palpably against the weight thereof, p. 37.

Reaffirmed in Starker & Co. v. Luse & Mahana, 33 Iowa 596, (abstract).

Reaffirmed and extended in Brainard v. Van Kuran, 22 Iowa 266, holding further that upon an appeal every presumption will be indulged in favor of the verdict of the jury or the finding of the court, and the judgment will not be reversed because against the evidence, unless it clearly appears from the record.

Cross reference. See further, Bellamy v. Doud (11 Iowa 285), Vol. I, p. 817.

2. Homestead—Sale of and Purchase of New Homestead With Purchase Price.—Where a homestead is sold and a new one purchased with its proceeds, the latter has the same homestead character and exemption as the former, p. 38.

Reaffirmed in Sargent v. Chubbuck, 19 Iowa 39; Robb, Adm'r v. McBride, 28 Iowa 387, 388; Marshall v. Ruddick, 28 Iowa 490; Benham v. Chamberlain & Co., 39 Iowa 359.

Reaffirmed and explained in Benham v. Chamberlain & Co., 39 Iowa 359; Cowgell v. Warrington, 66 Iowa 668, 24 N. W. 268, holding that where homestead is sold, the vendor has a reasonable time thereafter in which to invest the proceeds in another homestead and to remove his family thereto and occupy it.

Reaffirmed and extended in Thompson v. Rogers, Richardson & Co., 51 Iowa 337, 1 N. W. 684, holding further that a debtor has a homestead in a one-half undivided interest in a lot which he received in exchange for a prior homestead.

Reaffirmed and extended in Green v. Farrar & Wheeler, 53 Iowa 430, 5 N. W. 560, holding further that where homestead is sold by its owner, and a new one acquired, with the proceeds, in the name of his wife, the latter homestead has the same character as the former: Holding further that a conveyance of homestead by a husband to his wife, does not change its homestead character.

Reaffirmed and narrowed in Rogers v. Raisor, sheriff, 60 Iowa 356, 14 N. W. 318, holding that where homestead in this state is sold and its proceeds invested in another homestead in another state, the latter homestead does not have the same character as the former, and is subject to the satisfaction of debts created by its owner before its acquisition.

Distinguished and narrowed in Elston and Green v. Robinson, 21 Iowa 533, 534, holding that a judgment debtor cannot, after the rendition of a judgment against him, occupy land as a homestead, and thus defeat the lien of the judgment creditor thereon.

Distinguished and narrowed in Peninsular Stove Co. v. Roark, 94 Iowa 564, 63 N. W. 327, holding that when homestead is sold and its

proceeds applied to some other use, the exemption ceases; and the fact that another homestead is thereafter acquired therewith, does not give the latter the character and exemption of the former homestead.

(Note.—See further specially, *Dalton v. Webb*, 83 Iowa 478, 50 N. W. 58, 32 Am. St. Rep. 314; *State v. Geddis*, 44 Iowa 537, important cases in this connection, not citing the text.—Ed.)

Cross references. See further in this connection, annotations under *Christy v. Dyer* (14 Iowa 438), ante. p. 263; *Thorn v. Thorn* (14 Iowa 49), ante. p. 204.

CITY OF MUSCATINE *v.* HERSHEY, 18 IOWA 39

1. **Cities and Towns—Wharves—Regulation of—Charter of City of Muscatine.**—Under the charter of the city of Muscatine, Sec. 18, Clause 5, it is doubtful whether the city can demand wharfage fees for the landing of rafts, or boats at a place within its limits along the Mississippi River where no wharf is constructed or place designated as such, and no wharf facilities are provided by it, p. 41.

Cited with approval in *City of Dubuque v. Stout*, 32 Iowa 49, holding that a city, granted power by its charter to "establish wharves" and "to regulate their use and fix the rate of wharfage," cannot recover fees of a person for the use of his own premises as a wharf, where such city has not, by ordinance or otherwise, provided wharves or designated places for such use: That the right of a city to collect wharfage does not rest wholly in the police power, but is dependent upon its providing wharves and designating their uses, for the convenience of those using them.

Cited in *Grant v. City of Davenport*, 18 Iowa 194, holding that where a city acquiesces in the erection of a private wharf, and permits its use for about fifteen years by those erecting it, it cannot, at its pleasure, divest such persons of the right thus acquired.

STATE *v.* McCOMB, 18 IOWA 43

1. **Indictment—Trial—Continuance at First Term After Arrest—When Allowed Accused.**—Under both the codes of 1851 and 1860, the accused is not entitled to a continuance as a matter of right, and without a showing, at the first term of court after his arrest under an indictment, p. 45.

Distinguished in *State v. Harris*, 33 Iowa 357, 358, holding that under Secs. 4723-4725 of the Code of 1860, an accused person if not in custody, or on bail, or has not deposited money in lieu of bail, cannot be required, unless he consents, to go to trial at the term at which an indictment is returned against him; that in such case the prosecution must be continued to the next term of the court; and this without motion or showing by the accused.

2. Indictment—Continuance—Discretion of Trial Court—Abuse—Reversal.—The district court is vested with a sound judicial discretion in passing upon a motion for a continuance by accused in a criminal prosecution where cause is required to be shown, and his ruling thereon will not be ground for reversal, except in case of manifest abuse thereof, p. 47.

Reaffirmed in State v. Reid, 20 Iowa 419.

Cross reference. See further on this question, annotations and note under State v. Cox (10 Iowa 351), Vol. I, p. 703.

3. Record—Clerical Mistakes, Omissions or Misprisions in—Correction.—Clerical mistakes, omissions or misprisions in a record entry may, under Sec. 2667 of the Code of 1860, be corrected by the court at another term than that at which it was made: Thus, it is proper for the district court to amend and correct a record entry so that the name of a grand juror who returned an indictment may appear in the list of grand jurors at the term at which the indictment was returned, when it appears that the omission of the name of the grand juror from the list was an evident mistake, pp. 47, 48.

Reaffirmed, varied and qualified in Goodrich v. Conrad, Adm'r, 28 Iowa 301, holding that *nunc pro tunc* orders must be limited to supplying such entries as have been omitted through oversight or negligence, and cannot be made to alter or expunge a record.

4. Indictment—Indorsement of Names of Witnesses on Sufficiency of.—Where the indorsement on an indictment unmistakably describes a witness who was before the grand jury, it is sufficient, although his name be not thereon indorsed: So, the indorsement thereon as a witness of "ex-sheriff U. of Rockford, Ill.," is sufficient to authorize the introduction of such person upon the trial of the indictment, pp. 49, 50.

Reaffirmed and explained in State v. Dale, 109 Iowa 99, 100, 80 N. W. 209, holding that the variance between the name of the witness on the indictment and the one called must be such as to mislead or prejudice the defendant.

Reaffirmed and extended in State v. Ostrander, 18 Iowa 453, 454, holding further than an indorsement of "Lovinia Umpstead" as a witness on the indictment authorized the introduction of "Lovinia Olmstead" as a witness, there being no proof that the defendant was deceived or misled.

Reaffirmed and extended in State v. Schlagel, 19 Iowa 170, 171: State v. Stanley, 33 Iowa 533, holding further that the indorsement of the initials of Christian names of a witness on an indictment; his Surname being given, is sufficient to authorize his introduction.

Reaffirmed and extended in State v. Arnold, 98 Iowa 256, 257, 67 N. W. 253, holding further that the mere misnomer in respect

to the Christian name of a witness indorsed on an indictment will not prevent the state introducing him as a witness, when his identity sufficiently appears from the facts, and it does not appear that the accused was thereby misled to his prejudice.

Cited in State v. Van Auken, 98 Iowa 679, 68 N. W. 456, not in point.

(Note.—See further, sustaining, but not citing, the text, State v. Pierce, 8 Iowa 231.—Ed.)

Cross reference. See further in this connection, annotations under Rule 2 of State v. Bowers (17 Iowa 46), ante. p. 490.

HAYS v. THODE, 18 IOWA 51

1. Judgment Lien on Land—Prior Unrecorded Mortgage.—

A judgment lien on land is inferior to that of a prior unrecorded mortgage thereon, p. 53.

Reaffirmed in Evans v. McGlasson, 18 Iowa 151; Churchill v. Morse, 23 Iowa 231, 232, 92 Am. Dec. 422; First Nat'l Bank of Tama City v. Hayzlett, 40 Iowa 659.

Reaffirmed and extended in Fletcher v. Kelly, 88 Iowa 492, 55 N. W. 477, 21 L. R. A. 347, holding further that an unrecorded mortgage on land is prior to the subsequent lien of a mechanic or materialman, and that the latter must, at his peril, take notice of all liens and incumbrances, except as provided in the statute relating to his liens.

Cross references. See further on this question, annotations and cross references under Rule 1 of Vannice v. Bergen (16 Iowa 555) ante. p. 472; Welton v. Tizzard (15 Iowa 495), ante. p. 371.

2. Mortgage on Land—Foreclosure and Sale under Decree—

Redemption by Junior Lienholder or Mortgagee—How made.—A junior mortgagee or lienholder may redeem from a sale under a decree of foreclosure of a senior mortgage on land; but such redemption must be made by his paying the amount bid for the property at the sale with ten per cent. interest and costs, pp. 53, 54.

Distinguished and explained in Clayton v. Ellis, 50 Iowa 593-595, holding that the lien of the judgment as to the unsatisfied balance on the real estate sold, is, as to all persons and in all cases, divested by the sale: That the judgment debtor may sell his redemption, and his purchaser may redeem by paying the amount of the bid, interest and costs: But if redemption of the whole or of any parcel of land sold under execution or decree is made by the debtor, the judgment to the extent of the balance thereon will constitute a lien on the premises in his hands, and it may again be sold on execution based on the judgment.

Distinguished and narrowed in Wilson v. Conklin, 22 Iowa 456, 457, holding that where there are three liens on land, and it is sold

under decree to satisfy the senior, then if the second junior desires to redeem, he must (under Secs. 3338 and 3339 of the Code of 1860) pay the amount bid at the sale and interest and costs, and, also, pay to the first junior lienholder the amount of his lien, with interest.

Cross reference. See further on this question, annotations under Rule 2 of Curtis v. Millard & Co. (14 Iowa 128), ante. p. 215.

LEFTWICK AND BARTON FOR THE M. E. CHURCH v. THORNTON, 18
IOWA 56

1. Justice's Court—Appeal from—Effect—De Novo Trial.—

An appeal to the district court from a judgment in a justice's court waives all errors, irregularities and illegalities in the inferior court, and brings the case to the district court for a trial *de novo*, p. 58.

Reaffirmed and explained in Belding v. Torrence, 39 Iowa 517, holding that errors of law committed in a proceeding in a justice's court which result in a final judgment, may be reviewed upon appeal, unless they be regarded as waived: But if such errors be upon decisions not resulting in a final judgment, they are to be reviewed upon writ of error.

Reaffirmed and extended in Young v. Rann, 111 Iowa 256, 82 N. W. 786, holding further than an appeal lies to the district court from a decision of the county board of supervisors selecting a newspaper in which to publish its proceedings, and that such appeal brings the matter before the district court for a trial upon its merits.

2. Justice's Court—Appeal to District Court from Default Judgment in—Right of Defendant to Demur or File Answer in District Court.—Upon an appeal to the district court from a default judgment entered in a justice's court, the defendant is not entitled to demur or file an answer as a matter of absolute right, but may do so by leave of court, upon a satisfactory excuse for not answering, or applying to the justice to set aside the default, p. 58.

Reaffirmed and explained in May v. Wilson, 21 Iowa 81, holding that upon an appeal to the district court from a judgment in a justice's court, a party cannot file additional, or new pleadings as a matter of right, but may do so under equitable circumstances and by leave of court, and upon proper terms, but not without satisfactorily excusing his failure to so plead in the inferior court.

Reaffirmed, explained and qualified in Griswold v. Bowman, 40 Iowa 369, holding that the filing of amendments on appeal from a justice's to the district, or circuit court is a matter within the

discretion of the latter court; but that the refusal to allow an amendment on such appeal is proper, when it sets up a matter over which the justice's court had no jurisdiction.

Overruled in Harty v. D. M. & M. R. R. Co., 54 Iowa 330, 331, 6 N. W. 546, holding that under Sec. 3596 of the Code of 1873, where the defendant appeals to the circuit court from a default judgment entered in a justice's court, he has the absolute right to file his answer in the circuit court, without leave of that court and without excusing his default below, the costs in the justice's court to be taxed against him.

3. Default—Effect of—Admission by—Practice.—A default admits that the plaintiff is, from the record, entitled to recover some amount, leaving only the exact sum to be determined, p. 58.

Cited in Borgalthous v. Farmers' & Merchants' Ins. Co., and Leedham, 36 Iowa 252, holding that where one voluntarily pays a judgment against him, he thereby waives all errors in the proceedings, and cannot thereafter appeal.

CITY OF BURLINGTON v. KELLAR, 18 IOWA 59

1. Statutes—Repeal of Statute Which Repealed Previous One.—The repeal of a statute does not, unless expressly so provided by the Legislature, revive a statute previously repealed, p. 63.

Cited in 147 Iowa 345, 126 N. W. 326.

2. Municipal Corporations—Authority to, To be Closely Pursued—Construction of Authority to.—Authority conferred upon a municipal corporation must be closely pursued, and is to receive a strict construction, p. 65.

Reaffirmed, explained and qualified in Burdick v. Babcock, 31 Iowa 572, 573, holding that a municipal corporation has only the powers expressly granted, those necessarily implied or incident to powers expressly granted, and those absolutely essential and indispensable to the declared objects and purposes of the corporation; and that any fair doubt as to the existence of such a corporate power is to be resolved against it, and against the corporation.

Reaffirmed and extended in City of Oskaloosa v. Tullis & Faxon, 25 Iowa 444; Logan & Sons v. Pyne, 43 Iowa 525, 22 Am. Rep. 261; Phillips v. Harrow, 93 Iowa 100, 61 N. W. 436, holding further that a city can exercise only granted powers, which must be pursued strictly, and all doubt as to the extent thereof must be resolved in favor of the public, and against the city.

Reaffirmed and extended in Field v. City of Des Moines, 39 Iowa 578, 579, 585, 18 Am. Rep. 46, holding further that where a city passes an ordinance in excess of authority conferred, authorizing an officer to do an act or acts, the ordinance is void, and the city is not liable for the act or acts of the officer done thereunder.

Reaffirmed and extended in Trustees of Diocese of Iowa v. City of Anamosa, 76 Iowa 542, 41 N. W. 314, 2 L. R. A. 606, holding further that if a city be granted authority to establish grades, and to cause streets to be graded by ordinance, these things can be done in no other way: That it cannot do by the acts of executive officers, or by simple resolution or direction of a majority vote of its council, that which its charter says shall be done by ordinance adopted by a two-thirds vote.

Cross reference. See further on this question, annotations and cross references under Rules 1 & 3 of Clark, Dodge & Co. v. City of Davenport (14 Iowa 494), ante. p. 272.

McCLAY v. HEDGE, 18 IOWA 66

1. **Contract to Render Services—Breach by Contractor, and Action on Quantum Meruit—Defenses.**—Where one contracts to render certain services (in this case to build a house) and after performing part of the labor fails to complete the contract, or is guilty of a breach thereof, he may maintain an action against the other party upon a *quantum meruit*; but the defendant (the other contracting party) may therein set up as a full or a partial defense, the amount it will reasonably cost to complete the work, together with any damages sustained by reason of the non-fulfillment or breach of the contract. But, if in such case, the contractor sues upon the express contract, he cannot recover upon the *quantum meruit*, pp. 67, 68.

Reaffirmed in Jemison v. Gray, 29 Iowa 547; Byerlee v. Mendel, 39 Iowa 385, 386; Wolf, Carpenter & Angel v. Gerr, 43 Iowa 341; Aetna Iron & Steel Works v. Kossuth & Co., 79 Iowa 44, 45, 44 N. W. 217.

Reaffirmed and extended in Whitesell v. Hill, 101 Iowa 638, 639, 70 N. W. 751, 37 L. R. A. 830, holding further that in an action by a physician for services rendered, the defendant, patient, may set up by counterclaim, damages resulting from the negligence or unskillfulness of the plaintiff, physician.

Distinguished and narrowed in Berthold v. Seevers Mfg. Co., 89 Iowa 508, 509, 56 N. W. 669, holding that where defendant receives, retains and uses defective piling knowing of its defects, and without notice or complaint within a reasonable time, and without offering to return such piling, he cannot claim damages by reason of such defects.

Distinguished and narrowed in Miller v. Mason City & Ft. Dodge R. R. Co., 132 Iowa 418, 108 N. W. 305, holding that parties may contract with reference to the approval of work to be done under an agreement, so that the one rendering the services cannot recover unless they are approved as thereby provided: That a party cannot abandon his contract, and sue for compensation for his services in dis-

regard of the terms thereof: And that a person cannot sue upon a *quantum meruit* for services rendered, where they were of no benefit to the defendant in such action.

Cited in 146 Iowa 489, 125 N. W. 214.

Unreported citation, 81 N. W. 689.

Cross references. See further on this question, annotations under *Corwin v. Wallace* (17 Iowa 374), ante. p. 539; *Pixler v. Nichols* (8 Iowa 106), Vol. I, p. 497.

LITCHFIELD v. POLK COUNTY, 18 IOWA 70

1. Illegal Taxes—Injunction to Restrain Sale for.—Injunction lies upon complaint of the owner to restrain the sale of property for taxes illegally assessed, p. 72.

Reaffirmed in *Zorger v. Township of Rapids*, 36 Iowa 180, holding that injunction lies to restrain the illegal collection of taxes.

Reaffirmed and explained in *Rood v. Board of Supervisors of Mitchell County*, 39 Iowa 446, holding that if a tax is illegal, and not merely irregular or erroneous, its enforcement will be restrained by injunction.

Reaffirmed and varied in *Key City Gas Light Co. v. Munsell*, 19 Iowa 308, 309, holding that injunction lies in favor of the owner of land to restrain its sale under an execution against a person not its owner.

Cited in *Brockman v. City of Creston*, 79 Iowa 592, 44 N. W. 823, the court holding that a tax payer of a city, whether he be a resident or a non-resident thereof, may maintain a bill to enjoin it and its officials from unlawfully selling or disposing of municipal property.

Cross reference. See further on this question, annotations under *Macklot v. City of Davenport* (17 Iowa 379), ante. p. 541.

Reaffirmed as to first paragraph in *Tod v. Crisman*, 123 Iowa 698, 699, 99 N. W. 688, under the Code of 1897.

2. Actions—Parties—What Persons Necessary Parties.—All persons necessary to a determination of the matter involved in an action must (under Sec. 2765 of the Code of 1860) be made parties by order of court before a trial therein.

Thus in an action involving the title to land, all parties claiming a title or interest therein adverse to the plaintiff, must be made parties, pp. 73, 74.

Reaffirmed and extended in *Shear v. Green*, 73 Iowa 690, 36 N. W. 643, holding further that in an action to enjoin a nuisance in the keeping and selling intoxicating liquors that (under Secs. 2551-2553 of the Code of 1873) before the property may be adjudged sold or destroyed, all parties claiming a title or interest therein must be made parties, and their rights be adjudicated.

Reaffirmed and extended in Stroup v. Bridger, 124 Iowa, 406, 100 N. W. 115, holding further that in an action of conversion, all parties claiming title or interest in the property involved in the action must (under Secs. 3462 and 3466 of the Code of 1897) be made parties thereto.

WHITE v. WATTS, 18 IOWA 74

1. Foreclosure of Mortgage—Separate Parcels or Tracts of Land—Failure to Sell Separately Vitiates Sale.—Where under an execution in an action to foreclose a mortgage on several parcels or tracts of land, the sheriff sells the tracts or parcels *as a whole* to satisfy the debt, the sale will be set aside, and a re-sale be ordered, either on motion or proceedings in equity for such purpose, p. 76.

Reaffirmed in Williams v. Allison, 33 Iowa 289, applying the rule to a sale in gross of several parcels of land under an execution on a plain judgment.

Cited in 149 Iowa 343.

Cross references. See further on this question, annotations under Lay v. Gibbons (14 Iowa 377) ante. p. 240; Rule 6 of Boyd v. Ellis (11 Iowa 97,) Rule 1 of Grapengether v. Fejervary (9 Iowa 163), Vol. I, pp. 556 and 781, respectively.

2. Mortgage on Land—Action to Foreclose—Conclusiveness of Decree—Right of Junior Incumbrancer not a Party, to Redeem from Sale.—A junior incumbrancer who is not made a party to an action by a senior incumbrancer to foreclose a mortgage on land, is not bound or concluded by the decree therein, and may redeem from a sale thereunder, p. 76.

Special Cross reference. For cases citing the text, and many others on the question, see annotations under Heimstreet v. Winnie (10 Iowa 430), Vol. I, p. 723.

Cross reference. See further, annotations under Ten Eyck v. Casad and Rowley (15 Iowa 524), ante. p. 378.

3. Default—Motion to Set Aside—Conclusiveness of Court's Ruling on—Res Adjudicata.—Where a defendant moves the court to set aside a default, he is concluded by the court's ruling thereon from afterwards bringing a bill to have such ruling reviewed, p. 78.

Unreported citations, 103 N. W. 158, 128 N. W. 375.

WATSON, ADMINISTRATOR v. RUSSELL, 18 IOWA 79

1. Evidence—Actions—Personal Representative a Party—When Defendant may Testify—Real Party in Interest Alive.—Under Secs. 3980 and 3982 of the Code of 1860, in an action by an administrator, the defendant may testify as to facts transpiring before the death of the decedent, when the real party in interest is

alive. So, where a trustee sues upon a contract in relation to the trust, dies pending the action, and his administrator is substituted as party plaintiff, the defendant may testify (under above Code and sections) as to matters transpiring before the death of the trustee, the real party in interest, the *cestui que trust* being alive, pp. 82, 83.

Reaffirmed and extended in Hogan, Adm'r v. Sullivan, O'Dowd and Sullivan, 114 Iowa 459, 87 N. W. 448, holding further that in an action by an administrator for the recovery of money due, his decedent and wherein other persons intervene and claim right, or title to a certain portion of the amount sued for, the defendant may (under Sec. 4604 of the Code of 1897) testify *in favor of intervenors* as to facts transpiring before the death of decedent, although such section of the Code of 1897, rendered him incompetent to testify to such facts in his own favor.

Reaffirmed and qualified in Quick v. Brooks, Adm'r, 29 Iowa 485-487, holding that where the plaintiff gives his deposition in an action during the lifetime of the defendant and relative to transactions between them, and thereafter (pending the action) the defendant dies, and his administrator is substituted as defendant, such deposition is inadmissible.—The decedent, defendant, not having given his deposition therein before his death.

ENDERS v. BECK, 18 IOWA 86

1. Actions—Abatement for Defect of Parties—When Raised by Demurrer and When to be Plead—Proceedings on Plea in Abatement.—A defect of parties apparent upon the face of the petition may (under Sec. 2876 of the Code of 1860) be raised by demurrer; but if not so apparent, the facts showing the defect of parties may (under Sec. 2969 of the Code of 1860) be pleaded in the answer in abatement, together with any other defense the defendant may properly interpose.

When a plea of abatement for defect of parties is interposed by answer, it is to be tried by the court or jury as any other issue; and in such case upon a trial by jury it is (under Sec. 3124 of the Code of 1860) error for the court to take the issue thereto away from the jury upon the introduction of part of the evidence, or at any other time, p. 87.

Reaffirmed in McCormick v. Blossom, 40 Iowa 259, under Sec. 2732 and 2851 of the Code of 1873, corresponding to Secs. 2969 and 3124 of the Code of 1860; Holding, however, that a defect of parties apparent on the face of the petition can (under Sec. 2648 of the Code of 1873, corresponding to Sec. 2876 of the Code of 1860) only be taken advantage of by demurrer.

Unreported citation, 130 N. W. 994.

STATE v. TULLEY, 18 IOWA 88

1. Criminal Law—Testimony of Accomplice—Corroboration Required—Indictment for Seduction—Prosecutrix an Accomplice.—In order to sustain a conviction the testimony of an accomplice must be corroborated by other evidence not only tending to show that the offense charged in the indictment was committed, but such corroboration must further tend to connect the accused with its commission.—And mere matters of suspicion are insufficient for this purpose.

Under an indictment for seduction, the prosecutrix is an accomplice, and the rule applies to a conviction upon her testimony, pp. 88, 89.

Reaffirmed and extended in State v. Kissock, 111 Iowa 692, 693, 83 N. W. 725, holding further that evidence of the birth of a child as a result of illicit sexual intercourse is not corroborative of the testimony of the prosecutrix upon the trial of an indictment for seduction; and that in such case, evidence showing that the accused had an opportunity to commit the crime is not sufficient corroboration of the prosecutrix.

(Note.—See further, sustaining and explaining, but not citing, the text, State v. Mulholland, 115 Iowa 172, 88 N. W. 325; State v. Wycoff, 113 Iowa 670, 83 N. W. 713; State v. Burns, 110 Iowa 745; 82 N. W. 325; State v. McGinn, 109 Iowa 673, 81 N. W. 156; State v. Bess, 109 Iowa 675, 81 N. W. 152; State v. Bauerkemper, 95 Iowa 564, 64 N. W. 609; State v. Bell, 79 Iowa 119, 44 N. W. 244; State v. Kingsley, 39 Iowa 439; State v. Upton, 5 Iowa 465; State v. Andre, 5 Iowa 389; Ray v. State, 1 G. Greene, 316; but see further, specially, State v. Fruerhaken, 96 Iowa 302, 63 N. W. 301—And there are many other cases to the same effect.—Ed.)

MORRIS v. SARGENT, 18 IOWA 90

1. Evidence—Acknowledgment of Deed—Certificate of Officer Taken over Want of Memory of Grantor—Burden of Proof on Party Impeaching Certificate.—Want of memory on the part of a grantor in a deed to the fact of his signing it, should have little, if any weight against the certificate of acknowledgment of an officer as to such fact. The burden of proof is on the party seeking to impeach a certificate of acknowledgment. In such case the fact that the officer who took the certificate does not remember the circumstances of its taking, is entitled to little weight, pp. 94, 95.

Reaffirmed in Van Orman v. McGregor, 23 Iowa 302; Bailey Wood & Co. v. Landingham, 39 Iowa 429, holding that a certificate of acknowledgment of a deed, although not conclusive, is very strong evidence of the fact of its execution.

Reaffirmed in Gribben v. Clement, 141 Iowa 153, 119 N. W. 599, holding that the certificate of a notary as to the signing and

acknowledgment of an instrument is entitled to great weight, should not be lightly overcome, and that the testimony of a party thereto that he did not sign it, is not alone sufficient for the purpose.

Cited in Vance v. Anderson, 39 Iowa 429, 430, holding that in the absence of evidence as to the true time of the execution of an instrument, the presumption is that it was executed as of the date of the instrument; but this may be rebutted by evidence showing when, in fact, it was executed: But to overcome the presumption and prove that it was made and executed at a time different from that at which it purports to have been executed, when the rights of third parties are involved, the evidence should be clear and satisfactory.

(Note.—See further, Mixer v. Bennett, 70 Iowa 329; 30 N. W. 587; Herrick v. Musgrave, 67 Iowa 63, 24 N. W. 594, important cases on this question not citing the text.—Ed.)

2. Estoppel in Pais—Act of Another—When Sufficient—Principal and Agent—Estoppel by Person Acting as Agent.—One cannot be estopped by the acts of another without full knowledge thereof. So, a party cannot be estopped by the acts of one purporting to act as his agent, without knowledge that the latter is so acting, p. 99.

Reaffirmed and explained in White v. Morgan, 42 Iowa 116, 117, holding that where the owner of property holds another out as its owner, or as having full power of disposition thereof, or of its proceeds, and the latter so holds himself out and obtains credit on the strength of such ownership, the owner cannot claim title either to the property or its proceeds as against a person whom he has thereby induced to deal with the person held out as the owner.

Reaffirmed and extended in Lord, Owen & Co. v. Wood, 120 Iowa 307, 94 N. W. 843, holding further (as does the present case in argument) that there can be no estoppel unless a party, by his acts or conduct, induces another to act to his injury.

Cited in Crouse v. Morse, 49 Iowa 390, (dissenting opinion) the majority court opinion reaffirming the text.

(Note.—See further, Tufts v. McClure, 40 Iowa 317; French & Davis v. Rowe & Hyde, 15 Iowa 563, important cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Lucas v. Hart (5 Iowa 415), Vol. I, p. 364.

3. Husband and Wife—Wife's Deed Signed by Agent, etc.—Whether a wife would be bound by signing a deed by herself or by her duly authorized agent, without duly acknowledging it, is at least a question of doubt under our statute (code of 1860), p. 99.

Cited in Sims v. Hervey, 19 Iowa 288, the case holding that a deed or mortgage of lands by a husband and wife intended to circulate or float in business channels, and when it finds an owner to

have her name inserted in the absence of the grantor (wife) is not effective as a conveyance, without authority in writing for the insertion of such name, though the transaction may, in certain cases, give equitable right; but no equity will exist in favor of the owner of such an instrument, when the grantor (wife) receives and retains no benefits therefrom, and does not ratify the negotiation of the instrument and filling in of the blank.

Cross reference. See Rules 2, 4 & 5, hereof, in this connection.

4. Homestead—Conveyance of to be Concurred In and Signed by Both Husband and Wife or It is Void.—A deed to homestead must (under Sec. 1247 of the Code of 1860) be concurred in and signed by both the husband and wife, or it is void. A deed to homestead where the husband signs both his own and his wife's name thereto, will not be given effect upon proof that the husband had previously so conveyed other realty, without proof of facts constituting an estoppel against the wife, pp. 99, 100.

Reaffirmed and extended in Haggerty v. Brower, 105 Iowa 400, 75 N. W. 323, holding further that the delivering up for cancellation of a contract to reconvey (or notes for which a deed absolute on its face is given to secure) does not deprive the wife of the grantor of the right to homestead in the land conveyed by the deed which is in fact a mortgage.

Reaffirmed and extended in Hostetler v. Eddy, 128 Iowa 406, 104 N. W. 487, holding further that the actual occupation by the family of the real property as a dwelling place is a sufficient declaration of its homestead character.

Cited in Jordan v. Henderson, 19 Iowa 566 (abstract); Sylvester v. Fleming, 19 Iowa 567 (abstract); Shafer v. Dean, 29 Iowa 145, not in point.

Cross reference. See further on this question, annotations and cross references under Larson v. Reynolds & Packard (13 Iowa 579), ante. p. 190.

5. Homestead—Abandonment—Temporary Absence From is Not.—Temporary absence from a homestead does not constitute an abandonment thereof as against persons not prejudiced by it, p. 102.

Reaffirmed and qualified in Jones v. Blumenstein, 77 Iowa 365, 366, 42 N. W. 323, holding that the length of time a debtor is absent from his homestead is entitled to consideration, but is not conclusive, on the question of abandonment thereof by him.

Cross references. See further on this question, annotations under Rules 1 & 2 of Fyffe v. Beers (18 Iowa 4), ante. p. 573; Davis, Moody & Co. v. Kelley (14 Iowa 523), ante. p. 279.

6. Homestead—Void Conveyance by Husband and Subsequent Lease by Him, no Estoppel of Wife.—Where a husband exe-

cutes a conveyance to homestead which is void by reason of his wife failing to concur in and sign it, the subsequent lease of the land by him does not estop the wife from attacking the conveyance as void, pp. 102, 103.

Reaffirmed and varied in Haggerty v. Brower, 105 Iowa 400, 75 N. W. 323, holding that the delivering up for cancellation of a contract to reconvey (or notes for which a deed absolute on its face is given to secure) does not deprive the wife of the grantor of the right to homestead in the land conveyed by the deed which is in fact a mortgage.

Distinguished in Bradshaw and wife v. Remick, 90 Iowa 412, 413, 57 N. W. 898, holding that where homestead is sold under a foreclosure decree, and the husband and former owner of the homestead thereafter leases it from the grantee in the sheriff's deed and occupies it under such lease for four years, with the full knowledge and acquiescence of his wife, neither of them can thereafter maintain an action to set aside the sheriff's sale for failure of compliance with the statute relative to the sale of homestead under execution.

Cross reference. See Rule 2 hereof, in this connection.

DOYLE v. REILLY, 18 IOWA 108, 85 Am. Dec. 582

1. Practice—Report of Referee—Setting Aside for Uncertainty.—A report of a referee which is so vague and uncertain as to a material issue in a cause, as that it does not enable the court to determine what is found and reported thereon, will be set aside, pp. 111, 112.

Distinguished and narrowed in Sage v. Nichols, 51 Iowa 47, 48, holding that the findings of fact of a referee must be full and complete; but that where a referee fails to find and report facts on an issue (or issues) in a cause referred, the court may re-refer the cause for him to find as to it, and may order that such additional report be made from the evidence introduced on the trial without new evidence being introduced before such referee—And this is the rule where the report of a referee is vague or uncertain as to the finding of facts upon an issue (or issues) in the cause.

2. Res Adjudicata—Failure to Make Defense—When Bars Action on Matter or Demand not So Pleased.—Where a defendant fails to plead payment or any other defense which he has to an action, he is estopped by the judgment therein from thereafter suing on the claim or demand not so pleaded, unless he was prevented from making his defense by accident or mistake, or by the fraud of the plaintiff in the first action. A defendant who negligently fails to interpose a plea of payment or other defense to an

action, cannot, after judgment therein, maintain an action based on such defense, pp. 112, 113.

Reaffirmed in Barrett v. Blackmar, 47 Iowa 571, 572, Bedwell v. Gephart, 67 Iowa 48, 49, 24 N. W. 587; Wharten v. Himstreet, 112 Iowa 607, 84 N. W. 703.

Reaffirmed and explained in Savery v. Sypher, 39 Iowa 678, 679, holding that where in an action to foreclose a mortgage on land, defendant fails to interpose a set-off in reliance upon plaintiff's agreement that the mortgaged property should be bid off in full satisfaction of whatever judgment might be rendered, and, after judgment, the plaintiff violates the agreement, the defendant is not estopped by the judgment from recovering the amount of such set-off.

Reaffirmed and extended in Ulber v. Dunn, sheriff, and Sutton, 143 Iowa 263, 119 N. W. 270, holding further that a party cannot attack a judgment on account of a defense which he might have interposed in the action wherein it is rendered.

(Note.—In this last case no fraud, accident or mistake was pleaded or proved.—Ed.)

(Note.—See further, Lawrence Sav. Bank v. Stevens, 46 Iowa 429; Dewey v. Peck, 33 Iowa 242, important cases on this question, not citing the text.—Ed.)

Cross reference. See further on this question, annotations and note under Rule 2 of Dalton v. Lane & Guye (13 Iowa 538), ante. p. 183.

MITCHELL v. PETERS, 18 IOWA 119

1. **Equitable Actions Concerning Real Estate—Parties—Lis Pendens.**—In an action in equity involving the title to real estate, it is the better practice to make all persons parties who are known to claim an interest therein; but it is questionable whether in order to constitute *lis pendens* it is necessary to make a person a party whose interest therein is not shown by the records, or who is not in possession of the realty at the time of the commencement of the action, p. 122.

Cited in Noyes v. Crawford, 118 Iowa 22, 91 N. W. 801, 96 Am. St. Rep. 363, holding that an action in equity involving the title to land, and orders, judgments and proceedings therein, do not affect the rights of a *bona fide* purchaser thereof, for value and without notice, before its commencement, or the rights of any one claiming through him.

STATE v. EMEIGH, 18 IOWA 122

1. **Indictment—Allegations—Errors as to Not Prejudicial—Error as to Name of Injured Person.**—An error in an indictment

as to the name of the person injured is (under Sec. 4656 of the Code of 1860) immaterial, when the offense is otherwise described with sufficient certainty to identify the act which is the subject of the offense.

Erroneous allegations in an indictment which do not tend to the prejudice of the substantial rights of the accused upon the merits are (under Sec. 4660 of the Code of 1860) not fatal, p. 124.

Reaffirmed as to first paragraph in State v. Crawford, 66 Iowa 319, 320, 23 N. W. 684; State v. Semotan, 85 Iowa 60, 51 N. W. 1162, under Sec. 4302 of the Code of 1873, corresponding to Sec. 4656 of the Code of 1860.

Reaffirmed as to first paragraph in State v. Carnagy, 106 Iowa 485, 76 N. W. 805; State v. Burns, 119 Iowa 666, 94 N. W. 239, under Sec. 5286 of the Code of 1897, corresponding to Sec. 4656 of the Code of 1860, mentioned in the text.

Reaffirmed and explained as to first paragraph in State v. Flynn, 42 Iowa 164, 165, holding that where an indictment for resisting an officer, sets out the officer's name as "Patrick Ryan" when his name is "Patrick Ryder" such variance is not fatal (under Sec. 4302 of the Code of 1873, corresponding to Sec. 4656 of the Code of 1860).

Reaffirmed and explained as to first paragraph in State v. Cunningham, 111 Iowa 238, 82 N. W. 776, holding that if (under Sec. 5286 of the Code of 1897, corresponding to Sec. 4656 of the Code of 1860) an offense is charged in the indictment, and from facts in evidence the court is satisfied that defendant was not misled, this is enough to warrant the conclusion that the act intended to be charged was sufficiently described or indicated.

Reaffirmed as to second paragraph in State v. Reid, 20 Iowa 417, 418, holding that the fact that an indictment fails to sufficiently lay the venue, cannot be raised in arrest of judgment or on a motion for new trial.

Reaffirmed as to second paragraph in State v. White, 32 Iowa 19, holding that the fact that the name of accused is erroneously or improperly stated in an indictment, cannot be made the ground for a motion in arrest of judgment: That in such case the accused must correct such error upon arraignment.

Reaffirmed and explained as to second paragraph in State v. Brooks, 85 Iowa 368, 369, 52 N. W. 241, holding that a clerical error which may be seen by a casual reading of the indictment, is not fatal; and that such an error may be corrected by leave of court: That a mistake in the Year Date of the commission of the offense charged, where such date is later than the finding of the indictment, is such an error.

(Note.—See further, State v. Fogarty, 105 Iowa 32, 74 N. W. 754; State v. Windahl, 95 Iowa 470, 64 N. W. 420; State v.

Emmons, 72 Iowa 265, 33 N. W. 672; State v. Carr, 43 Iowa 418; State v. Cunningham, 21 Iowa 433; State v. Williams, 20 Iowa 98, some important cases on this subject not citing the text.—Ed.)

Cross references. See further on this question, annotations, notes and cross references under State v. Gurlock (14 Iowa 444), ante. p. 265; State v. Kreig (13 Iowa 462), ante. p. 174.

2. **Indictment—Rape—Inconsistent Declarations or Statements of Prosecutrix—Impeachment of.**—Upon the trial of an indictment for rape, previous statements or declarations of the alleged ravished woman which are inconsistent with her testimony thereon are inadmissible, unless she is first examined as to them while testifying, pp. 124, 125.

Cited in State v. Wheeler, 116 Iowa 213, 89 N. W. 979, 93 Am. St. Rep. 236, not in point.

JONES v. BRUNSKILL, 18 IOWA 129

1. **Pleading—Demurrer—Sufficiency of as to Point of Objection.**—Under Sec. 2877 of the Code of 1860, a demurrer must distinctly specify or point out the error wherein the pleading is claimed to be defective, or it will be disregarded, and where language in a demurrer is so general as not to notify the adverse party of the objection to his pleading, the demurrer will be disregarded, pp. 130, 131.

Reaffirmed in Chambers v. Ingham, 25 Iowa 222; Childs v. Limback, 30 Iowa 400; Fockler v. Martin, 32 Iowa 119.

Reaffirmed and extended in Chambers v. Ingham, 25 Iowa 222, holding further that where a pleading demurred to is good as to objections specifically made, the court will not inquire as to whether it is otherwise defective.

(Note.—See further, McLaughlin v. Bascomb, 36 Iowa 593; McGregor, and Sioux City R. R. Co. v. Birdsall, 30 Iowa 257; Davenport Gas Light & Coke Co. v. City of Davenport, 15 Iowa 6; McKellar v. Stout, 13 Iowa 487, important cases on this question, not citing the text.—Ed.)

EASLEY v. BRAND, 18 IOWA 132

1. **Usury—Action on Usurious Note—When no Forfeiture Allowed.**—In an action on a note for additional usurious interest, where the debtor has paid the principal of the original loan and twenty per cent. thereon, no judgment of forfeiture in favor of the school fund for ten per cent. per annum on the original indebtedness shall be entered, pp. 134, 135.

Reaffirmed in Seekel v. Norman, 78 Iowa 263, 43 N. W. 193, holding that where a debtor has paid the principal of a usurious

1. Husband and Wife—Mortgage on Real Estate by Wife
JOHNSON COUNTY FOR THE USE OF SCHOOL FUND v. RUGG, 18 Iowa
 for a balance of usurious interest, no judgment of forfeiture to the
 school fund shall be entered.

note or contract and an amount equal to the forfeiture allowed to

the school fund in addition, then in an action on a note executed
to Secure Husband's Debt—Action of Foreclosure—Judgment.—
 In an action to foreclose a mortgage on real estate, executed by
 a wife to secure the debt of her husband, no personal judgment
 shall (under the Code of 1860) be entered against her, nor general
 execution be ordered to issue against her in case the mortgaged
 property fails to satisfy the debt, p. 138.

Reaffirmed in **Knox v. Moser**, 69 Iowa 343, 28 N. W. 630, under
 the Code of 1873.

Reaffirmed and explained in **Green & Densmore v. Scranage**,
 19 Iowa 464-466, 87 Am. Dec. 447, holding that false representa-
 tions made to the wife by the husband, or undue influence exerted
 by him to induce her to execute a mortgage, where she after-
 wards duly acknowledges it, does not affect or prejudice the mort-
 gagee, if the conduct of the husband was without the instigation,
 procurement, knowledge or consent of the mortgagee; that in such
 case, fraud must be brought home to the latter party.

Reaffirmed, explained and extended in **Wolf v. Van Metre**,
 23 Iowa 403, holding further that a wife may mortgage her separate
 property to secure the debt of her husband, and equity will enforce
 the mortgage; but that a wife is not bound personally or beyond the
 mortgage for such a debt.

Cited in **Fyffe v. Beers**, 18 Iowa 9, the court not deciding the
 proposition of the text, and the case turning upon another ques-
 tion.

Cited in **McLaren v. Hall**, 26 Iowa 306, the court holding that
 a husband may act as the agent of his wife, or she may ratify his
 acts in relation to her property, if such ratification is with full
 knowledge.

Cited in **Richmond v. Tibbles and husband**, 26 Iowa 477, the
 court holding that a wife is liable, under the Code of 1860, for
 breach of covenants contained in a deed to her own land.

Cross reference. See further on this question, annotations un-
 der Rule 2 of **Jones v. Crosthwaite** (17 Iowa 393), ante. p. 546.

EMERICK v. SLOAN, 18 IOWA 139

**1. Petit Jury—Manner of Obtaining—Discretion of Trial
 Court—Abuse—Reversal.**—The manner of obtaining the requisite

number of jurors to try a cause, whether from the regular panel or from talesmen, is (under Secs. 2738 and 3044 of the Code of 1860) so much a matter within the sound judicial discretion of the district court that his action thereon will not be cause for reversal, except in case of abuse thereof, p. 140.

Cited in Fountain v. West, 23 Iowa 13, 92 Am. Dec. 405, holding that where, in the selection of a jury to try a civil action, the plaintiff accepts the jury, whereupon the defendant peremptorily challenges a juror, that upon the panel being refilled, it is not error for the court to permit the plaintiff to peremptorily challenge a juror on the panel at the time he accepted the jury.

Cross reference. See further in this connection, annotations under Rules 1 & 2 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

2. Tax Sales—What may be Sold.—Under Sec. 6, Chap. 24 Acts of Extra Session of the Eighth General Assembly, amending Sec. 759 of the Code of 1860, the county treasurer may sell either real or personal property for the payment of delinquent taxes, regardless of whether or not the property so sold be that on which the taxes are levied, or other property of the delinquent tax payer, p. 141.

Reaffirmed in Garrettson v. Scofield, 44 Iowa 37.

3. Trial—Error in Admission or Exclusion of Evidence—Appeal—Insufficient Record—Review.—The question of whether or not the trial court erred in the admission or exclusion of evidence, will not be reviewed upon appeal, when the evidence is not shown by the record, p. 141.

Reaffirmed and explained in Jenks v. Knott's Mexican Silver Mining Co., 58 Iowa 552, 12 N. W. 590, holding that where on appeal, the record fails to show answers to questions objected to, such questions will not be reviewed: That in such case the material inquiry is, not whether an improper question was asked, but was illegal testimony received by the answer.

(Note.—See further, Mosier v. Vincent, 34 Iowa 475; State v. Keeler, 28 Iowa 551; I. & M. R. R. Co. v. Perkins, 28 Iowa 281; Thurston v. Cavenor, 8 Iowa 155; Hanan v. Hale, 7 Iowa 153; Speers v. Fortner, 6 Iowa 553; Mays v. Deaver, 1 Iowa 216, important cases, sustaining and explaining, but not citing the text.—Ed.)

YOUNGER FOR USE OF RALSTON v. MARTIN, 18 IOWA 143

1. Negotiable Note Payable to Payee or Order—Assignment without Indorsement—Action by Assignee—Defenses.—Where a negotiable note payable to order is assigned without indorsement, the assignee may (under Secs. 2757, 2760 of the Code of 1860) sue

thereon in his own name, subject to set-off or other defense existing before the assignment, p. 145.

Reaffirmed in Trustees of Northwestern College v. Schwagler, 37 Iowa 579, holding that the holder of a note payable to the payee or order, may maintain an action thereon in his own name without it being indorsed to him.

Reaffirmed and extended in Franklin v. Twogood, 18 Iowa 523, 524, holding further that the rule is applicable to the assignee of a negotiable note which is assigned upon a separate paper, an independent instrument made for another purpose, the note not being indorsed.

Reaffirmed and extended in King v. Gottschalk, 21 Iowa 514; *Rubey v. Culbertson*, 35 Iowa 266, holding further that a person who has possession of a note payable to order, but not indorsed to him, may sue thereon, and the production by the plaintiff of the note upon the trial, is *prima facie* evidence of ownership and authorizes a recovery, unless plaintiff's ownership be disproved.

Reaffirmed and extended in Rubey v. Culbertson, 35 Iowa 266, holding further that in an action on a negotiable note payable to order, proof of possession of the note by plaintiff is *prima facie* evidence of his ownership, and is admissible in evidence independent of a written assignment on the back of the paper.

Reaffirmed and extended in Bennett v. Stoddard & Rennick, 58 Iowa 655, 12 N. W. 627, holding further that the holder of a note, placed in his hands as collateral security, is in equity at least, the owner of the note and its proceeds until the principal debt is paid: That as such owner he can (under Secs. 2543, 2545 of the Code of 1873) maintain an action thereon in his own name.

Reaffirmed, extended and varied in Green v. Marble, 37 Iowa 96, holding further that the verbal assignment of a note and guaranty thereof, entitles the assignee to sue on the guaranty in his own name.

Reaffirmed, extended and varied in Rising v. Teabout, 73 Iowa 420, 35 N. W. 500, holding further that the holder of a negotiable or non-negotiable note may (under Code of 1873) maintain an action thereon in his own name.

Cited in Bettis v. Bristol, 56 Iowa 42, 8 N. W. 809, holding that a note payable to the payee or order may be indorsed by his agent whose authority is conferred by parol; that where such a note is indorsed by such agent, the indorsement need not show his authority or how it is conferred.

Cross reference. See other Rules hereof.

2. Negotiable Note—Assignment without Indorsement—Action on — Defenses — Distinction Between Indorsement and Assignment.—In an action by the holder of a negotiable note payable to order of the payee and not indorsed to him, either in his own name or that of the payee, it is (under Sec. 2760 of the Code of 1860) subject to any defense or set-off existing before notice of the assignment to the maker. In such case the plaintiff is an assignee, not an indorsee of the note. Under Sec. 1794 of the Code of 1860, in order for such a note to be freed from such defenses in the hands of a holder, it must be *indorsed* for value, before due and without notice thereof, pp. 145, 146.

Reaffirmed in Hecker v. Boylan, 126 Iowa 166, 101 N. W. 756; De Laval Separator Co. v. Sharpless, 134 Iowa 32, 111 N. W. 431, under Secs. 3043 and 3044 of the Code of 1897.

Reaffirmed and extended in Franklin v. Twogood, 18 Iowa 521, 524, holding further that the rule is applicable to the assignee of a negotiable note which is assigned upon a separate paper, an independent paper made for another purpose, the note not being indorsed.

Reaffirmed and extended in Johnson v. Walker, 60 Iowa 319, 320, 14 N. W. 328, holding further that one who accepts a note and mortgage as collateral security and by delivery merely, acquires no greater rights than his assignee had thereunder.

Cited with approval in State v. Nine, 105 Iowa 135, 74 N. W. 946, not in point, but upon analogy.

Cross reference. See other Rules hereof.

3. Negotiable Note — “Bearer” and “Order” Notes — How Negotiated.—Under Sec. 1794 of the Code of 1860, a note payable to “order” is to be negotiated by indorsement, and a note payable to “bearer” by delivery merely, p. 145.

Reaffirmed and extended in Richards v. Daily, 34 Iowa 429, holding further that where a note payable to “bearer” is transferred by delivery *after maturity*, it is subject to all equities and defenses arising out of the instrument itself, such as payment, want of consideration, or fraud, but not to an independent set-off: That the fact that such note in such case is transferred by written assignment and not by delivery, does not change the rule.

Cross reference. See other Rules hereof.

GASKELL v. CASE, 18 IOWA 147

1. Decedent's Estate—Descent and Distribution—Exemptions to Widow—Personalty no Longer used by Her—Distribution.—Where personal property is in the hands of a widow, which is set apart under Sec. 2361 of the Code of 1860 (Personalty in her hands as head of the family which would be exempt from execu-

tion) for the benefit of herself and the family of decedent, and the widow is no longer the head of such family, and the property is not needed, or used for the benefit of the widow or family it is (under Sec. 2422 of the Code of 1860) subject to distribution according to law, but not to the payment of decedent's debts. The widow does not own such property absolutely, and cannot authorize its sale or disposition by a second husband, p. 149.

Reaffirmed in Ellsworth v. Ellsworth, Adm'r, 33 Iowa 168, 169, holding that property exempted by Sec. 2361 of the Code of 1860, when no longer needed or used by the widow as head of the family, is not subject to the payment of decedent's debts, but is to be distributed according to law.

Reaffirmed and explained in Paup and husband v. Sylvester, Adm'r, 22 Iowa 376, 377, holding that a child of decedent cannot, after obtaining majority and marrying, maintain an action against the widow for possession of or for the value of the property exempted under Sec. 2361 of the Code of 1860: That such property is exempted for the benefit of both the widow and of children of the decedent while they remain at home.

Reaffirmed and explained in Meyer v. Meyer, 23 Iowa 377, 92 Am. Dec. 432, holding that the property exempted by Sec. 2361 of the Code of 1860, is not the property of the widow absolutely, but is to *remain* with her, and is subject to her *use*: But the court says, however, that "We would not say that she might not dispose of fattened hogs, or otherwise prevent waste."

EVANS v. MCGLOSSON, 18 IOWA 150

1. Judgment Lien on Land — Prior Unrecorded Deed or Mortgage, Superior to.—A prior unrecorded deed or mortgage to or on land is superior to a judgment lien thereon given by a subsequent judgment against the grantor or mortgagee, p. 151.

Reaffirmed and explained in Lathrop v. Brown, 23 Iowa 49, 51, holding that a judgment creditor has a lien only on the interest of his judgment debtor in land; that a judgment creditor whose judgment is first rendered, has a superior lien on the interest of the judgment debtor in land, to that of a subsequent judgment creditor.

Reaffirmed, explained and varied in Chapman v. Coats, 26 Iowa 291, holding that where a deed, or mortgage, to land is made by a debtor to a third person before a levy of attachment on it by a creditor of the grantor (debtor) and the deed, or mortgage is recorded before sale under such attachment, then the purchaser at the execution, or decretal, sale is constructively notified of such prior conveyance, and is not a subsequent *bona fide* purchaser having a superior right.

Reaffirmed and extended in First Nat'l Bank of Tama City v. Hayzlett, 40 Iowa 659; Bush v. Herring, 113 Iowa 160, 84 N. W. 1037, holding the rule equally applicable to the lien on land of an attachment creditor.

Cross references. See other Rules hereof. See further, annotations and cross references under Rule 1 of Vannice v. Bergen (16 Iowa 555), ante. p. 472; Welton v. Tizzard (15 Iowa 495), ante. p. 371.

2. Unrecorded Deed or Mortgage to or on Land—Sale under Subsequent Judgment—Rights of Purchaser.—Where there is a sale of land under a judgment to a person other than the execution plaintiff, and for value paid and without notice of a prior unrecorded deed or mortgage to or on the land, such purchaser takes it free from any right or claim of the prior grantee or mortgagee, p. 151.

Reaffirmed in Foreman v. Highan, 35 Iowa 384; Bush v. Herring, 113 Iowa 160, 84 N. W. 1037; Koch v. West, 118 Iowa 472, 92 N. W. 664, 96 Am. St. Rep. 394.

Reaffirmed and qualified in Chapman v. Coats, 26 Iowa 291, holding that where a deed or mortgage to land is made by a debtor to a third person before a levy of attachment on it by a creditor of the grantor (debtor) and the deed, or mortgage, is recorded before sale under such attachment, then the purchaser at the execution, or decretal sale is constructively notified of such prior conveyance, and is not a subsequent *bona fide* purchaser having a superior right.

Cross references. See Rule 3 hereof. See further on this question, annotations and cross references under Rule 1 of Vannice v. Bergen (16 Iowa 555), ante. p. 472; Welton v. Tizzard (15 Iowa 495), ante. p. 371; Blaney v. Hanks (14 Iowa 400), ante. p. 254.

3. Unrecorded Deed or Mortgage to Land—Sale under Subsequent Judgment—Purchase by Execution Plaintiff, Rights of.—Where an execution plaintiff buys land at an execution sale under a judgment rendered subsequent to the execution of an unrecorded deed or mortgage of the judgment debtor thereto or thereon, the execution plaintiff having neither actual or constructive notice of the prior conveyance at the time of his purchase, he takes the land free from the claims or rights of the prior grantee or mortgagee: But this rule does not apply in equity, where equities of so strong a nature as to prevent its application are alleged and proved, pp. 151, 152.

Reaffirmed in Ettenheimer v. Northgraves, 75 Iowa 29, 30, 39 N. W. 121.

Reaffirmed and explained in Bush v. Herring, 113 Iowa 160, 84 N. W. 1037, holding that a purchaser at judicial or sheriff's sale, whether such purchaser be the judgment creditor or a stranger, is a purchaser, and is in general protected from prior unrecorded deeds or equities.

Reaffirmed and varied in Cooley v. Wilson, 42 Iowa 428, holding that the rule applies where the attorney of the judgment creditor is the purchaser of land sold under execution.

Reaffirmed and qualified in Butterfield v. Walsh, 21 Iowa 99, 89 Am. Dec. 557, and 36 Iowa 536, 537; Walker v. Elston and Green, 21 Iowa 531; Gower v. Doheney, 33 Iowa 39, holding that where the execution plaintiff becomes purchaser at a sale thereunder, without actual notice of an equity existing in favor of a third person to the land sold, and there is nothing in the way of possession or otherwise, to put the plaintiff upon inquiry as to such equity, he is a subsequent purchaser, and has the superior right to that of the holder of the equity.

Reaffirmed and qualified in Wallace v. Bartle, 21 Iowa 349, 350, 89 Am. Dec. 584, holding that a purchaser at an execution sale, of a judgment debtor's *equitable interest* in land, the judgment debtor having no apparent or record title, takes subject to the rights of a third person who purchased such equity before such sale, although such execution purchaser had no notice of the third person's rights at the time of his purchase.

Cited in Lathrop v. Brown, 23 Iowa 51, holding that a judgment creditor has a lien only on the interest of his judgment debtor in lands; that a judgment creditor whose judgment is first rendered has a superior lien on the interest of the judgment debtor in land, to that of a subsequent judgment creditor.

Cross references. See further on this question, annotations, notes and cross references under Vannice v. Bergen (16 Iowa 555), ante. p. 472; Welton v. Tizzard (15 Iowa 495), ante. p. 371; Rule 3 of Blaney v. Hanks (14 Iowa 400), ante. p. 254.

WASSON v. MITCHELL, 18 IOWA 153

1. Officers—Judicial Acts—Liability for—Officer or Board Approving Bonds.—A judicial officer is not liable civilly for *judicial* acts, unless, it may be, where he acts willfully, maliciously, or corruptly: And this exemption extends to all officers charged with the determination of matters of a *quasi* judicial character; and it applies to the board of supervisors of a county, p. 155.

Reaffirmed in Londegan v. Hammer, 30 Iowa 511, 512; McGrew v. Holmes, 145 Iowa 542, 124 N. W. 196, holding that a justice of the peace or a mayor is not civilly liable for judicial acts—

The court doubting whether he would be so liable in such an instance even if he acted willfully, maliciously, or corruptly.

Reaffirmed and extended in Muscatine Western R. R. Co. v. Horton, 38 Iowa 47, holding further that an officer, or members of a board, charged with the duty of determining a matter or fact, is, or are, not civilly liable for errors of law or of fact in acting thereon, unless he, or they, act willfully, maliciously, or corruptly.

Reaffirmed and extended in Henke v. McCord, 55 Iowa 384, 7 N. W. 625, holding further that a justice of the peace is not liable in damages for issuing a warrant for breach of a city ordinance which is void for want of authority of the city to enact it; and that a ministerial officer who executes such warrant, it being regular and sufficient on its face, is not liable in damages therefor.

Reaffirmed and extended in Chamberlain v. Clayton, 56 Iowa 333, 334, 9 N. W. 238, 41 Am. Rep. 101, holding further that the trustees of the state deaf and dumb institution are not civilly liable personally for canceling a contract made with a teacher or superintendent whom they have employed, and refusing to allow him to perform services under his contract, even though the acts of such officers be "wrongfully, unjustly and illegally" done, Sec. 1686 of the Code of 1873 under which they acted granting to them discretion in such matter: That there can be no personal liability for a judicial or quasi judicial act unless the act done be willful, corrupt, malicious, or without jurisdiction.

(Note.—In this last case it was not averred and proved that such trustees acted corruptly, or maliciously.—Ed.)

Reaffirmed and narrowed in Jones v. Brown, 54 Iowa 80, 6 N. W. 143, 37 Am. Rep. 185, holding that where a judicial officer has jurisdiction he cannot be held liable in a civil action for damages for a decision therein, although it be alleged by the plaintiff in the action for damages that he acted fraudulently and corruptly.—Holding, therefore, that an arbitrator is not liable in damages for an award made by him, although it is alleged that it was made fraudulently and corruptly.

Cross references. See other Rules hereof. See further on this question, annotations under *Howe v. Mason* (14 Iowa 510), ante, p. 276; *Gowing v. Gowgill* (12 Iowa 495), ante, p. 82.

2. Officers—Ministerial—Liability of Ministerial Officer and Sureties.—A party injured by the misfeasance or non-feasance of a ministerial officer may sue both the officer and his sureties therefor, p. 156.

Reaffirmed and qualified in Boardman v. Hayne, 29 Iowa 345, 346, holding, however, that a ministerial officer is not liable for

honest mistakes or errors or even negligence, or official misconduct which is brought about by the carelessness, or the misconduct of the person alleging it as the basis of his action: Holding, also, that the assignee of an order on a school district and which is procured by fraud, cannot sue the president and secretary of the district, who issued it, thereon.

Reaffirmed and narrowed in Henke v. McCord, 55 Iowa 384, 386, 7 N. W. 625; McGrew v. Holmes, 145 Iowa 542, 124 N. W. 196, holding that a justice of the peace or mayor is not liable in damages for issuing a warrant for breach of a city ordinance which is void for want of authority of the city to enact it; and that a ministerial officer who executes such warrant, it being regular and sufficient on its face, is not liable in damages therefor.

Cited with approval in Longee v. Reed, 133 Iowa 51, 110 N. W. 166, a case turning upon the limitation of an action against a ministerial officer for omission of a ministerial act.

Cited in Muscatine Western R. R. Co. v. Horton, 38 Iowa 47, holding that an officer, or members of a board, charged with the duty of determining a matter or a fact, is, or are, not civilly liable for errors of law or of fact in acting thereon, unless he, or they, act willfully, maliciously or corruptly.

Cross references. See Rule 1 hereof and cross references there found. See, also, Rule 3 hereof.

3. Officers—County Board of Supervisors—Approving Bonds—When Personally Liable for—Judicial and Ministerial Acts.—The members of the county board of supervisors are not personally liable for honest mistakes and errors of judgment, whether of law or of fact, in the approving of bonds, but are so liable for negligence, or official misconduct in such a matter, pp. 156, 157.

Cited with approval in Maynes v. Brockway, 55 Iowa 459, 8 N. W. 318, not in point.

Distinguished and narrowed in Hubbard v. Switzer, 47 Iowa 683, holding that the question of the financial sufficiency of a surety on a bond to stay a judgment is not a judicial question to be determined by the clerk, and such officer and sureties on his official bond are liable in damages for an insufficient bond negligently taken by him.

Cross reference. See other Rules hereof, and cross references there found.

CHITTENDEN & Co. v. GOSSAGE, 18 IOWA 157

1. Mortgage on Land by Person to Secure Another's Debt—Action to Foreclose, No Personal Judgment Against Mortgagor.—Where one executes a mortgage on land to secure the debt of another and the mortgagor, by the terms of the instrument or other-

wise, does not assume a personal liability for the debt, then in an action to foreclose, no personal judgment must be rendered and no general execution must be ordered against him. In such an instance, the mortgagor is only liable to the extent of the mortgaged property, p. 159.

Reaffirmed, explained and extended in Well v. Churchman, 52 Iowa 255, 256, 3 N. W. 40, holding that the relation of debtor and creditor must exist between the two parties to a mortgage before the mortgagee will be entitled to a personal judgment in an action to foreclose: Holding further that a mortgage on land simply acknowledging the receipt of money the instrument is given to secure, with a stipulation therein that it is to be void upon the payment of the sum by the mortgagor, his heirs, etc., at a given time, but not showing further that it is executed for a debt, does not authorize a personal judgment against the mortgagor (or his administrator or estate, in case of his death) in an action of foreclosure.

(Note.—See further, Newbury v. Rutter, 38 Iowa 181; Elmore v. Higgins, 20 Iowa 250; Christner v. Brown, 16 Iowa 132; Anderson v. Reed, 11 Iowa 180; Deland v. Mershon, 7 Iowa 70, important cases on this question, not citing the text.—Ed.)

CHAMBERS v. COCHRAN AND BROCK, 18 IOWA 159

1. **Execution Sale of Land—Setting Aside by Purchaser.**—Where, under Sec. 3321 of the Code of 1860, the purchaser at an execution sale of land obtains nothing of value and acts under a misapprehension as to the state of the title, he may have the sale vacated; and this rule is more forceful where the purchaser is misled as to the title by the false representations of the execution debtor, pp. 162-164.

Distinguished and narrowed in Holtzinger v. Edwards, 51 Iowa 384, 1 N. W. 601, holding that where at the time of an execution sale of land, the judgment debtor has *any* title or interest therein, the rule *caveat emptor* applies, and the execution purchaser takes such title or interest, and cannot complain or set the sale aside.

2. **Principal and Surety—Discharge of Surety by Discharge of Principal.**—Whatever discharges the principal, as a general rule, likewise discharges the surety, pp. 165, 166.

Reaffirmed, explained and extended in Hershler v. Reynolds, 22 Iowa 155, 156, holding further that any valid agreement or act of the creditor, founded upon a sufficient consideration and without the consent of the surety, whereby the creditor precludes himself from demanding performance of the principal, or entitles the latter to exemption from performance for any period of time,

discharges the surety; and this rule applies, either before or after judgment on the obligation or contract: Holding, however, that where a plaintiff in an action of replevin consents to judgment, provided execution be stayed for a given time, such judgment (under Secs. 3293, and 3300 of the Code of 1860) binds the sureties on his bond, where they fail to object thereto at the time of the judgment.

Reaffirmed, explained and extended in Bonney v. Bonney, 29 Iowa 451, 452; Fullerton Lumber Co. v. Snouffer, 139 Iowa 178, 179, 117 N. W. 51, holding further that a binding agreement between the principal and creditor, without the consent of the surety, by which the time of payment of the debt is extended, releases the surety, regardless of whether or not he is thereby prejudiced.

Reaffirmed, explained and extended in Port v. Robins, 35 Iowa 213, holding further that where the payee of a note holds a mortgage lien to secure the debt, on property of a value more than sufficient to pay the debt, and voluntarily releases the lien without the assent of the surety on the note, the latter is thereby discharged; and this defense is available to the surety against one who takes such note with notice of the facts.

Reaffirmed, explained and extended in City of Maquoketa v. Willey, 35 Iowa 329; Lucas County v. Roberts, 49 Iowa 161, 162; Bedwell v. Gephart, 67 Iowa 47, 25 N. W. 586, holding further that where a creditor holds an obligation signed by principal and surety, and also holds collateral for its payment, the surrender of the collateral security, without the knowledge of the surety, discharges the latter to the extent of the security surrendered.

Reaffirmed, explained and extended in Melick v. First Nat'l Bank of Tama City, 52 Iowa 95, 2 N. W. 1022, a case turning on fraudulent representations of the principal inducing a surety to sign a note, and other questions not germane.

Reaffirmed, explained and extended in Malanaphy v. Fuller & Johnson Mfg. Co., 125 Iowa 723, 724, 101 N. W. 641, 106 Am. St. Rep. 332, holding further that the discharge of the principal, either by act of the parties or by operation of law, from his liability to pay a debt or claim secured, releases the surety thereon, although judgment therefor may have been rendered against the latter before such release: In such a case, a court of equity will enjoin the collection of the judgment against the surety.

Reaffirmed, explained and varied in Rowley v. Jewett, 56 Iowa 496, 497, 9 N. W. 355, holding that if the surety has been lulled into security by the acts and conduct of the creditor, and in consequence thereof fails to obtain indemnity or make an effort to so do, he is wholly discharged; but if he only surrenders certain property held by him as collateral security to the principal debtor,

and has not been otherwise damaged, he is discharged only to the extent of the value of the property surrendered.

Reaffirmed and extended in Thornburgh v. Madren, 33 Iowa 384, holding further (as does the present case in argument) that where the creditor, by himself or his agent, admits or represents that the debt has been paid, and the surety acts on such admission or representation to his prejudice, and will suffer loss if the creditor be allowed to thereafter deny such payment, the creditor is estopped, and the surety is released.

Reaffirmed and varied in Skiff v. Cross, 21 Iowa 461, 462, holding that a surety who pays the debt for which he is liable for his principal, is subrogated to the rights of the creditor, and may maintain action therefor: That where the sheriff pays or turns over money or property in his hands as such officer, either wrongfully or by mistake, to a person not entitled thereto, the sureties on his official bond may sue the person receiving it, therefor.

Cross references. See Rules 3 & 4 hereof. See further on this question, annotations under Charles v. Haskins (14 Iowa 471), ante. p. 269; Ames v. Maclay (14 Iowa 281), ante. p. 237; Corrielle v. Allen (13 Iowa 289), ante. p. 151; Kelly v. Gillespie (12 Iowa 55), ante. p. 9.

3. Principal and Surety—Reducing Note to Judgment—When Surety Discharged.—Reducing to judgment a note signed by a principal and surety does not discharge the surety; but the creditor cannot violate the duties imposed upon him by reason of the knowledge of such relationship without being answerable for the consequences.

In such case the judgment creditor is not bound to sue out an execution—certainly not without a request by the surety in writing as provided by Chap. 75, Code of 1860, if then—in order to preserve his rights against the surety, although his omission so to do results in the loss of a lien on the property of the principal: But if the judgment creditor, by some voluntary act and without the consent of the surety, surrenders an actual lien, or withdraws an execution after an actual levy upon the goods of the principal, then, if loss occurs, it falls upon the creditor and not the surety, pp. 165, 166.

Reaffirmed and explained in Sherraden v. Parker, 24 Iowa 31, 32, holding that the levy of an execution upon property is, as between the parties to an action, a *prima facie* satisfaction of the judgment; and that where property held by a surety is levied upon to satisfy a judgment against the principal and such surety, and such levy is afterward abandoned and the property placed in the possession of the principal, such acts release the surety.

Reaffirmed and extended in City of Maquoketa v. Willey, 35 Iowa 329, holding further that a creditor cannot relinquish a right or lien he has acquired upon the property of the principal without resorting to the proper proceedings to make the debt therefrom, whether the right is acquired by agreement, by the property being voluntarily placed in his hands, or he has acquired a lien thereon by legal proceedings; and such relinquishment releases the surety to the extent of the value of the property released.

Reaffirmed and varied in Port v. Robbins, 35 Iowa 213, holding that where the payee of a note holds a mortgage lien to secure the debt, on property of a value more than sufficient to pay the debt, and voluntarily releases the lien without the assent of the surety on the note, the latter is thereby discharged; and this defense is available to the surety against one who takes such note with notice of the facts.

Reaffirmed and qualified in Bedwell v. Gephart, 67 Iowa 47, holding that the release of real estate of the principal from the lien of a judgment, or the discharge of a levy whereby a lien on property of the principal has been created, discharges the surety to the extent of the value of the property released: But this rule does not apply where such act is done by the creditor in the compromise of a doubtful claim, or lien, and the amount received by the creditor is credited on the amount of the judgment.

Reaffirmed and qualified in Read v. American Surety Co. of N. Y., 117 Iowa 12, 13, 90 N. W. 591; Whitehouse v. American Surety Co. of N. Y., 117 Iowa 331, 90 N. W. 728, holding that a creditor, although he has a lien on the property of the principal, may look to the surety for the payment of his debt, and is not obliged to first pursue a statutory remedy against the principal, (unless requested by the surety in writing, as provided by Secs. 3064 and 3065 of the Code of 1897), provided he does not release the lien on the property, in which latter case the surety is discharged to the extent of the property released.

Cited in Williams v. Allison, 33 Iowa 286, not in point.

Cross references. See rule 2 hereof, and cross references there found. See, also, Rule 4, in this connection.

4. Principal and Surety—Parol Evidence of Suretyship.—The fact of suretyship may be shown *aliunde* and by parol, where not shown by the note or other contract or instrument, p. 165.

Reaffirmed in Piper v. Newcomer & Campbell, 25 Iowa 222; Port v. Robbins, 35 Iowa 211, 212.

Reaffirmed and extended in Fullerton Lumber Co. v. Snouffer 139 Iowa 178, 179, 117 N. W. 51, holding further that (under the Negotiable Instrument Act, Code Supp. of 1907) one of the makers of a negotiable note when sued by the payee may show by parol that

he was in fact a surety thereon, although appearing thereon as principal, and that the time of payment thereof was extended without his consent, thus discharging him.

Cross references. See Rule 2 hereof, and cross references there found. See, also, Rule 3 hereof.

MULLIGAN *v.* HINTRANGER, 18 IOWA 171

1. **Constitutional Law—United States Treasury Notes—Act of Congress of July 16, 1862, Constitutional.**—The Act of Congress of July 16, 1862, making United States Treasury Notes legal tender and authorizing their issuance, is constitutional; and redemption from a sale of land for taxes made before the taking effect of such act may be made in such notes, p. 172.

Special Cross reference. For cases citing, explaining and extending the text, and others, see annotations under Warnibold *v.* Schlichting (16 Iowa 243), ante. p. 432.

HINTRAGER *v.* BATES, 18 IOWA 174

1. **Constitutional Law—United States Treasury Notes—Act of Congress of July 16, 1862, Constitutional.**—The Act of Congress of July 16, 1862, making United States Treasury Notes legal tender and authorizing their issuance, is constitutional; and redemption from a sale of land for taxes made before the taking effect of such act may be made in such notes, pp. 175, 176.

Reaffirmed in Mulligan *v.* Hintrager, 18 Iowa 172.

Special Cross reference. For further cases citing, explaining and extending the text, and others, see annotations under Warnibold *v.* Schlichting (16 Iowa 243), ante. p. 432.

GRANT *v.* CITY OF DAVENPORT, 18 IOWA 179

1. **Cities and Towns—Dedication of Land to Public Use—"Reserved Landing" on Navigable Stream.**—The owner of land laying off land for public use of a city or town may withhold therefrom whatever ground he chooses; and the question of whether or not a dedicator withheld any land from public use, in such a case, is one of intention, to be determined from the circumstances surrounding the dedication, the object to be accomplished, and the whole plat, map or other instrument made for the purpose. So, the words "Reserved Landing" on a plat of land dedicated to public use along a navigable river front, means *reserved to the dedicator*, pp. 186, 187.

Reaffirmed, explained and extended in Youngerman *v.* Board of Supervisors of Polk County, 110 Iowa 734, 737, 738, 81 N. W. 167, 168, holding that in order to constitute a dedication, the intention to dedicate must have existed at the time thereof; and that in de-

termining the question of intention, the acknowledgement will be considered in connection with the plat, the certificate of survey, and such circumstances as may throw light upon the transaction: Holding further that where land is reserved by the dedicator, the fee simple title remains in him.

Cited in Warren v. Mayor of Lyons City, 22 Iowa 358, the court holding that realty dedicated to a city for a certain public use, cannot be diverted therefrom by it; that injunction lies in favor of the dedicator to prevent the diverting of the use thereof; and that an Act granting a city the right to sell, convey, or dispose of such dedicated property, is unconstitutional when attacked by the dedicator.

(Note.—See further, *Boehler v. City of Des Moines*, 111 Iowa 421, 82 N. W. 916; *Cowles v. Gray*, 14 Iowa 1, important cases on this subject, not citing the text.—Ed.)

2. Riparian Owners—Right to Erect Wharves—Cities and Towns.—A riparian owner of land situated outside of an incorporated city or town may erect wharves or landings on the shore of a navigable stream, conforming them to state regulations, if any, and not obstructing navigation; but such an owner of such land within the limits of an incorporated city or town, must yield to the paramount right of the municipal corporation to erect and regulate wharves and landings, where this right is conferred by the law creating it, pp. 192, 193.

Reaffirmed, explained and qualified in Musser v. Hershey, 42 Iowa 361, 362, holding that a riparian owner of land outside a city, has the right to construct, below high water-mark, bridge-piers and landings, and to reclaim the soil, conforming to state regulations and not obstructing navigation; but that these rights depend upon and are appurtenant to the adjacent soil, and are not the subject of sale, except by sale and conveyance of the land along the navigable stream.

Cited in Kraut v. Crawford, 18 Iowa 454, 87 Am. Dec. 414, not in point, but on the right of a riparian owner to accretions.

SHARP & O'NEAL v. WOODBURY, 18 IOWA 195

1. Arbitration and Award—Action on Award—Defense—Matters Submitted and Not Determined in Arbitration Proceeding.—Where an award is sued on, the defendant in the action may set up by way of defense, matters submitted by the arbitration agreement, but not passed on or determined by the arbitrators, alleging this latter fact in his answer, p. 198.

Reaffirmed and extended in M. & M. R. R. Co. v. S. C. & St. P. R. R. Co., 49 Iowa 611, holding further that an award which is not definite and final may be disregarded, or, may be set aside or stricken by the court wherein it is filed.

ESTEP v. KEOKUK COUNTY, 18 IOWA 199

1. **Counties—County Elective Officers, Tortious or Fraudulent Acts of—Liability of County.**—The county is not liable for the tortious or fraudulent act of an elective county officer whose duties are prescribed by statute, unless, perhaps, when the county subsequently ratifies such act, or receives a benefit therefrom.

So, a county is not liable for money wrongfully and fraudulently collected as taxes by the county treasurer and appropriated to his own use, pp. 200, 201.

Reaffirmed and explained as to first paragraph in State v. Haskell, 20 Iowa 281, holding that the unauthorized act of a public agent or officer, whose powers are defined by express statute, does not bind his principal or the public.

Reaffirmed and extended as to first paragraph in Clark v. City of Des Moines, 19 Iowa 209, 210, 87 Am. Dec. 423; Citizens' Bank of Des Moines v. City of Spencer, 126 Iowa 105, 101 N. W. 645, holding further that persons dealing with municipal officers, or other public agents acting under delegated powers must, at their peril, ascertain for themselves whether in fact and in law, the authority being exercised exists.

Reaffirmed and narrowed in Barney v. Buena Vista County, 33 Iowa 263-265, holding that a county is liable to the extent of money received or benefit derived from the unauthorized act of a county officer whose duties are prescribed by statute: And that where a person in making a payment to the county, presents a county warrant for an amount in excess of the payment, to the county treasurer, who *cancels* the warrant, but instead of delivering to the owner thereof a certificate of overplus, delivers to him in lieu thereof unauthorized warrants, the county is liable to the holder of the original warrant to the amount in excess of the payment made, in an action for money had and received.

Cross reference. See further on this question, annotations under Rule 2 of Hull & Argalls v. Marshall County (12 Iowa 142), ante. p. 29.

WATSON v. CHESIRE, 18 IOWA 202, 87 Am. Dec. 382

1. **Negotiable Instrument—Indorsement Without Recourse—Implied Warranties Resulting from—Liability of Indorser—Fraud.**—One who indorses a negotiable instrument *without recourse*, in the absence of an agreement to the contrary, impliedly warrants that it is genuine and not forged or fictitious, that it is of the kind and description purported on its face, that the indorser has done nothing and will do nothing to prevent its collection, that the parties to the instrument are *sui juris* and capable of contracting, and that it has not been paid; and where the instrument is unenforceable by

reason of any such fact or facts, or in case of fraud practiced by the indorser in the transfer, he is liable to the indorsee for the amount of the consideration paid therefor, with interest. The same rule applies in case of the transfer of such instrument by delivery, pp. 206-209.

Reaffirmed in State v. Wooderd, 20 Iowa 548, 549, holding that where a note is paid and is afterwards indorsed without any indorsement of payment thereon, the indorser is liable to the indorsee for the amount paid therefor.

Reaffirmed and extended in Miller v. Dugan, 36 Iowa 437, 438, holding further that the rule is equally applicable to the transfer of a judgment without recourse.

Reaffirmed and extended in Hunter v. Aylworth, 38 Iowa 213, 214, holding further that where one assigns a contract for the purchase of school land, he thereby undertakes that all the legal incidents and rights of the contract shall pass to the assignee, and that he will not do anything to abridge or impair them: Holding further that such assignee has the right to be a party to foreclose such contract; that when such assignor fails to disclose the fact of the assignment in such action, he is guilty of fraud upon the assignee, and if he buys any of the land after the foreclosure sale, he will be regarded as holding it as a trustee for his assignee, the latter to pay the assignor the sum paid therefor, with interest and taxes, and the value of improvements made thereon by the assignor, deducting rents and profits.

Reaffirmed and extended in Waller, et al Ex'rs v. Staples, et al Adm'rs, 107 Iowa 741, 742, 77 N. W. 571, holding further that where one transfers a note without recourse, which is secured by a chattel mortgage, such transfer carries the mortgage with it, and there is in such case, an implied warranty on the part of the transferor that such mortgage is genuine and enforceable.

Reaffirmed and narrowed in Scofield v. Moore, 31 Iowa 243, 244, holding that one who transfers "all right, title and interest in" a judgment "without recourse" does not thereby become a guarantor of the amount due thereon.

Cross references. See Rules 2 & 3 hereof. See further on this question, annotations under Rule 3 of Allen v. Pegram (16 Iowa 158), ante. p. 420.

2. Negotiable Instrument—Transfer of Worthless Paper by Delivery or Indorsement without Recourse—Liability of Transferor or Indorser.—Where the holder of negotiable paper knows it to be of no value and, by delivery or by indorsement without recourse transfers it to one for value and who receives it in good faith and without knowledge that it is worthless, the assignor is liable to the assignee for the amount paid therefor, p. 208.

Reaffirmed in Dayton v. Tillotson, 39 Iowa 405.

Distinguished in Brown v. Zachary, 102 Iowa 440, 71 N. W. 415, a case wherein the facts do not bring it within the rule.

Cross reference. See further, Rules 1 & 3 hereof.

3. Negotiable Instrument—Indorsement by Prior Indorsee without Recourse—Effect.—Where the indorsee of a negotiable instrument indorses it without recourse, such indorsement does not give the last indorsee a right to sue the original payee upon facts constituting a cause of action against him in favor of the first indorsee: Such a transfer, without more, operates simply to transfer the title to the note or instrument, and not an independent cause of action: But it may be, under our statute (Code of 1860), that this right or cause of action can be specially assigned by the first to the last indorsee, p. 209.

Reaffirmed in Leach v. Hill, Exchange Bank of Earlham, et al, 106 Iowa 178-180, 76 N. W. 669, a case wherein a check is indorsed *with recourse*, the court holding that one may specially assign an independent cause of action growing out of a transaction for which a check or other negotiable instrument is executed, along with the transfer of the instrument.

Cross reference. See Rules 1 & 2 hereof, in this connection.

4. Evidence—Intention, Knowledge, Belief May Be Testified To by Party.—Where a person's knowledge, belief or intention is a material fact, he may testify thereto as to any other fact, in which case a liberal scope shall be allowed upon cross-examination, p. 211.

Reaffirmed in Un. Stock Yards Nat'l Bank of Omaha, Neb. v. Coffman, 101 Iowa 597, 70 N. W., 694; City Nat'l Bank of Columbus, Ohio v. Jordan, et al, 139 Iowa 503, 504, 117 N. W. 760.

Reaffirmed, explained and extended in Dorn and McGinty v. Cooper, 139 Iowa 752, 16 A. & E. Ann. Cas. 744, 118 N. W. 36, holding that when intent, motive, or malice is directly in issue, a party may testify directly to his intent or purpose: Holding further that if malice be involved, a party charged therewith may testify to his friendly feelings toward the other party.

Reaffirmed and extended in Mann v. Taylor, 78 Iowa 359, 360, 43 N. W. 221, holding further that in an action involving an issue of fraudulent representations inducing a contract, a party may testify that but for them he would not have entered into the contract.

Reaffirmed and extended in Chew v. O'Hara & Co., 110 Iowa 85, 81 N. W. 158, holding further that in an action sounding in wantonness or malice, the defendant may testify as to the facts and circumstances and his belief therefrom, causing him to do the act or

acts complained of, although such facts may be what others told him in the absence of the plaintiff.

Reaffirmed and qualified in Browne v. Hickie, 68 Iowa 333, 334, 27 N. W. 278; Zimmerman v. Brannon and Holliday, 103 Iowa 148, 149, 72 N. W. 441, holding that where an agreement or contract is entered into, secret motives or intentions of one of the parties thereto are immaterial, and cannot be testified to by him in an action thereon.

(Note.—See further, Counselman & Co. v. Reichart, 103 Iowa 430, 72 N. W. 490; Frost v. Rosecrans, 66 Iowa 405, 23 N. W. 895; Selz v. Belden, 48 Iowa 451; Van Tuyl v. Quinton, 45 Iowa 459, important cases on this question not citing the text.—Ed.)

NOSLER v. HUNT, 18 IOWA 212

1. **Vendor and Purchaser—Deeds—Breach of Covenant of Seizin—Measure of Damages for.**—The plaintiff can recover only nominal damages in an action for breach of covenant of seizin in a deed to land, where the failure of title constituting the loss is purely technical, and the plaintiff has thereby suffered no loss of the land, p. 217.

Reaffirmed in Hencke v. Johnson, 62 Iowa 556, 17 N. W. 766; Norman v. Winch, 65 Iowa 264, 21 N. W. 599, holding that until some substantial injury occurs to the grantee, he can only recover nominal damages for a breach of covenant of seizin.

Reaffirmed, explained and qualified in Boon v. McHenry, 55 Iowa 204, 7 N. W. 504, holding that nominal damages can only be recovered by the grantee in a deed, for a technical breach of a covenant of seizin, where he has suffered no loss: But that a covenant of seizin runs with the land, and entitles the owner of the land at the time a loss occurs by reason of such breach to recover the actual damages sustained.

Reaffirmed and extended in Gifford v. Ferguson, 19 Iowa 168, 169, holding further that the fact that there has been a technical breach of a covenant in a deed to land, not resulting in loss to the grantee, does not authorize the rebating of interest on the purchase money, in an action to foreclose a mortgage given therefor.

Reaffirmed and extended in Norman v. Winch, 65 Iowa 264, 21 N. W. 599, holding further that the omission to assess nominal damages, in an action wherein the plaintiff has only a technical right to recover, is not a ground for a new trial.

Reaffirmed, extended and varied in McClure, trustee v. Deed, and Power, trustee, 115 Iowa 550-552, 88 N. W. 1094, 91 Am. St. Rep. 181; Foshay v. Shafer, 116 Iowa 303, 304, 89 N. W. 1106, holding further that the statute of limitation does not commence to run

against covenants of seizin, to warrant and defend title, or against incumbrances, in a deed, until the grantee has thereby sustained a substantial injury.

STANFORD *v.* GREENE COUNTY, 18 IOWA 218

I. Contracts—Executory—Contract of County in Relation to Swamp Land—When Cause of Action Accrues.—Where a county contracts with a person for him to select and plat swamp lands, and to receive therefor one hundred dollars in cash as soon as the work is completed, and the remainder of the contract price out of the first moneys and government scrip there is realized by the county for the lands, the contractor cannot, before completion of the work, or before the county disposes of and conveys any part of the lands, maintain an action against the county for the compensation allowed by the contract, pp. 221, 222.

Cited in Davis & Co. v. Cobban, 39 Iowa 393, a case wherein a stipulation in a contract as to time of performance of acts was held not to be a condition precedent: The court holding that the determination of whether or not a provision in a contract is a condition precedent, is governed by the intention of the parties, to be gathered from the entire language of the instrument; and that it is best, in order to manifest the intention of a condition precedent, to commence the portion thereof intended as such, with a proviso.

SLOAN *v.* WAUGH, 18 IOWA 224

I. Conflict of Laws—Statute of Limitation—Section 2746 of the Code of 1860 Must be Pleaded and Proved.—Under Sec. 2746 of the Code of 1860, a cause of action barred by the statute of limitation of any other state or country where the defendant has previously resided, is barred when sued on in this state; but the facts constituting such bar must be pleaded, and, if denied, proved by the defendant when sued thereon in this state, p. 226.

Reaffirmed in Petchell v. Hopkins, 19 Iowa 534, 535.

Reaffirmed and explained in Lloyd v. Perry, 32 Iowa 145; *Thompson v. Read*, 41 Iowa 50, holding that under Sec. 2746 of the Code of 1860, if a cause of action arises in another state, and is barred by the statute of limitation of another state or country where the defendant has previously resided for the period of the limitation, then it is barred when sued on in this state; and such fact is a full defense to the action in this state: That the fact that such defendant resided in this state before he went to the other state or country where the cause of action arising out of this state was so barred, does not change the rule.—Sec. 2745 of the Code of 1860, as to the suspension of the statute of limitation by non-residence of defendant, having application only to causes of actions *arising in this state*,

and Sec. 2746, above, as amended by Sec. 10, Chap. 167, Acts of 1870, not applying to this last case.

Cited with approval in Moulton v. Walsh, 30 Iowa 363, the court holding that before a demurrer will lie against a petition because the cause of action is barred by the Statute of Limitation, such fact must affirmatively appear from the petition itself.

Cited in Thompson v. Read, 41 Iowa 50, holding that the repeal of a statute of limitation, and of course an amendment thereof, cannot act retrospectively, so as to disturb rights acquired thereunder and deprive parties of protection to which they were fully entitled under the prior enactment; Holding further that Sec. 10, Chap. 167, Acts of 1870, amending Sec. 2746 of the Code of 1860, so that such section does not operate upon a cause of action arising in this state, does not apply to or revive a cause of action previously barred by such section.

SULLIVAN v. COLLINS, 18 IOWA 228

1. Accord and Satisfaction—Promissory Note—Compromise of Claim Before Suit Brought—Sufficiency of Consideration.—A note given before a suit is brought, to settle an illegal or wholly unfounded claim, is not based upon a sufficient consideration, and cannot be enforced at law. In such case, it is essential, in order for there to be a sufficient consideration for the note, that the claim be sustainable either at law or in equity, or that it, at least, be *doubtful* either in its right or in its amount, p. 229.

Reaffirmed and explained in Keefe v. Vogle, 36 Iowa 89, holding that a note given in settlement of a *doubtful* or a *disputed* claim, is based upon a sufficient consideration, although the claim be not shown to be valid either at law or in equity.

Reaffirmed and explained in Shaw v. C. R. I. & P. R. R. Co., 82 Iowa 202, 203, 47 N. W. 1005, holding that the execution and delivery of a due bill and a receipt for an unliquidated and disputed demand is an accord and satisfaction: That the settlement of a disputed claim, although it be of doubtful validity, is a sufficient consideration for such an agreement.

(N. B.—Of course this does not apply in cases where there is fraud, accident or mistake.—Ed.)

Reaffirmed and extended in Tucker v. Ronk, 43 Iowa 82, holding that a note given in compromise and settlement of a claim wholly illegal and unfounded and on which no action is brought is not based upon a sufficient consideration, and is unenforceable either at law or in equity: Holding further that the maker of such a note may maintain an action in chancery to restrain the transfer thereof—it being negotiable—and to enforce its delivery to him in order that it be canceled.

Reaffirmed and extended in Peterson v. Breitag, 88 Iowa 422, 423, 55 N. W. 88, holding further that a note and mortgage which is given in settlement of a claim for damages for a tort which is barred by the statute of limitation, and to *avoid action thereon*, are void for want of consideration.

Reaffirmed and qualified in Ruen, Adm'r v. Prudential Ins. Co., 129 Iowa 742, 743, 106 N. W. 204, holding that the acceptance of a part of a liquidated and undisputed or undoubted amount in full thereof, is without consideration, and does not bar an action for the residue.

(Note.—See further, Schaben v. Bruning, 74 Iowa 102, 36 N. W. 910; Drake v. Hill, 53 Iowa 37, important cases on this question, not citing the text.—Ed.)

Cross references. See other Rules hereof. See further in this connection, annotations and note under Rule 2 of Hall v. Smith (10 Iowa 45), Vol. I, p. 640.

2. Promissory Note—Consideration For, Imported—Plea of Want of—Burden of Proof.—A promissory note imports a consideration, and one attacking it for want thereof has the burden of proof to clearly prove his defense, p. 230.

Reaffirmed in First Nat'l Bank of Cedar Rapids v. Hurford & Bro., 29 Iowa 585.

Cross reference. See further on this question, annotations, note and cross reference under Rule 2 of Veach v. Thompson (15 Iowa 380), ante. p. 353.

3. Promissory Note—False Representations Inducing Execution of.—Where plaintiff in an action on a promissory note obtained its execution by false representations, he cannot recover thereon, p. 232.

Reaffirmed and extended in Rauen, Adm'r v. Prudential Ins. Co., 129 Iowa 737, 106 N. W. 202, holding further that a receipt or a written surrender of a right, or a release of a subsisting cause of action, will be set aside upon sufficient proof of accident, mistake or fraud, although the demand released is disputed and unliquidated.

Cross reference. See Rule 1 of Levi v. Karrick (13 Iowa 344), ante. p. 160.

SYPHER v. MCHENRY, 18 IOWA 232

1. Trusts and Trustees—Sale of Trust Estate—Trustee Purchasing or Becoming Interested in—Effect—Equitable Relief.—Where a trustee sells the trust estate and becomes purchaser of or interested therein thereat, the *cestui que* trust may, in equity, set the sale aside, and have the property re-exposed to sale, without re-

gard to the advantage or disadvantage flowing to the trustee from the first sale, p. 235.

Reaffirmed and extended in Walker v. Walker, 127 Iowa 83, 102 N. W. 437, holding further that a sale of land by a fiduciary under order of court, whereat he becomes the purchaser, will be set aside upon motion of the *cestui que* trust in the court ordering it; or, if the fiduciary so becomes purchaser and another is reported as the purchaser, then equity will set the sale aside after the report of sale is confirmed.

Reaffirmed and narrowed in Read v. Howe, 39 Iowa 561, holding that where an administrator becomes interested in realty at his own sale, equity will set the sale aside while it is in the hands of the ostensible purchasers thereat; but where such property has passed into the hands of an innocent purchaser, for value and without notice, the sale will be upheld, the administrator in such case being liable to the value of the realty.

Cited with approval in Penny v. Cook, 19 Iowa 544, the case involving other questions connected with a sale of land under a deed of trust, the court saying that "this harsh and summary mode of disposing of the equity of redemption is jealously watched by the courts, and when the power has been fraudulently or oppressively and unfairly or irregularly exercised, the owner will be allowed to come in and impugn the sale and redeem the property, especially where the application is not stale, and the property has not passed into the hands of *bona fide* purchasers."

Cited in 149 Iowa 694, 126 N. W. 942, 943.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a direct attack of sales by fiduciaries.

(Note.—See further, Pearson v. Taylor, 37 Iowa 331; Buell v. Buckingham & Co., 16 Iowa 284, 85 Am. Dec. 516; Clark v. Lee, 14 Iowa 426; MacGregor v. Gardner, 14 Iowa 326; Bank of Old Dominion v. D. & P. Ry. Co., 8 Iowa 277, 74 Am. Dec. 302, important cases sustaining and explaining, but not citing the text.—Ed.)

Cross references. See further, annotations under Rule 1 of Buell v. Buckingham & Co. (16 Iowa 284), ante. p. 437; Rule 3 of MacGregor v. Gardner (9 Iowa 65), Vol. I, p. 546.

MUSSELLMAN v. MAUK, 18 IOWA 239

1. Appeal from Inferior Courts—United States Revenue Stamp—When Required—Meaning of Words "Writs or Other Process" in Act.—"Writs or other process" as used in the United States Revenue Act of Aug. 1, 1864, (requiring a stamp to be affixed thereon upon appeal) comprehends any instrument or paper whatever which in effect transfers a cause from an inferior to a superior court; and such a paper must have a stamp affixed thereto, or the appeal will

be dismissed. Such stamp may, however, be affixed to the bond, transcript, or other paper connected with the appeal, p. 240.

Reaffirmed and extended in Hugus v. Strickler, 19 Iowa 415, 416, 419, holding further that a party appealing from a justice's to the district court cannot affix the revenue stamp pending a motion to dismiss his appeal.

Reaffirmed and extended in City of Muscatine v. Sterneman, 30 Iowa 528, 6 Am. Rep. 685, holding further that an instrument requiring a stamp under the law of the text, is inadmissible in evidence unless it is affixed thereto.

ANSON v. DWIGHT, 18 IOWA 241

1. Pleading—Confession and Avoidance—Averments in Plea of.—A plea in confession and avoidance must—under the Code of 1860—confess, directly or by implication, that but for the matter so pleaded the action is maintainable; and such confession must be in the same count in which the matter in avoidance is pleaded, p. 242.

Reaffirmed in Morgan & Rogers v. Hawkeye Ins. Co., 37 Iowa 360.

Reaffirmed in Day v. Mill-Owners' Mut. F. Ins. Co., 75 Iowa 699, 700, 38 N. W. 116, under the provisions of the Code of 1873.

2. Practice—Pleading—Demurrer, Withdrawal of After Ruling—Waiver of Error.—Where after a ruling on a demurrer adverse to him, the party demurring withdraws the demurrer by leave of court, he thereby waives the error, if any, in the ruling of the court thereon, p. 243.

Reaffirmed and varied in Lane & Wilson v. Goldsmith, 23 Iowa 242, holding that where, after the court sustains an objection to the competency of a witness, the party in whose favor the ruling is made withdraws the objection, and the adverse party then declines to examine the witness, the latter thereby waives error, if any, in the court's ruling.

3. Trial—Challenge of Juror—Discretion of Trial Court—Abuse of—Reversal.—If in the selection of a jury the court in the exercise of a sound discretion, is brought to the conclusion that a juror will not act with entire impartiality, a challenge to such juror should be sustained. In such a case, the ruling of the trial court will not be cause for reversal, except where his discretion has been abused.

So, where in an action for the recovery of damages for sheep killed by dogs, a juror is asked if he has any bias or prejudice about the matter of dogs killing sheep, such as will prevent him from try-

ing the cause impartially, and answers that he has, it is proper for the court to sustain a challenge to him for cause, p. 243.

Reaffirmed as to first paragraph in State v. Crouch, 130 Iowa 482, 107 N. W. 174; Croft v. Ch. R. I. & Pac. Ry. Co., 134 Iowa 417, 109 N. W. 726, holding that the abuse of discretion of the trial court must clearly appear upon appeal.—The last case holding that in determining the qualifications of a juror, his *manner* may be taken into consideration by the trial court.

Reaffirmed and narrowed as to first paragraph in Wilson v. Wapello County, 129 Iowa 78-80, 6 A. & E. Ann. Cas. 958, 105 N. W. 364, holding that in an action against a county, the plaintiff cannot challenge jurors because of their being tax payers; that in such case the plaintiff's remedy is by a change of venue to an adjoining county.

(Note.—See further, In re Goldthorp's Estate, 115 Iowa 430, 88 N. W. 944; Geiger v. Payne, 102 Iowa 581, 69 N. W. 554; Strague v. Atlee, 81 Iowa 1, 46 N. W. 756, some important cases, sustaining and explaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations, note and cross references under Rule 2 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

4. Evidence—Value of Personal Property—Opinion of Witness As to—Opinion As to Damages, Inadmissible.—The opinion of a witness as to the value of personal property is admissible to prove such fact, where he first shows that he knows the value thereof; but his opinion as to amount of *damages* for injury to or destruction of personal property, is inadmissible, p. 244.

Reaffirmed in Haight v. Kimbark, 51 Iowa 14, holding that the opinion of a witness as to the value of personal property involved in an action is admissible, when he shows that he is possessed of sufficient knowledge concerning the subject to have an opinion.

Reaffirmed and explained in Russell v. City of Burlington, 30 Iowa 266, holding that opinions of witnesses as to the *value* of property which is the subject of litigation are admissible, but not their opinions as to the *amount of damages* sustained.

Unreported citation, 50 N. W. 577.

Special Cross reference. For other cases citing and sustaining the text and many more, see annotations under Dalzell v. City of Davenport (12 Iowa 437), ante. p. 70.

Cross reference. See further on this question, annotations under Rule 2 of Prosser v. Wapello County (18 Iowa 327), *Infra.* p. 639.

5. Dogs are Personal Property—Action for Damages for Killing.—A dog is personal property; and an action for damages may be sustained by its owner against a person who wrongfully kills it.

In such an action the rule of evidence announced in Rule 4 hereof, is applicable, p. 244.

Reaffirmed and varied in Hamby v. Samson, sheriff, 105 Iowa 114, 74 N. W. 919, 67 Am. St. Rep. 285, 40 L. R. A. 508, holding that a dog is the subject of larceny.

Reaffirmed and varied in Alexander v. Crosby, 143 Iowa 52-55, 119 N. W. 718, holding that the owner of a vicious or dangerous dog is—under Sec. 2340 of the Code of 1897—liable in damages for injuries done by it, without proof of knowledge on the part of the owner of its vicious or dangerous character; but that in order to render one who *harbors* such an animal, so liable in damages for injuries done by it, knowledge of its character before the injury, must be brought home to him.

SAVERY v. BROWN, 18 IOWA 246

1. Liens—Attachment on Land—Prior Unrecorded Deed to—Rights of Purchaser Under the Attachment.—A prior unrecorded deed by the debtor is superior to the lien of an attachment on the land conveyed: And where such deed is recorded before a sale of the land under the attachment, the grantee has the superior right to that of the purchaser thereat, p. 248.

Reaffirmed in Henry County v. Bradshaw, 20 Iowa 360, 362.

Cross reference. See further on this question, annotations and cross references under Welton v. Tizzard (15 Iowa 495), ante. p. 371.

2. Deeds—Presumption As to Time of Execution.—A deed to land which is duly signed and acknowledged is *prima facie* presumed to have been fully executed on the date shown by the instrument; and this rule will be invoked most strongly against a subsequent attachment creditor of the grantor; and the burden of proof is on such a grantor to rebut or overcome the presumption, p. 249.

Reaffirmed in Lyon v. McIlvaine, 24 Iowa 15.

Reaffirmed and extended in Henry County v. Bradshaw, 20 Iowa 361, 362, holding further that a deed, or mortgage, duly acknowledged is *prima facie* presumed to have been delivered on the date of acknowledgment thereof, and the burden of proof is on the party claiming that it was delivered on a different date.

3. Pleadings—Reply, When Required.—Under the Code of 1860, no reply is required to an answer which does not set up a counter-claim, cross-demand, or set-off, p. 251.

Reaffirmed, explained and extended in Barger v. Farris & Wilmer, 34 Iowa 230, 231; Gwyer v. Figgins, 37 Iowa 520, holding that unless an answer contains a set-off, counterclaim, cross petition or cross-demand, no reply thereto is necessary; that all other affirmative allegations in an answer are denied by operation of law: And when a

reply is filed when not required, it does not change the issue or shift the burden of proof, and the case stands as if it had not been filed.

4. Action in Chancery—Adequate Remedy at Law—Effect—Appeal—Failure to Raise Question Below.—Because a party has an adequate remedy at law is not—under Sec. 2613 of the Code of 1860—a ground for the abatement or dismissal of an action brought in equity; and more especially is this the rule upon appeal, where such question was not raised by answer, or at any stage of the proceedings below, p. 251.

Reaffirmed and explained in Traer v. Lytle, 20 Iowa 302; Gray v. Coan, 23 Iowa 353, holding that when an action is brought at law when it should have been brought in equity, or the converse, it may—under the Code of 1860—be transferred to the proper docket upon motion. Such fact is not a ground for demurrer to the petition.

Reaffirmed and extended in Hatch v. Judd, 29 Iowa 97, 98, holding further that a failure to move for a transfer to the proper docket before or upon filing an answer, waives such defect in the proceedings.

Cross reference. See further on this question, annotations under Conyngham v. Smith (16 Iowa 471), ante. p. 458.

5. Equity—Action to Remove Cloud upon Title to Land.—An action is maintainable in equity to remove a cloud upon a title to land and to quiet the title thereto, notwithstanding the fact that the plaintiff has a remedy at law by an action of ejectment, p. 251.

Reaffirmed in Standish v. Dow, 21 Iowa 369, holding that a person in possession of land may maintain an action in equity to remove a cloud upon and to quiet his title thereto.

Cited in Brainard v. Van Kuran, 22 Iowa 264, holding that a creditor of a grantor in a fraudulent conveyance, may, after levy and before sale under an execution, maintain an action in equity to set such conveyance aside as fraudulent, without first exhausting his legal remedies to obtain satisfaction of the judgment.

CAMPBELL v. AYRES, 18 IOWA 252

1. Res Adjudicata—Action to Set Aside Execution Sale.—A judgment on the merits, in an action by a judgment debtor to set aside an execution sale, against the sheriff and purchaser, is *res adjudicata* as to the debtor, the creditor, and those claiming through them, pp. 253, 254.

Reaffirmed and explained in School Township of Bloomfield v. Independent Sch. Dist. of Castalia, 134 Iowa 355-357, 112 N. W. 8, holding that a judgment upon the merits is conclusive upon the parties to the action, as to the subject-matter therein involved; that the

rule applies where a cause is submitted upon its merits, and the court dismisses the petition.

Cross reference. See further on this question, annotations and note under *Whitaker v. Johnson County* (12 Iowa 595), ante. p. 102.

COFFIN *v.* GEPHART, 18 IOWA 256

1. **Replevin—When Maintainable.**—Replevin is not maintainable against one not in possession of nor claiming an interest in the personalty involved, or who is not in collusion with a co-defendant in reference to it, at the time the action is commenced, p. 258.

Cited in *Hardy v. Moore*, 62 Iowa 68, 17 N. W. 200, the court holding that where personal property is levied under a writ against one not its owner, and the owner, before sale thereunder, serves the notice of ownership required by the Code of 1873, on the officer, he may after sale under the writ or process, maintain replevin against the officer to recover possession of the property, and damages for its detention, and may therein recover the value thereof, if the property is not forthcoming. But see *Woodling v. Mitchell*, 127 Iowa 265, 103 N. W. 116, (citing and doubting the text), holding that when the above facts exist, the defendant should sue for conversion, for damages, and not in replevin; and that if such facts appear from the petition in an action of replevin, it will be dismissed.

2. **New Trial—Misconduct of Jury as Ground—Jury Taking Deposition to Room.**—Where a deposition which is material to the issue and not read as evidence on the trial, is taken to their room and read by the jury, without the knowledge or the consent of the party complaining or of his attorney, it is ground for a new trial, or for reversal by such party upon appeal, p. 259.

Reaffirmed and extended in *McLeod v. Humeston & Shenandoah Ry. Co.*, 71 Iowa 139, 140, 32 N. W. 246, holding further that where, through no fault of counsel on either side of a controversy, a paper containing material facts pertinent to the issue, and not introduced in evidence, is given to the jury and considered by them in their retirement, it is sufficient ground for a new trial; and the affidavits of jurors are admissible in support of a motion for a new trial, to prove such facts.

Reaffirmed and extended in *Douglass v. Agne*, 125 Iowa 71, 72, 99 N. W. 552, holding further that if the jury consider any evidence or statements of persons other than that introduced upon the trial and which it is reasonably probable influenced their verdict, it is such misconduct as will require a new trial; and that the affidavits of jurors are admissible to prove such facts.

Cross reference. See further on this question, annotations, note and cross references under Rule 2 of *Stewart v. B. & M. River R. R. Co.*, (11 Iowa 62), Vol. I, p. 771.

RICHARDS v. DES MOINES VALLEY R. R. Co., 18 Iowa 259

1. Railroads—Condemnation of Land for—Failure or Refusal to Pay Damages Assessed—Injunction by Land Owner.—Injunction lies in favor of a land owner to restrain a railroad company from using a right of way, upon its failing, or refusing to pay the damages assessed in the condemnation proceeding. The rule is equally applicable where damages are increased upon appeal to the district court from an assessment by the sheriff's jury, and the company fails or refuses to pay the increased assessment, as where no appeal is taken, pp. 260, 261.

Reaffirmed and extended in Hibbs v. C. & S. W. R. R. Co., 39 Iowa 343; Harbach v. Des Moines & K. C. Ry. Co., 80 Iowa 597, 598, 44 N. W. 350, 11 L. R. A. 113, holding further that a land owner may enjoin a railroad company and its lessees and purchaser from use of the land appropriated, until payment of the damages assessed.

Reaffirmed and extended in Irish v. B. & S. W. R. R. Co., 44 Iowa 382, holding further that where, upon an appeal from an assessment of damages by a sheriff's jury, a judgment is entered by agreement of the land owner and the railroad company for a certain amount, to draw interest at ten per cent. per annum, the land owner not to enforce the collection of the judgment for a certain period, and at its expiration to have all his legal rights and remedies, that upon the expiration of such period, the land owner may enjoin the use of the land by the company, upon failure or refusal by it to pay such judgment.

Reaffirmed and extended in Holbert v. St. L., K. C. & N. R. R. Co., 45 Iowa 27, holding further that injunction lies in favor of a land owner to restrain a foreign railroad company from using a portion of the line of a railroad company of this state, until the latter pays the compensation assessed therefor against it.

Reaffirmed and varied in Conger v. B. & S. W. R. R. Co., 41 Iowa 422, 423, holding that where a railroad company fails or refuses to pay damages assessed for a right of way, the land owner may enjoin the use by it, or, may, at his election, if the railroad company is in possession of the land, maintain ejectment therefor: But the judgment in such ejectment must be for possession of the land in case the company fails to pay the damages, with interest at six per cent. per annum, and costs, within forty-five days from its entry.

Reaffirmed and varied in Forbes v. Delashmutt, 68 Iowa 167, 168, 26 N. W. 57, holding that injunction lies upon the complaint of a land owner to restrain a railroad from using land ostensibly condemned for a purpose allowed by statute, not needed or used by the

company therefor, but for another purpose for which the statute does not allow its condemnation.

Reaffirmed and qualified in Peterson v. Ferreby, sheriff, 30 Iowa 328, 330, holding that where a railroad company appeals from an assessment of damages for a right of way by a sheriff's jury, but deposits the amount thereof with the sheriff, the land owner has no right to demand payment of the money deposited, until after the trial of the appeal; and he cannot, therefore, compel the sheriff, by mandamus, to make such payment pending the appeal.

Cited with approval in Varner v. St. L. & C. R. R. Co., 55 Iowa 683, 8 N. W. 637, not in point, but upon analogy.

Cross reference. See further in this connection, annotations under Henry v. D. & P. R. R. Co. (10 Iowa 540), Vol. I, p. 743.

CHILDS v. SHOWER, 18 IOWA 261

1. Evidence—Tax Deed for Several Parcels of Land, to Show Color of Title—Proof of Separate Sales—Occupying Claimant.—In an action by an occupying claimant to recover the value of improvements on land, the plaintiff may, in order to show color of title, introduce a tax deed to several parcels of land, including that in controversy, and may otherwise prove that such parcels were sold separately and not in gross, p. 265.

Cited in McCready v. Sexton & Son, 29 Iowa 414 (dissenting opinion), 4 L. R. A. 214, the majority court holding that so much of Sec. 784 of the Code of 1860, as provides that a tax deed is *conclusive* evidence that land sold thereunder was legally listed, assessed, levied upon under a valid tax warrant and sold as prescribed by statute, is unconstitutional: That the Legislature cannot make a tax deed *conclusive* evidence of the regularity of proceedings which are essential to a valid tax sale—But see Parker v. Sexton & Son, 29 Iowa 427-429; Hurley v. Powell, Levy & Co., 31 Iowa 66; Bulkley v. Callanan, 32 Iowa 465; Madson v. Sexton, 37 Iowa 562, 563—not citing the text—holding that a failure to comply with the statute as to giving notice for a tax sale of land, and other directory parts thereof, does not invalidate it; and that land may be so sold without a tax warrant.

2. Occupying Claimants—Action for Value of Improvements—Secs. 2274, 2275 of the Code of 1860, Unconstitutional.—Secs. 2274 and 2275 of the Code of 1860, allowing a personal judgment and general execution against a land owner in favor of an occupying claimant for the value of improvements, is unconstitutional, p. 268.

Cited with approval in Buell v. Ball, marshal, 20 Iowa 293, not in point.

Cited in Newman v. Samuels, 17 Iowa 553, not in point, but upon analogy.

3. **Occupying Claimant—Constitutionality of Statutes Compensating for Improvements.**—A statute allowing a *bona fide* occupying claimant compensation for beneficial improvements made on the land so occupied, to be paid out of the rents and profits, or providing that the owner shall not have possession until he pays therefor, is constitutional, pp. 268, 269.

Cited in Swift v. Calnan, 102 Iowa 213, 71 N. W. 233, 63 Am. St. Rep. 443, 37 L. R. A. 462, upholding constitutionality of Secs. 2019, 2020 and 2027 of the Code of 1873, in reference to contribution by adjoining land owner who uses party wall erected by his neighbor.

4. **Occupying Claimant—Compensation for Improvements—Measure of.**—A *bona fide* occupying claimant of land who makes improvements thereon is, in an action against the owner therefor, to be only allowed the amount which they augmented the value of the property, p. 275.

Special Cross reference. For cases citing the text, and many others, see annotations under Parsons v. Moses (16 Iowa 440), ante. p. 454.

5. **Constitutional Law—Statute in Part Unconstitutional and in Part not.**—Where part of a statute is unconstitutional and part is not so, and the two cannot be separated from each other, the whole is unconstitutional, p. 271.

Reaffirmed and explained in City of Keokuk v. Keokuk Northern Line Packet Co., 45 Iowa 211, holding that statutes which are partly in conflict with the Constitution will be held void no farther than as to those parts which are unconstitutional; while those within the limits of legislative authority will be upheld: And the court applied the rule to a city ordinance, some parts of which were within and some parts without authority granted by the Legislature.

Reaffirmed and varied in McCready v. Sexton & Son, 29 Iowa 399, 4 Am. Rep. 214, holding that when the unconstitutional part of a statute is so distinct from the rest that the latter may be upheld without it, then it will be held valid as to the constitutional and void as to the unconstitutional portion: Holding, therefore, that so much of Sec. 784 of the Code of 1860 as provides that a tax deed is *conclusive* evidence that land sold thereunder was legally listed, assessed, levied upon under a valid tax warrant and sold as prescribed by statute, is unconstitutional.

DONALDSON ET AL, ADMINISTRATORS v. MISSISSIPPI & MISSOURI R. R. Co., 18 IOWA 280, 87 AM. DEC. 391

1. **Death by Wrongful Act—Master and Servant—Liability of Corporation for Act of Servant Producing Death.**—An action for damages is maintainable by the personal representative—under Secs. 4110 and 4111 of the Code of 1860—for damages on account of

the death of a person which is caused by the wrongful or negligent act of such corporation's servant, and done in its employment. At Common Law no right of action existed against one who had caused the death of another to recover damages therefor, the civil remedy being merged in the public offense, pp. 283, 284, 286.

Reaffirmed in Philo v. Ill. Cent. R. R. Co., 33 Iowa 45-51, holding that under Sec. 4111 of the text, and Chap. 169, Sec. 7, Acts of 1862, a railroad company is liable in damages for the death of an employe operating its train, which is caused by the wrongful act, or the want of ordinary care of a fellow servant; and that such action is to be maintained by the personal representative of the deceased.

Reaffirmed and explained in Sherman v. Western Stage Co., 24 Iowa 551, holding that the "wrongful act of Sec. 4111 of the Code of 1860, includes "wrongful act, neglect or default," the case, however, turning on other questions.

Reaffirmed and varied in Major v. B. C. R. & N. Ry. Co., 115 Iowa 312-314, 88 N. W. 816, holding that the right of action of the text is purely statutory, allows only the personal representative to sue, and that a wife cannot maintain an action of damages for the death of her husband by wrongful act.

Cited in Emmert v. Grill, 39 Iowa 692, not in point.

2. Master and Servant—Master's Liability for Servant's Torts.

—A master is liable in damages for the tortious or wrongful act of his servant which is done in his service, p. 284.

Reaffirmed, explained and extended in Yates v. Squires, 19 Iowa 28, 87 Am. Dec. 418, holding that a master is liable for the torts of his servant, done in the course of his employment, although they are done without his authority or even against his express directions.

Cross reference. See Rule 1 hereof.

"Fellow Servants—Negligence—Liability of Master."—See *Sullivan v. M. & M. R. R. Co.* (11 Iowa 421), Vol. I, p. 837.

3. Death by Wrongful Act—Action for—Measure of Damages—Evidence—Instructions.

—In an action by a personal representative for damages for the death of a person, caused by the wrongful act of the defendant, the plaintiff is only entitled to recover the amount the estate suffered in a pecuniary way; and no damages shall be allowed for the pain and suffering of the deceased before his death, or for the grief and distress of his family or loss of his society by them on account thereof.

In such an action, evidence of the exact situation of the deceased at the time of his death, his occupation, annual earnings, age, health, habits, family and his estate is admissible, the court to properly instruct the jury as to the measure of damages as above set out, pp. 290, 291.

Reaffirmed in Rase, Adm'r v. Des Moines Valley R. R. Co., 39 Iowa 255, 256; Kinser, Adm'r v. Soap Creek Coal Co., 85 Iowa 31, 33, 51 N. W. 1153.

Reaffirmed as to first paragraph in Dwyer, Adm'r v. Ch., St. P. & O. Ry. Co., 84 Iowa 481-483, 51 N. W. 244, 245, 35 Am. St. Rep. 322.

Reaffirmed as to first paragraph in Coates, Adm'x v. Burlington, C. R. & N. Ry. Co., 62 Iowa 493, 494, 17 N. W. 764, holding that it is reversible error for the court to give an instruction to the jury on the measure of damages for death of a person by wrongful act, which does not set out the measure thereof as set out in the first paragraph of the text.

Reaffirmed as to second paragraph in Van Gent, Adm'r v. Ch. M. & St. P. Ry. Co., 80 Iowa 528, 45 N. W. 913, holding that in an action against a railroad company for damages for the death of a brakeman caused by its wrongful or negligent act, evidence that deceased was sober and industrious, and of his good character as a brakeman, is admissible for plaintiff.

Reaffirmed and explained in Hammer, Adm'r v. Janowitz, or Sioux City Boiler and Sheet Iron Works, 131 Iowa 27, 108 N. W. 111, holding that in an action by a personal representative for damages for the death of his decedent by the wrongful act or negligence of the defendant, the jury may take into consideration the age of the decedent, his expectancy of life, his health, occupation, habits, experience, earning capacity, and all other proved circumstances bearing upon his business prospects, so far as they depended upon his personal ability, capacity, efforts, and management.

Reaffirmed and qualified in Walters, Adm'r v. Ch. R. I. & P. R. R. Co., 36 Iowa 460-462; Wheelan, trustee v. Ch. M. & St. P. Ry. Co., 85 Iowa 177, 178, 52 N. W. 122, holding that where a personal representative sues a railroad company for damages on account of the death of an infant, caused by its negligent or wrongful act, the measure of damages is the pecuniary loss to the estate of such decedent, infant, by reason of his value thereto *after he attained majority*.

Cited in In re Estate of Cook, 126 Iowa 161, 101 N. W. 748, not in point, but involving the distribution of damages recovered as in the text.

Distinguished and narrowed as to first paragraph in Muldowney v. Ill. Cent. Ry. Co., 36 Iowa 468; Kinser, Adm'r v. Soap Creek Coal Co., 85 Iowa 31, 51 N. W. 1153, holding that where one sues for personal injury caused by the negligent or wrongful act of a railroad company, dies during its pendency and before trial, and his administrator is substituted as plaintiff, proof of the bodily pain and mental anguish of the injured person—deceased—caused thereby is admissible in evidence, and is an element of damages.

Distinguished and narrowed in Union Mill Co. v. Prentzler, Adm'r, 100 Iowa 547, 548, 69 N. W. 878, holding that where, after filing a counterclaim against the plaintiff and the sureties on an attachment bond by reason of the wrongful suing out of an attachment, the defendant dies and his administrator is substituted as defendant in the attachment action, that upon the trial thereof thereafter, the defendant (administrator) may recover punitive or exemplary damages, if the decedent would have been so entitled to recover.

Unreported citation, 58 N. W. 1069.

Cross reference. See Rule 4 hereof, in this connection.

4. Death by Wrongful Act—Evidence—Carlile Tables of Mortality.—In the action set out in Rule 3 hereof, Carlile Tables of Mortality are admissible in evidence for plaintiff for the purpose of showing the life expectancy of the person killed, p. 291.

Reaffirmed in Walters, Adm'r v. Ch. R. I. & P. R. R. Co., 36 Iowa 461; Wheelan, trustee v. Ch., M. & St. P. Ry. Co., 85 Iowa 177, 178, 52 N. W. 122; Hammer, Adm'r v. Janowitz, or Sioux City Boiler and Sheet Iron Works, 131 Iowa 27, 108 N. W. 111.

Cited in Bixby v. Omaha & Council Bluffs Ry. & Bridge Co., 105 Iowa 300, 75 N. W. 185, 67 Am. St. Rep. 299, 43 L. R. A. 533, not in point, but upon the admissibility of scientific works as evidence.

5 Evidence — Negligence—Contributory Negligence—Action Against Railroad for Killing Person Crossing Track.—Where a personal representative sues a railroad company for killing his decedent while he was crossing its track, he must prove either directly or by facts and circumstances that at the time he was killed the decedent was rightfully and not negligently or improperly upon the track, and that his death was not caused by his own negligence or want of care, pp. 287-289.

Reaffirmed and explained in Wright v. Ill. & Miss. Telegraph Co., 20 Iowa 215, holding that in an action for negligence, the plaintiff cannot recover where his own negligence or carelessness was the proximate cause of the occurrence producing the injury complained of.

Reaffirmed and explained in Sherman v. Western State Co., 24 Iowa 557-561; Spencer v. Ill. Cent. R. R. Co., 29 Iowa 58; Reynolds v. Hindman, 32 Iowa 148, 149, holding that where in an action of damages for negligence, it appears that there was mutual negligence, and the negligence of each party was the proximate cause of the injury, the plaintiff cannot recover: That no one can recover for an injury which his own negligence was in whole or in part the proximate cause.—And this rule applies in an action by a personal representative for damages for the death of his decedent.

Reaffirmed and explained in Reynolds v. Hindman, 32 Iowa 149; Carlin v. Ch. R. I. & P. R. R. Co., 37 Iowa, 322; Patterson v. B. & M. R. R. Co., 38 Iowa 280; Artz v. C. R. I. & P. R. R. Co., 38 Iowa 296, 297; Murphy v. C. R. I. & P. R. R. Co., 45 Iowa 663, 664; Bullard v. Mulligan, 69 Iowa 418, 419, 29 N. W. 405; Clampit v. Ch. St. P. & K. C. Ry. Co., 84 Iowa 74, 50 N. W. 673, holding that in an action of damages for negligence causing personal injury, the plaintiff must not only prove the negligence of the defendant and the injury; but he must, also, show that the injury was not the result of his own negligence, or that his want of ordinary care and prudence did not directly contribute to its cause.—And the court holds in some of these cases that the rule is applicable in such an action by a personal representative.

Reaffirmed and extended in Greenleaf, Adm'r v. Ill. Cent. R. R. Co., 29 Iowa 36, 40, 46, 47, 4 Am. Rep. 181; Murphy v. C. R. I. & P. R. R. Co., 45 Iowa 663, 664, holding further that in an action for negligence when facts claimed to constitute it are undisputed, the question is for the court, and when disputed it is for the jury to determine: Holding further that in such an action, the burden is on the plaintiff to show the negligence of the defendant and his own care; but he need only prove enough to raise a reasonable presumption of the negligence of defendant, and to make it probable that the latter neglected its duty, when it is a question for the jury.—And this rule applies in an action by a personal representative.

Reaffirmed and extended in Gamble v. Mullin, 74 Iowa 101, 36 N. W. 910, holding further that in an action for negligence which injured plaintiff's animal and afterwards caused its death, the plaintiff who had control of it after the injury, must prove that the injury and death was not proximately caused by his negligence or want of care: And this is the rule although the defendant specially pleads contributory negligence.

Reaffirmed and varied in Oliver v. Iowa Cent. Ry. Co., 122 Iowa 220, 221, 97 N. W. 1074, holding that although it is the duty of those in charge of a railroad train to keep a look-out and give warning of its approach to a street crossing, still, one who is injured by such train at such place through his own negligence, cannot recover therefor.

Reaffirmed and qualified in Bullard v. Mulligan, 69 Iowa 419, 29 N. W. 405, holding that the doctrine of contributory negligence does not apply in an action for negligent injury of property not under the personal control or management of the plaintiff at the time of the injury and when he is not present thereat.

Cited in Sherman, Adm'r v. Western Stage Co., 24 Iowa 565, the court holding that where a common carrier places a woman passenger in a skiff to be rowed across a swollen river by a boy sixteen

years of age, it cannot rely upon such passenger's negligence while in the skiff, to defeat a recovery for her death, caused by its over-turning.

Cited in *Murphy v. C. R. I. & P. R. R. Co.*, 38 Iowa 546, (dissenting opinion), the majority court opinion involving the duty of a railroad company to a trespasser on its track, and to one there by license or at a crossing, and other matters intimately connected with the text.

6. Trial—Evidence—Order of Introduction—Discretion of Trial Court—Abuse—Reversal.—The trial court has a large judicial discretion in controlling the manner of the introduction of evidence, and his rulings thereon will not be ground for reversal, except in case of manifest abuse, pp. 289, 290.

Reaffirmed in *McNichols v. Wilson*, 42 Iowa 392; *Meadows v. Hawkeye Ins. Co.*, 67 Iowa 60, 24 N. W. 592.

Cross reference. See further on this question, annotations and note under Rule 1 of *Rutledge v. Evans*, sheriff (11 Iowa 287), Vol. I, p. 818.

7. Appeal—Verdict Against Weight of Evidence—Conflicting Evidence on Trial—Affirmance, when.—When upon appeal to the Supreme Court, it appears that the evidence below upon a jury trial was conflicting and that the trial court properly instructed the jury, the judgment will not be reversed because the verdict is against the weight of the evidence, pp. 288, 289.

Reaffirmed and extended in *Conner & Co. v. Mountain*, 28 Iowa 593 (abstract); *Todd v. Branner*, 30 Iowa 440; *Snyder v. Eldridge*, 31 Iowa 130, holding further that where the evidence upon a jury trial is conflicting, and the trial court refuses to grant a new trial, a very strong and clear case of the verdict being against the weight of the evidence must be made to appear, in order to justify a reversal upon appeal.

Cross references. See further on this question, annotations and cross references under Rule 2 of *Brockman v. Berryhill* (16 Iowa 183), ante. p. 423; *Napper v. Young* (12 Iowa 450), ante. p. 72.

BOARDMAN v. BECKWITH, 18 IOWA 292

1. Pleadings—Exhibits—What to be Filed with Petition—Action to Recover Real Estate.—The plaintiff in an action for the recovery of real estate is not required to file his title papers or copies thereof as exhibits with his petition. Section 3570 of the Code of 1860 prescribes the requisites of a petition in such a case, and it need only be pursued, p. 293.

Cited with approval and extended in *Taylor v. Cedar Rapids & St. P. R. R. Co.*, 25 Iowa 378, holding that only instruments or writings which the the basis of the action are required to be copied in, or

filed as exhibits with the petition: That the rule is inapplicable to writings of *evidence* merely.

Cross reference. See further on this question, annotations under *Walkup v. Zehring* (13 Iowa 306), ante. p. 155.

2. **Appeal—Evidence not Objected to Below.**—Where evidence is not objected to at the time it is offered, error in its admission will not be considered or reviewed by the Supreme Court, p. 293.

Reaffirmed and extended in *Crawford v. Wolf, Carpenter & Angle*, 29 Iowa 574, holding further that only the grounds of objection given below to the admission of evidence, will be considered upon appeal.

3. **Constitutional Law—Statutes—Curative Acts—Retroactive Operation.**—A curative statute having a retroactive operation is constitutional in so far as it does not interfere with vested rights or impair obligations under per-existing contracts.

So, a statute legalizing the prior levy and assessment of taxes, and prescribing the manner in which property is to be sold therefor, is constitutional as to all sales for taxes, and other proceedings thereunder made after its taking effect, pp. 294, 295.

Reaffirmed in *Richman v. Board of Supervisors of Muscatine County*, 77 Iowa 520, 42 N. W. 425, 14 Am. St. Rep. 308, 4 L. R. A. 445, the case upholding the Act of the Twenty-first General Assembly curing defects in the proceedings of the board of supervisors in the construction of a levee, and enabling it to assess costs of its construction and maintenance against lands thereby benefited.

Reaffirmed in *Ch. R. I. & P. Ry. Co. v. Avoca*, 99 Iowa 561, 68 N. W. 882, the court upholding the constitutionality of an Act of the Twenty-fifth General Assembly legalizing acts of the board of directors of the Independent Sch. Dist. of Avoca in the levying of taxes for school purposes for certain years.

Reaffirmed as to second paragraph in *Iowa R. R. Land Co. v. Soper*, 39 Iowa 117, 118, 123.

Reaffirmed and explained in *Tuttle v. Polk & Hubbell*, 84 Iowa 15, 16, 50 N. W. 39, holding that the Legislature has power to cure defects or irregularities in the proceedings of officers or boards, where it has the power to dispense with such proceedings by prior statute.—The court upholding the constitutionality of the Act of April 16, 1888, as to cities of the first class and cities organized by special charter, curing defects or irregularities in relation to a special tax or assessment by subsequent ordinance and proceedings thereunder, and holding that such ordinance or proceedings applies to contracts for such special tax or assessment for pavements made under such irregular or defective proceedings.

Reaffirmed and explained in *Witter and Nourse v. Board of Supervisors of Polk County*, 112 Iowa 391, 83 N. W. 1045; *McSurely v.*

McGrew, 140 Iowa 172, 118 N. W. 419, holding that the Legislature may by statute, cure any defects or irregularities in the acts or proceedings of an officer, or municipal body, when it could have dispensed with such proceedings, or have made the manner of doing them immaterial, or have authorized them, as the case may be, by previous statute.

Reaffirmed and extended in City of Clinton v. Walliker, 98 Iowa 659, 660, 68 N. W. 433, holding further that the Legislature has power to pass an act curing and legalizing the defects or irregularities in the proceedings, ordinances and resolutions of a city relative to paving its streets, assessing and levying taxes therefor, and appropriating funds for the building of a city hall, built before the taking effect of the curative act; and that such act applies to a claim for erecting a pavement under such cured proceedings, ordinances, etc., on which an action is pending at the time of the passage of the curative act.—The court upholding as constitutional the Act of March 23, 1894, in favor of the city of Clinton and for such purposes.

Reaffirmed and varied in State v. Squires, 26 Iowa 347, 348, holding that unless a statute shows a clear intention that it operate retrospectively it will not be given such effect: Holding further that in order for the Legislature to possess the power to cure a defective or irregular proceeding, it must have power to authorize it by a prior law.—The court upholding the constitutionality of an Act legalizing the organization of an independent school district, and irregularities and defects in the proceedings therefor.

Cross references. See further in this connection, annotations under Morrison v. Springer (15 Iowa 304), ante. p. 346; Bartruff v. Remey (15 Iowa 257), ante. p. 339.

4. New Trial—Motion For—When To be Filed.—Under Sec. 3114 of the Code of 1860, a motion for a new trial must be filed within three days after rendition of the judgment, unless one of the grounds thereof be for newly discovered evidence; and such a motion made more than three days thereafter and not having as one of the grounds therefor newly discovered evidence, will be disregarded, or overruled, pp. 295, 296.

Reaffirmed and explained in Patterson v. Jack, 59 Iowa 633, 634, 13 N. W. 725, holding that where a motion for a new trial on the ground of newly discovered evidence and other grounds, is filed after the time allowed therefor by Sec. 2838 of the Code of 1873—corresponding to Sec. 3114 of the Code of 1860—has expired, except for newly discovered evidence, it will be disregarded as to all other grounds except that one.

Reaffirmed and qualified in Beems, Adm'r v. C. R. I. & P. R. R. Co., 58 Iowa 153, 12 N. W. 223, holding that a motion for a new trial which is not filed within the time prescribed by statute will be over-

ruled, unless a further time therefor is given by written agreement of parties, in which case it must be filed within the time agreed on, or it will be overruled.

HATFIELD *v.* LOCKWOOD, 18 IOWA 296

1. **Conveyance of Realty with Appurtenances—Right of Grantee to Unexpired Lease.**—A conveyance of real estate with its appurtenances, conveys the right of the grantor in an unexpired lease thereof, unless there is an express agreement to the contrary, pp. 297, 298.

Reaffirmed and extended in Chambers *v.* Irish, 132 Iowa 323, 109 N. W. 788, holding further that the grantee of leased premises may maintain forcible entry and detainer against the lessee at the expiration of the term.

Unreported citation, 129 N. W. 960.

2. **Trial—Special Verdict—When Allowed and What to State—Form of Submitting Questions.**—Under Sec. 3079 of the Code of 1860, a party is only entitled to a special verdict upon material facts in issue; and the questions submitted must be in such form as to elicit from the jury only conclusions of fact as established by the testimony, and not a statement of the evidence adduced on the trial, or conclusions of law, pp. 298, 299.

Reaffirmed in Phoenix *v.* Lamb, 29 Iowa 355.

Reaffirmed in Fishbaugh *v.* Spunaugle, 118 Iowa 343, 92 N. W. 60, decided under the Code of 1897, holding that where a special finding is more in the nature of a conclusion of law than of a finding of fact, it may be disregarded.

Reaffirmed and extended in Sutherland *v.* Standard L. & Acc. Inc. Co., 87 Iowa 513, 58 N. W. 30, holding further that—under the Code of 1873—the failure of the jury to return a special finding will not necessitate a reversal, unless because of the failure, it is manifest from the record that the jury has not found the necessary facts to authorize its general verdict.

CLEVELAND *v.* DETWEILER, 18 IOWA 299

1. **Slander—Imputing Want of Chastity to Female.**—Spoken words imputing want of chastity to a female constitutes slander *per se*.

So, to charge a woman with sodomy or with having had intercourse with an animal, is slander *per se*, pp. 300-303.

Reaffirmed in Haynes *v.* Ritchey, 30 Iowa 77, 6 Am. Rep. 642.

Reaffirmed as to first paragraph in Beardsley *v.* Bridgman, 17 Iowa 292; *Snediker v. Poorbaugh*, 29 Iowa 491; *Cushing v. Hederman*, 117 Iowa 638, 91 N. W. 941, 94 Am. St. Rep. 320.

Cited as to last paragraph in State v. Gage and Mallison, 139 Iowa 402, 116 N. W. 596, on the question of what constitutes sodomy, and the sufficiency of an indictment therefor.

Cross reference. See further on this question, note and cross references under *Estes v. Carter* (10 Iowa 400), Vol. I, p. 714.

BECKWITH v. DARGETS, 18 IOWA 303

1. **Pleadings—Demurrer to Petition, When Lies.**—Under Sec. 2876 of the Code of 1860, a demurrer lies to a petition for a *defect of*, but not for *misjoinder* of parties, p. 304.

Reaffirmed in Dubuque County v. Reynolds, 41 Iowa 455.

Reaffirmed and explained in Turner v. First Nat'l Bank of Keokuk, 26 Iowa 566, 567; *Indep. Sch. Dist. of Graham Township v. Indep. Sch. Dist. No. 2*, 50 Iowa 324, holding that in case of a misjoinder of parties in a petition, the defect must be taken advantage of by motion to strike and not by demurrer.

Reaffirmed and extended in Mornan v. Carroll, 35 Iowa 24, 25, holding further that a demurrer lies only for the causes allowed by Sec. 2876 of the Code of 1860.

2. **Action to Quiet or Remove Cloud from Title to Land.**—In an action in equity to remove a cloud from and to quiet the title to land, the plaintiff may properly join as parties in his petition, all persons claiming an interest or title therein, or who are necessary to a full settlement of questions involved, pp. 305, 306.

Cited with approval in Thomas v. Stickle, 32 Iowa 77, not in point, but on a parity.

MAYO v. SAMPLE, 18 IOWA 306

1. **Slander—Privileged Communications—What Are—Exemption from Liability—When.**—Slanderous words are privileged when spoken by a party in the performance of a public or an official duty, in a good faith belief of their truth upon a just occasion and without malice. So, a charge of crime by a public officer made in the line of duty, in good faith, from information obtained from others, and without actual malice is privileged, pp. 309, 311, 312.

Reaffirmed and varied in Kinyon v. Palmer, 18 Iowa 387, holding that the press may freely comment on the conduct or speeches of public men, being liable therefor only when it speaks falsely and with malice; but that malice may be inferred from the false publication.

Reaffirmed and qualified in Smith v. Howard, 28 Iowa 56, 67, holding that if a witness in bad faith and with malice and not in pertinently responding to a question or questions, utters and publishes slanderous words, he is liable therefor in damages.

Reaffirmed and qualified in Comfort v. Young, 100 Iowa 629, 69 N. W. 1033, holding that where one, without probable cause, in bad

faith and without honestly believing that his statements are true, files an information before a board of insane commissioners charging a person with being insane, the law will imply malice, and such person so filing the information is liable in damages in an action of libel brought by the person so wrongfully charged.

Cited in State v. Parish, 22 Iowa 289, not in point.

(Note.—See further, Rainbow v. Benson, 71 Iowa 301, 32 N. W. 352; Rector v. Smith, 11 Iowa 302, important cases sustaining and explaining, but not citing the text.—Ed.)

BLAKE v. GRAVES, 18 IOWA 312

1. **Justice's Court—Pleadings and Evidence Under in.**—Technical exactness or nicety of pleading is not required in a justice's court, it being sufficient if the pleadings apprise the parties of the nature of the cause of action and defense. Great liberality in the matter of pleading and in the introduction of evidence thereunder is allowed in such court, pp. 313, 314.

Reaffirmed in Root v. Ill. Cent. R. R. Co., 29 Iowa 103; West v. Moody, 33 Iowa 138, 139; Fauble v. Stewart, 35 Iowa 380.

. *Cross reference.* See further on this question, annotations and cross reference under Rule 1 of Tilley v. Nusum (17 Iowa 238), ante. p. 522.

2. **Evidence—Declarations of Party in Possession of Personal Property—Competency.**—Declarations of a person while in the possession of personal property explanatory of such possession, as that he held it as the agent of another or in his own right, are admissible in evidence against a party claiming through or under him: But such declarations, however, must be made at the time of possession, must be simply explanatory of it, and not in regard to the contract under which the possession is held.

Thus in an action for the value of a horse taken under an attachment as the property of the plaintiff's son, and where in such action the defendant alleges fraud, evidence of the declarations of the son as to ownership of the horse and his offers to sell it, etc., made and done while in possession, but after the alleged sale to the plaintiff, are admissible, pp. 314, 315.

Reaffirmed as to first paragraph in Stephens v. Williams, 46 Iowa 543; Sweet v. Wright & Spencer, 57 Iowa 512, 513, 10 N. W. 871; Hardy v. Moore, 62 Iowa 70, 17 N. W. 202.

Reaffirmed and extended as to first paragraph in Nodde v. Hawthorn, 107 Iowa 382, 77 N. W. 1062, holding that a lessee of a flour mill is the owner of the stock on hand, so as to make his declarations competent under the rule.

Reaffirmed and qualified in Murray v. Cone, 26 Iowa 279, holding that in an action of replevin for cattle levied on under an execution

against M., claimed by the plaintiff by a prior purchase from M., the declarations of the plaintiff after the alleged purchase, as to how he obtained and paid for the cattle are self-serving and inadmissible in his favor.

Distinguished and qualified in McCormicks v. Fuller & Williams, 56 Iowa 46, 8 N. W. 802, holding that declarations made by a party in possession of personal property, after he has parted with his right, are not admissible to affect one claiming under him.

Cross reference. See further on this question, annotations under Rule 2 of Taylor v. Lusk (9 Iowa 444), Vol. I, p. 604.

3. Evidence—Husband and Wife—Competency.—In an action by a married woman, her husband is a competent witness in her behalf (under Sec. 3983 of the Code of 1860) when she introduces him as such, p.315.

Special cross reference. For cases citing, sustaining, and extending the text and others on the question, see annotations under Rule 7 of Russ v. Steamboat War Eagle (14 Iowa 363), ante. p. 247.

SIMERAL v. DUBUQUE MUTUAL FIRE INSURANCE CO., 18 IOWA 319

1. Mutual Insurance Company—Policy Holders Become Members—Notice of By-laws, etc.—One who buys a policy of insurance in a mutual fire insurance company becomes a member thereof, and is charged with notice of its articles of incorporation and by-laws, p. 322.

Reaffirmed in Coles v. Iowa State Mut. Ins. Co., 18 Iowa 431.

Reaffirmed, explained and extended in Walsh v. Aetna L. Ins. Co., 30 Iowa 144, 145, 6 Am. Rep. 664, holding further that the rule is equally applicable to the holder of a policy of life insurance: Holding, however, that the rule does not charge a policy holder with notice of the rules and regulations of the company in reference to the transaction of its business by its officers or agents, but only as to the provisions of its charter or by-laws fixing the rights and liabilities of the members of the company.

Reaffirmed and extended in Corey v. Sherman, Assignee, 96 Iowa 133, 64 N. W. 835, 32 L. R. A. 490; Fitzgerald v. Metropolitan Acc. Ass'n of Chicago, Ill., 106 Iowa 459, 76 N. W. 810; Farmers' Mut. Hail Ass'n v. Slattery, 115 Iowa 413, 88 N. W. 950, holding further that the rule applies to all mutual insurance companies, of whatever kind, and its policy holders or members, and the latter are charged with notice of and are governed by the articles of incorporation and by-laws of the company at the time of the issuance of their policies or of their becoming members.

Reaffirmed, extended and qualified in Hobbs v. Mut. Benefit Ass'n, 82 Iowa 112, 47 N. W. 984, 31 Am. St. Rep. 466, 11 L. R. A. 399; Fitzgerald v. Metropolitan Acc. Ass'n of Chicago, Ill., 106 Iowa 459, 76 N. W. 810; Farmers' Mut. Hail Ass'n v. Slattery, 115 Iowa 413, 414, 88 N. W. 953, holding further that a member of a mutual

insurance company, whether fire, life or other kind of insurance, is presumed to have knowledge of and be governed by its articles of incorporation and by-laws in force *at the time of the issuance of the policy or of his becoming a member*, but is not charged with knowledge of or to be governed by by-laws thereafter passed, unless it is expressly so provided by the policy or contract of membership.

Reaffirmed and varied in Moore v. Union Fraternal Accid. Ass'n et al, 103 Iowa 428, 72 N. W. 646, holding, also, that the holder of a policy of insurance in a mutual company is charged with notice of and governed by a printed stipulation on the back thereof as to the condition under which it is issued and accepted.

Unreported citation, 60 N. W. 238.

Cross reference. See further on this question, annotations under Coles v. Iowa State Mut. Ins. Co. (18 Iowa 425), *Infra*. p. 661.

2. Pleadings—Demurrer to Answer Overruled—Party Declining to Plead Further—Judgment.—Where a demurrer to an answer containing a complete defense or bar to plaintiff's cause of action, is overruled and the plaintiff stands upon his demurrer and declines to plead further, final judgment will (under Sec. 3086 of the Code of 1860) be rendered by the court in favor of the defendant, pp. 323, 324.

Reaffirmed and varied in Brown v. Mallory, 26 Iowa 472, holding that where defendant demurs to plaintiff's petition, and, upon its being overruled, stands upon his demurrer, judgment will be rendered against him as in cases of default.

HAND v. ARMSTRONG, 18 IOWA 324

1. Promissory Note Providing for Rate Higher than Legal—Time Interest Runs—Usury.—Where a promissory note provides that it shall bear interest at a higher rate than the legal, but does not stipulate as to when the interest commences or ceases to run, interest will be charged per annum at the rate provided, from the date of the note until it is paid, unless a plea of usury is interposed, pp. 325-327.

Reaffirmed in Lucas, Thompson & Co. v. Pickel, 20 Iowa 492; Warren v. Ewing, 34 Iowa 174.

Distinguished in Bousquet, trustee v. Ward & O'Farrell, 116 Iowa 129, 89 N. W. 197, a case of peculiar facts, and involving liability of guarantors for interest of more than legal rate, on a debt which they guarantee.

PROSSER v. WAPELLO COUNTY, 18 IOWA 327

1. Public Roads and Highways—Establishment of—Assessment of Damages by Board of Supervisors—Appeal—Trial.—A land owner may (under the Code of 1860) appeal to the district court

from an assessment of damages by the board of supervisors occasioned by the establishment of a public road; and upon such appeal the question of the amount of the damages may be tried *de novo* and by a jury, pp. 329, 330.

Reaffirmed and explained in Sigafos v. Talbot, 25 Iowa 215, holding, also, that no motion to set aside the appraisal or assessment of damages, or a claim of appeal before the board of supervisors, is necessary before taking the appeal.

Reaffirmed and extended in Warner v. Doran, 30 Iowa 522; Vancleave v. Clark, 37 Iowa 185, 18 Am. Rep. 6, holding further that a land owner whom the board of supervisors has refused to allow any damages upon the establishment of, or upon a change in a county road, may appeal therefrom to the district court.

Reaffirmed and varied in Lippencott v. Allander, 25 Iowa 446, holding that a party may appeal to the district court from an order of the board of supervisors revoking a ferry license.

Distinguished and narrowed in Lippencott v. Allander, 23 Iowa 537, 538, holding that no appeal lies—under Sec. 267 of the Code of 1860, the section under which the text is decided—from the action of the board of supervisors in granting or refusing to grant a ferry license.

Cross reference. See further on this question, annotations under Umbarger v. Bean (15 Iowa 256), ante. p. 338.

2. Evidence—Value and Damages—Opinions of Witnesses.—Opinions of witnesses as to the *value* of realty taken for public use in a condemnation proceeding are admissible; but their opinions as to the *damages* sustained by the land owner by reason thereof, are inadmissible, p. 330.

Reaffirmed in Harrison v. Iowa Midland R. R. Co., 36 Iowa 325; Hartley v. K. & N. W. Ry. Co., 85 Iowa 466, 467, 52 N. W. 355, 356, proceedings to condemn land for railroad right of way.

Reaffirmed and explained in Cannon v. Iowa City, 34 Iowa 204, holding that in an action for injury to real estate, the plaintiff is not allowed while testifying as a witness, to give her opinion as to the amount of damages he has suffered: He should only state the facts complained of and their consequences, leaving the jury to determine the damages.

Reaffirmed and extended in Anson v. Wright, 18 Iowa 244; Russell v. City of Burlington, 30 Iowa 266, holding further that opinions of witnesses of the *value* of property which is the subject of litigation are admissible, but not their opinions of the amount of *damages* sustained.

Cross references. See further on this question, annotations under Rule 4 of Anson v. Wright (18 Iowa 241), ante. p. 620; Dalzell v. City of Davenport (12 Iowa 437), ante. p. 70.

3. Ferries—Rights of Riparian Owners.—At Common Law a riparian owner cannot establish a public ferry and exact tolls, unless

by grant, or such prescriptive use as pre-supposes a grant; but he may establish a ferry on his own land for the convenience of himself and family; and he may exact tolls upon a contract express or implied, when not forbidden by statute, and when this exaction does not injure or affect an established public ferry.

The riparian owner has the preference under the Code of 1860, in the granting of a ferry license, pp. 334, 335, 338.

Reaffirmed and varied in Clark v. City of Des Moines, 19 Iowa 223, 224, 87 Am. Dec. 423, holding that the rule of the text is equally applicable to a public toll bridge: Holding further that a city cannot lend its credit to aid in the construction of a toll bridge, unless it is expressly authorized by its charter so to do.

Cited in Kraut v. Crawford, 18 Iowa 554, 87 Am. Dec. 414, holding that land gained by accretions belongs to the adjoining riparian owner along a navigable river, as far out as the middle of the stream: Holding further that where the government sells land, referring to a plat which bounds it by and upon a navigable river, it cannot, by any subsequent action or grant to another, deprive the first purchaser of the full right to his river front, or of any of the incidents to riparian ownership: And this is the rule although the land subsequently granted was afterwards newly formed or elevated above the river by alluvion, and lies outside of the meander line and between it and the edge of the water at the time of the subsequent grant.

4. Riparian Owners—Ferries—Rights of Owner of Ferry Franchise.—Where a ferry license is granted to one not the riparian owner, he cannot use the land of the latter without first compensating him therefor: And the rule applies to the use of a part of a highway by such ferry license owner, where the highway was condemned for the public use as a highway, and the fee simple title remains in the riparian owner, pp. 338-341.

Reaffirmed and extended in Prosser v. Davis, 18 Iowa 369-371, holding further that injunction lies upon complaint of a riparian owner whose rights are being invaded as in the text.

Distinguished and narrowed in Sandford v. Martin, 31 Iowa 68, 69, holding that land of a riparian owner cannot be condemned for ferry purposes unless specially authorized by statute; and that such a proceeding is not allowed by Chap. 55 of the Code of 1860.

BURCHETT v. CASADY, 18 IOWA 342

1. Justice's Court—Entry of Judgment "forthwith"—Non-compliance with Statute—Effect.—The word "forthwith" in Sec. 3895 of the Code of 1860 (as to entry of judgment by a justice of the peace) means "within a reasonable time:." But even if a justice of the peace before whom a verdict is returned, or by whom a judgment is rendered as therein provided, fails to enter judgment thereon "within

a reasonable time," it is, as between the parties to the action, not *void*, but *voidable*, cannot be attacked by them collaterally, but must be set aside by writ of error, or other proper and direct proceedings, p. 344.

Reaffirmed in Knox v. Nicoli, 97 Iowa 689, 66 N. W. 876, holding that the provision of the statute, that the judgment upon a verdict in a justice's court must be entered "forthwith" is to be reasonably construed: Hence, holding that where a verdict is returned at 9 o'clock at night, judgment may be entered thereon the following morning.

Reaffirmed and narrowed in Tomlinson v. Litze, 82 Iowa 33, 34, 47 N. W. 1015, 31 Am. St. Rep. 458, holding that a judgment entered by a justice of the peace ninety days after verdict, is void, and may be set aside and canceled by a court of equity at the instance of the judgment debtor.

Reaffirmed and narrowed in Worrall v. Chase & Co., 144 Iowa 668, 123 N. W. 340, holding that where a cause is submitted to a justice for judgment without the intervention of a jury, he must, under Sec. 4522 of the Code of 1897, enter judgment therein within three days after the cause is submitted; and that a judgment in such case entered after such period is void: That where a statute requires a justice to do an act within a fixed time, he has no jurisdiction to act in the premises after the time fixed.

Cited with approval in Tomlin v. Woods, 125 Iowa 377, 101 N. W. 138, not in point, but upon analogy, and involving questions under the California Code.

Cited, varied and explained in Campbell v. Williams, 39 Iowa 648, the court holding that where at the time of the issuance of an execution from a justice's court, no judgment on which to base it has been entered, that a subsequently entered judgment therein has no retroactive effect, and gives such execution and levy thereunder no validity.—The court declining to decide whether the entry of judgment by a justice of the peace nine days after the trial and verdict, renders such judgment *void* or merely *voidable*.

Distinguished and narrowed in Gates v. Knosby, 107 Iowa 242, 77 N. W. 864, holding that where on a trial before a justice of the peace, the jury fails to agree and is discharged, the justice cannot two days thereafter order a second *venire*, in the absence of an agreement of the parties, and without further notice, as the law requires the second *venire* to be summoned "immediately."

BURTON v. HINTRAGER, 18 IOWA 348

1. **Tax Sale of Land of Minor or Lunatic—Period Allowed for Redemption.**—Where land of a minor, or of a lunatic, is sold for taxes, it may—under Sec. 779 of the Code of 1860 and Acts of 1862, p. 226—be redeemed within one year after the minor attains his majority, or, in a case of a lunatic, the disability is removed: But in order to make this rule applicable, the realty must be owned by the minor or

the lunatic at the time of the tax sale; and a subsequently acquired title by him will not render the rule applicable or extend the period of redemption from such tax sale longer than in other cases (three years, under Code of 1860), p. 350.

Cited in 146 Iowa 303, 125 N. W. 234.

Cross reference. See rule 3 hereof, in this connection.

2. Mortgage on Land—Interest of Mortgagee, a Chattel—Death of Mortgagee—To whom Mortgage Descends. The mortgagee in a mortgage on real estate has only a chattel interest, which follows the debt or thing it is given to secure; and in case of the death of the mortgagee, the mortgage descends as other personal property to the personal representative, in trust for the heir of decedent (mortgagee) who is in equity, in the absence of creditors it is necessary to pay, entitled to it, p. 351.

Reaffirmed in Shields v. Keys, 24 Iowa 307.

Reaffirmed in part in Gower v. Winchester, 33 Iowa 308, holding that a mortgage is a chattel interest, and is an incident to and follows the debt it is given to secure.

Reaffirmed in part in Clinton County v. Cox, 37 Iowa 571, 572, holding that a mortgage on land is simply a lien thereon to secure the indebtedness, and is effective until the mortgage debt is discharged or is no longer enforceable.

Reaffirmed and varied in White v. Rittenmyer, 30 Iowa 272, 273, holding that the interest of the mortgagor in land mortgaged is, before entry and foreclosure, an estate of inheritance, the mortgagee's interest being in such case no greater than a lien.

Reaffirmed and varied in Warren v. Davenport F. Ins. Co., 31 Iowa 469, 7 Am. Rep. 160, holding that a mortgagee has an insurable interest in the mortgaged property; but that in case of a loss he is only entitled to the amount of his debt: Holding, also, that the rule is applicable as to the insurable interest of a stockholder of a corporation in the corporate property.

(Note.—See further, *In re Estate of Miller*, 142 Iowa 564, 119 N. W. 978; *Scott v. McWhirter*, 49 Iowa 489; *Woodward v. Dean*, 46 Iowa 500; *Swan v. Yapple*, 35 Iowa 249; *Newman v. De Lorimer*, 19 Iowa 244; *Baldwin v. Thompson*, 15 Iowa 504; *Bates v. Ruddick*, 2 Iowa 423, important cases on this question not citing the text.—Ed.)

Cross reference. See Rule 3 hereof.

3. Tax Sale of Mortgaged Land—Redemption from—Who may Redeem—Minor Heir of Mortgagee.—Any right whatever, at law or in equity, whether perfect or inchoate, whether in possession or in action, or a charge or a lien upon it, constitutes such an ownership of land as will entitle a person owning or holding the right or interest to redeem such land from a sale from taxes. And where such an interest or right is held by a minor or a lunatic, he will be entitled to

redeem within one year after he attains majority, or the disability is removed, as provided by Sec. 779 of the Code of 1860, and Acts of 1862, p. 226; and the last rule applies to the minor heir of a deceased mortgagee in redeeming from a tax sale of mortgaged land, pp. 351, 352.

Reaffirmed and explained in Adams v. Beale, 19 Iowa 68, 69; Rice v. Nelson, 27 Iowa 151; Foster v. Bowman, 55 Iowa 243, 7 N. W. 515; Swan v. Harvey, 117 Iowa 62, 63, 90 N. W. 490, holding that any right which in law or in equity amounts to an ownership of land sold for taxes, or any right of entry upon it, or to its possession or enjoyment, or to any part of it, which may be deemed an estate, makes the holder an owner and entitles him to redeem from such tax sale.

Reaffirmed and explained in Busch v. Hall, 119 Iowa 282, 93 N. W. 357, holding that a mortgagee or any one having an interest in or lien upon land sold for taxes, may redeem; but that such redemption must be exercised by action after the tax deed issues.

Reaffirmed and extended in Adams v. Beale, 19 Iowa 68-70, holding further that a wife of a "head of a family" is entitled to redeem the homestead from a tax sale: Holding, also, that the provisions as to redemption and the time allowed therefor is governed by the statute in force at the time of the tax sale, although such law may be subsequently repealed, and a new and different one enacted.

Reaffirmed and extended in Tallman v. Cooke, 39 Iowa 403, 404, holding further that where before a sale of land for taxes, a father and mother by a deed duly acknowledged and in consideration of love and affection, convey the land to an infant son, the father retaining the possession of the deed as guardian of the grantee till after the land is sold for taxes listed to the father, and tax deed therefor is executed, and then placing the deed to the infant son of record, that such infant may, by an action in equity after he attains majority, redeem from such tax sale, and from the tax purchaser and purchasers from him, the failure to sooner record by the father, good faith, and an intention that the deed take effect at the time of its execution being shown by the son.

Reaffirmed and extended in Lloyd v. Bunce, 41 Iowa 670, 671, holding that a mortgagee may redeem the mortgaged land from a sale thereof for taxes: Holding further that where a widow buys land with money derived from a policy of insurance on the life of her deceased husband, a certain part thereof belonging to her infant son under such policy, and takes a conveyance thereto in her own name, the son may redeem the whole from a tax sale by an action by his next friend during infancy, or he may redeem the whole therefrom, upon attaining majority.

Reaffirmed and extended in Witt, Gd'n v. Mewhirter, 57 Iowa 549, 550, 10 N. W. 892, holding further that where a guardian, by order of court, sells the land of his ward, taking a mortgage thereon

as guardian for part of the purchase price, the ward may, within a year after arriving at majority or by his guardian before he arrives at majority, redeem from a tax sale of the land: And this is the rule, although such mortgage is made by the guardian by name as guardian, but does not show for whom he is such fiduciary.

Reaffirmed and extended in White v. Smith, 68 Iowa 315, 316, 25 N. W. 116, holding that any one having an interest in land may redeem from a tax sale thereof: Holding further that an executor under a will directing him to set aside a certain number of acres of testator's lands to certain devisees within a certain time, and devising the residue of his land to the executor, entitles the latter to redeem any of the testator's land which was sold for taxes before his death, provided that the period for redemption has not expired before the commencement of an action therefor.

Reaffirmed and extended in Ashenfelter, trustee, v. Seiling, and Schandelmeier et al, 141 Iowa 515-518, 119 N. W. 985, holding further (as does the present case) that statutes relative to redemption of land from tax sales are to be liberally construed: Holding that unless the provisions of Secs. 1341 and 1441 of the Code of 1897 are strictly complied with, the right of a land owner to redeem from a tax sale thereof, is not cut off; that the provisions of such sections are mandatory and not directory.

Reaffirmed and qualified in Curl v. Watson, 25 Iowa 39, 95 Am. Dec. 763; Rice v. Nelson, 27 Iowa 151, holding that where a person by reason of owing any interest in land sold for taxes, has a right to redeem, he may redeem the whole, and the purchaser may require this of him.—But see Jacobs v. Porter, 34 Iowa 346-348, (reaffirming the text), holding that where land is sold for taxes after the death of its owner, but for taxes accruing during his lifetime, and there are children of decedent who are adults and children who are infants at the time of the sale, that the infants upon attaining majority may redeem their undivided interests therein, but not the whole, from such tax sale.—This case expressly overruling Curl v. Watson, and impliedly overruling Rice v. Nelson, to this extent: Holding further that an infant upon arriving at majority may redeem his undivided interest in land sold for taxes, without redeeming the whole, and that another part owner thereof must redeem as required for persons not under disability.

Reaffirmed and qualified in Pearsons, Gd'n v. American Inv. Co., 83 Iowa 359, 49 N. W. 854, holding that in order—under Sec. 892 of the Code of 1873, corresponding to the law of the text—for an infant to redeem from a tax sale of land within one year after his majority, it being over three years from the tax sale, or for his guardian to so redeem after three years therefrom and during his minority, such infant or his guardian must, in the action therefor, satisfactorily

show that such infant was the owner of the land at and after the tax sale.

Reaffirmed and qualified in McGee v. Bailey, 86 Iowa, 515, 53 N. W. 310, holding that the disability of minority is removed by the minor's death; and that one who inherits land from him, although, an infant himself, must redeem from a tax sale of such decedent minor's land or his interest therein, within one year after his death.

Cited in Penn v. Clemans, 19 Iowa 379, 380; Stewart v. Corbin, 25 Iowa 149, holding that a sale for taxes of several parcels of land in gross, will be set aside in equity upon the complaint of the land owner.

Cited in Iowa Homestead Co. v. Webster County, 21 Iowa 233, involving the question of what title in land is taxable, and land claimed to be exempt therefrom.

Cited in Crum v. Cotting, 22 Iowa 422, the court holding that a purchaser at a tax sale of land, which is made pending an action to foreclose a mortgage thereon, is charged with notice of and is bound by the proceedings therein. -

Cited in Corning Town Co. v. Davis, 44 Iowa 628, holding (as does the present case) that the law relative to redeeming land sold for taxes is to be liberally construed in favor of the land owner; the case turning on other questions, not in point, but upon analogy.

Cited in Oskaloosa Water Co. v. Board of Equalization of Oskaloosa, 84 Iowa 412, 51 N. W. 19, 15 L. R. A. 296, not in point, but involving what property is subject to taxation.

Distinguished and narrowed in Stevens v. Casady, 59 Iowa 115, 12 N. W. 804, holding that where land owned by a person under no disability, is sold for taxes, it must (under the law of the text) be redeemed within three years from the date of sale; and this period will not be extended in favor of a minor (married woman or a lunatic) who thereafter acquires the title, either by conveyance or by descent from the owner of the land at the time it is sold.

Cross reference. See further on this question, annotations under Byington v. Rider (9 Iowa 566), Vol I., p. 629.

KARMUIER v. KROTZ, 18 Iowa 352

1. Contracts—Construction of—Evidence—Intention of Parties as Shown from Circumstances.—A contract will be read and considered in connection with the circumstances surrounding the parties at the time of its execution, in order to arrive at the intention of the parties, p. 356.

Reaffirmed, explained and extended in Corbett, Adm'r v. Berryhill, 29 Iowa 159, 160; Ditson v. Ditson, 85 Iowa 283, 52 N. W. 204, holding that courts should adopt the construction of a contract which is in accord with its terms as understood and adopted by the parties; that the intention of the parties will be followed, unless violence is

thereby done to the rules of language or to the rules of law; and that in arriving at such intention, the acts of the parties and the circumstances surrounding the transaction will be considered.

Reaffirmed, explained and extended in Craven v. Winter, 38 Iowa 479; Foley, Adm'r v. Hamilton, 89 Iowa 690, 57 N. W. 440, holding that in construing a contract the court will consider and weigh all its parts; and will arrive at the intention of the parties thereto by looking at the language employed, the object thereof, and all the circumstances attending it.

Reaffirmed and extended in Morrison v. Marquardt, 24 Iowa 61, 92 Am. Dec. 444, holding further that in the construction of grants the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, the state of the country, and the state of the thing granted, for the purpose of ascertaining the intention of the parties.

Cross references. See further on this question, annotations under Field v. Schricher (14 Iowa 119), ante, p. 214; Rule 2 of Rindskoff Bros. v. Barrett (14 Iowa 101), ante, p. 211.

2. Lands—"Easement" Defined.—An easement is a service which one estate owes to another estate, or the right of doing something to or having a privilege in one man's estate for the advantage and convenience of the owner of another estate, pp. 357, 358.

Reaffirmed in Price v. Baldauf, 82 Iowa 675, 676, 46 N. W. 985.

Reaffirmed and explained in Wetherill v. Brobst, 23 Iowa 587, 589, holding that the following contract is for the sale of an easement as distinguished from a license, is not revocable at the will of the vendor, and will be specifically enforced in equity, to wit: "Received of J. G. \$25 in full for twenty-two feet as an outlet on the North side of my following described land (describing it); and if I should fail to make title to the said land, I bind myself to refund said \$25 to said J. G., retaining interest for use of said road. J. B."

Reaffirmed and explained in Morrison v. Marquardt, 24 Iowa 61, 92 Am. Dec. 444, holding that an easement may be briefly defined to be a charge or burden upon one estate (the servient) for the benefit of another (the dominant).

Reaffirmed and extended in Dickinson v. Crowel, 120 Iowa 256, 94 N. W. 495, holding further that a written instrument or a decree, granting a mere easement over land, is not required to be recorded and indexed.

Cross reference. See Rules 4 and 5 hereof.

3. Deeds and Grants of Land or Easements—Reservation in.—A reservation is always of something issuing or coming out of the thing or property conveyed or granted, and not part of the thing or property itself; and it must be to the grantor or party executing it, and not to a stranger, p. 358.

Reaffirmed in White v. City of Marion, 139 Iowa 486, 117 N. W. 257.

Reaffirmed and explained in Stone v. Stone et al, 141 Iowa 442, 18 A. & E. Ann. Cas. 797, 119 N. W. 714, holding that a reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant: That an exception is a clause in a deed which withdraws from its operation some part of the thing granted which would otherwise have passed to the grantee under the general description: holding further that if a reservation in a deed or grant, does not contain words of inheritance, it exists for the life of the grantor only.

Reaffirmed and extended in Agne v. Slitsinger, 96 Iowa 186, 187, 64 N. W. 838, 36 L. R. A. 701, holding further that a reservation of a right to the grantor in a deed, carries with it such rights as are incident to the right reserved, and which are manifestly intended by the parties thereto.

(Note.—See further, Youngerman v. Polk County, 110 Iowa 731, 81 N. W. 166; Grant v. City of Davenport, 18 Iowa 187, important cases sustaining and explaining, but not citing the text.—Ed.)

Cross references. See further in this connection, Rich v. Zeilsdorff, 99 Am. Dec. 81; Eiseley v. Spooner, 8 Am. St. Rep. 128; Roberts v. Robertson, 38 Am. Rep. 710.

4. Lands—Easement—Conveyance or Grant—Easement Passes With Land by Implication, When.—An easement is an appurtenance to the land it benefits, and passes by descent, or by a devise or a conveyance of the land, even though it be not mentioned in the subsequent instrument, p. 360.

Reaffirmed in Wetherell v. Brobst, 23 Iowa 591; Teachout v. Capital Lodge of I. O. of Odd-Fellows, 128 Iowa 384, 104 N. W. 442.

Reaffirmed and extended in Thompson v. Miner, 30 Iowa 389, 390, holding further that where a person purchases a building with knowledge of its plan and construction, and of the common use of a passage-way and stairway by his vendor and a third person, or third persons, he is charged with notice of the easement of the latter.

Reaffirmed and qualified in Docorah Woolen Mill Co. v. Greer, 49 Iowa 492, 493, holding that in order for an easement to pass as an appurtenance and by implication, it must be annexed to or used and enjoyed as a part of the land at the time of the conveyance: That a right to an easement in relation to land, which has never been annexed to, used or enjoyed as a part thereof, must be specially conveyed in the deed thereto, or it will not pass to the grantee thereunder.

Reaffirmed and narrowed in Morrison v. Marquardt, 24 Iowa 60-62, 92 Am. Dec. 444, holding that an easement as to light and air (Ancient Light) preventing an adjoining land owner or the grantor from building on an adjoining lot as he pleases, or within a certain number of feet of the land conveyed, does not pass by implication,

but must be expressly conveyed or granted in the deed to the land whose owner claims the right: Holding further that when a deed to land mentions and conveys several easements thereunto belonging, it is a strong circumstance showing that none other were intended to be thereby conveyed.

5. Adverse Possession—Easements.—Where an easement—in this case a road—is granted, or reserved by a deed or grant to the land burdened therewith, but is not located or described in such instrument, it may become located by agreement or by usage and acquiescence, and when so done cannot be changed except by consent of both parties to the instrument, p. 360.

Reaffirmed in Dickinson v. Crowell, 120 Iowa 258, 94 N. W. 496, holding that an easement may be acquired by such long use and acquiescence by the parties, as will presume an agreement therefor.

Reaffirmed and explained in Agne v. Slitsinger, 96 Iowa 187, 64 N. W. 838, 36 L. R. A. 701, holding that an easement may be acquired by actual, open and notorious adverse possession under claim of right for the statutory period of limitation on actions for the recovery of real estate.

LEFFLER v. CITY OF BURLINGTON, 18 IOWA 361

1. Municipal Corporations—Rights of Lot Owners to Use of Streets, Public Grounds, etc., as Shown by Plat.—Lot owners in a city or town who purchased from one who has dedicated public squares, streets, alleys, etc., by a plat thereof, and who purchase their lots in reference to such plat, have a vested right to the use of such public property as shown by the plat of dedication, of which they cannot be deprived by the act of their vendor (the dedicator) or by the city or town to whose use the public property is dedicated, pp. 363, 364.

Reaffirmed in City of Keokuk v. Cosgrove, 116 Iowa 193, 89 N. W. 984, holding the rule to apply to the dedicator and all those claiming through him.

Reaffirmed and extended in Fisher v. Beard, 32 Iowa 352, holding further that the rule is the same where the dedication of the public property is made by the owner by parol, who thereafter sells lots with reference thereto: Holding further that a change in a plat by a dedicator in reference to public property dedicated, subsequent to a sale of lots by him with reference thereto and without the consent of the land owners thereto, does not affect their rights.

Cited in Youngerman v. Board of Supervisors of Polk County, 110 Iowa 734, 81 N. W. 167, the court holding that in order to constitute a dedication, the intention to dedicate must have existed at the time thereof; and that in determining the question of intention, the acknowledgment will be considered in connection with the plat, the certificate of survey, and such circumstances as may throw light upon the

transaction: holding further that where land is reserved by the dedicator, the fee simple title remains in him.

(Note.—See further, *Hull v. City of Cedar Rapids*, 111 Iowa 466, 83 N. W. 28; *Garstang v. City of Davenport*, 90 Iowa 359, 57 N. W. 876; *Cadle v. M. W. R. R. Co.*, 44 Iowa 11; *Cook v. City of Burlington*, 30 Iowa 103, important cases sustaining and explaining, but not citing the text.—Ed.)

Cross references. See further on this question, annotations under *Milburn v. City of Cedar Rapids & Ch. I. & Neb. R. R. Co.*, (12 Iowa 246), ante. p. 40; *Rule 1 of City of Dubuque v. Maloney* (9 Iowa 450), Vol. I, p. 606.

PROSSER *v.* DAVIS, 18 IOWA 367

1. **Ferry—Rights of Riparian Land Owner to Compensation for Use by—Injunction by Such Owner.**—Where a ferry license is granted to one not the riparian owner, he cannot use the land of the latter without first compensating him therefor: And the rule applies to the use of a part of a highway by such ferry license owner, where the highway was condemned for public use as a highway, and the fee simple title remains in the riparian owner: And injunction lies upon complaint of such a riparian owner whose rights are so being invaded, pp. 369-371.

Reaffirmed in *Prosser v. Wapello County*, 18 Iowa 338-341.

Cited in *Kraut v. Crawford*, 18 Iowa 554, 87 Am. Dec. 414, holding that land gained by accretions belongs to the adjoining riparian owner along a navigable river, as far out as the middle of the stream: Holding, also, that where the government sells land referring to a plat which bounds it by and upon a navigable river, it cannot, by any subsequent action or grant to another, deprive the first purchaser of the full right to his river front, or of any of the incidents to riparian ownership. And this is the rule, although the land subsequently granted was afterward newly formed or elevated above the river by alluvion, and lies outside of the meander line and between it and the edge of the water at the time of the subsequent grant.

Distinguished and narrowed in *Sanford v. Martin*, 31 Iowa 68, 69, holding that land of a riparian owner cannot be condemned for ferry purposes unless specially authorized by statute; and that such a proceeding is not allowed by Chap. 55 of the Code of 1860.

Cross reference. See further in this connection, annotations under Rules 3 and 4 of *Prosser v. Wapello County* (18 Iowa 327), ante. p. 639.

STATE *v.* CARRON, 18 IOWA 372, 87 AM. DEC. 401

1. **Seduction—Indictment for Seduction of Unmarried Female of Previous Unchaste Character.**—A man may be indicted and convicted for seducing an unmarried female who was of previous un-

chaste character, but who had reformed and was of chaste character at the time of the seduction, p. 376.

Reaffirmed in State v. Dunn, 53 Iowa 527, 5 N. W. 708; State v. Moore, 78 Iowa 497, 498, 43 N. W. 274; State v. Gunagy, 84 Iowa 180, 50 N. W. 883.

2. Seduction—Indictment for—Proof of Chastity of Prosecutrix Necessary to Convict.—Upon the trial of an indictment for seduction, the fact that the prosecutrix was of chaste character at the time and prior to the commission of the crime, or, if of previous unchaste character, that she had reformed, and was of chaste character at such time, is an essential fact to be established by the state; and it is one of the facts to be determined by the jury, p. 376.

Reaffirmed and extended in State v. Bennett, 137 Iowa 430, 110 N. W. 151, holding further that upon the trial of an indictment for the seduction of an unmarried female shown to have been of unchaste character at the time prior to the alleged seduction, the state may prove by her that subsequent to such prior time, and before the time of the alleged seduction, she determined to reform; and that such resolution, if followed with character in harmony before the time of the alleged seduction, is sufficient to leave the question of her reformation, with other facts, to the jury.

Reaffirmed and qualified in State v. Dun, 53 Iowa 527, 5 N. W. 708, holding that upon the trial of an indictment for seduction, evidence of the unchaste character of the prosecutrix eight years before the alleged commission of the seduction by accused, and when she was a child of fourteen, is inadmissible.

Cross reference. See further on this question, annotations under State v. Andre (5 Iowa 389), Vol. I, p. 362.

KINYON v. PALMER, 18 IOWA 377

(Later Appeal, 20 Iowa 138)

1. Libel and Slander—Petition in Action of—Allegations of—Proof.—In an action for libel or slander, under Sec. 2928 of the Code of 1860, if the words published are actionable on their face, and without their meaning and application to plaintiff being specially pleaded, the plaintiff need only set them out in his petition, whereupon it is for the court to determine as a matter of law, whether or not they are actionable *per se* as shown by the petition; but if, when fairly and reasonably construed, the words are not so actionable, the plaintiff must show their defamatory character by proper averment: When, however, in this last case, the plaintiff alleges generally that the words were published of and concerning him in a defamatory sense, specifying it, and it, as alleged, is libelous, the petition is good; but of course the plaintiff must establish his averments by proper proof, pp. 383, 384.

Reaffirmed and explained in McLaughlin v. Bascom, 38 Iowa 661, holding that in an action of slander where the words spoken are ambiguous, they are to be construed in the sense which the hearers understood them, and such facts may be proved by such persons, and is an ultimate fact to be determined by the jury.

Reaffirmed, explained and extended in Quinn v. Prudential Ins. Co., 116 Iowa 526, 527, 90 N. W. 350, holding that (under Sec. 3592 of the Code of 1897) a petition in an action of slander or libel need only state the defamatory sense in which the language was used, and that it was spoken of and concerning the plaintiff: That the innuendo is properly employed, only where the slanderous or libelous words are ambiguous, of doubtful meaning, or where, by reason of extrinsic facts and circumstances, they express a hidden or an unusual meaning: That where an innuendo is not so properly employed, or is not so required, the meaning of the words complained of cannot be thereby enlarged or restricted.

Reaffirmed and extended in Swearingen v. Stanley, 23 Iowa 121, holding further that the rule is equally applicable in an action for slander: Holding further that where words are actionable *per se*, no special damages are required to be pleaded or proven.

Reaffirmed and extended in Clarke v. Jones, 49 Iowa 478, holding that (under Sec. 2681 of the Code of 1873, corresponding to the section of the text) in an action for slander or libel, the plaintiff need only set out the words complained of in his petition, and allege therein that they were spoken of or concerning the plaintiff and in a defamatory sense, specifying such sense therein; and that the evidence supporting such allegations need not be alleged therein, but must be proved upon the trial of the action.

Distinguished and narrowed in Anderson v. Hart, 68 Iowa 402, 403, 27 N. W. 290, holding that when a libelous publication does not on its face, or by way of innuendo or otherwise, refer to a certain person, evidence as to whom the persons to whom it was published was referred to, is incompetent.

2. Libel and Slander—Action for—Pleadings—Answer—Justification and Mitigation—Proof—Malice.—In an action for libel or slander, the defendant may, under Sec. 2929 of the Code of 1860, plead the truth of the words complained of in justification, and any mitigating circumstances tending to reduce the amount of damages, or he may allege either of them in his answer; and a failure to establish his plea of justification will not, of itself, be deemed proof of malice, nor preclude his proving any such mitigating circumstances tending to reduce the damages, or to disprove malice, pp. 384, 385.

Reaffirmed in Mayo v. Sample, 18 Iowa 311; *Desmond v. Brown*, 33 Iowa 14.

Cited in Hendrickson v. Kingsbury, 21 Iowa 386, on the question of when punitive or exemplary damages are awarded in an action *ex delicto*, and being an action for assault and battery.

3. Pleadings—Irrelevant or Redundant Matter in—How Reached—Motion to Strike.—Irrelevant or redundant matter in a pleading must—under Secs. 2876 and 2946 of the Code of 1860—be reached by a motion to strike, and not by demurrer, p. 387.

Cited in Turner v. First Nat'l Bank of Keokuk, 26 Iowa 566, holding that where matter is improperly alleged in a pleading, in the alternative when it should be averred directly in connection with other allegations thereof, it must be reached by motion and not by demurrer: Holding, also, that in case of a misjoinder of parties in a petition, the defect must be taken advantage of by motion to strike, and not by demurrer.

STATE EX REL. FLOYD *v.* MAYOR AND CITY COUNCIL OF KEOKUK, 18
IOWA 388

1. Practice—Amendments—When Allowed—Discretion of Trial Court.—Under the Code of 1851, the trial court may, within the exercise of a sound discretion and subject to reversal for abuse thereof, allow material amendments at any stage of the proceedings.

This rule applies to amendments in mandamus proceedings, and allows the trial court to permit a return therein to be amended, p. 389.

Reaffirmed and explained as to first paragraph in Fulmer v. Fulmer, 22 Iowa 232, 233; *Hays v. Turner*, 23 Iowa 217, holding that—under the Code of 1860—the ruling of the trial court in allowing or refusing to allow an amendment will not be cause for reversal unless it appears on appeal that such court's judicial discretion was abused to the prejudice of the substantial rights of the appellant.

Reaffirmed and explained as to first paragraph in Mansfield v. Wilkerson, 26 Iowa 485, holding that a refusal to allow an amendment is proper, when the amendment asked is not necessary to the determination of the substantial rights of the party offering it.

Reaffirmed and explained as to first paragraph in Miller v. Perry and Townsend, 38 Iowa 303, 304, holding that although the right to amend is not absolute still, amendments are always allowable in furtherance of justice under a sound judicial discretion, and it is reversible error for the trial court to refuse to allow an amendment, where it operates as a denial of justice to a party.

Reaffirmed and extended as to first paragraph in Robinson v. Erickson, 25 Iowa 86, holding further that after a pleading which is a repetition of a former pleading, is filed by leave of court, it may be stricken upon motion.

Reaffirmed and extended as to first paragraph in Allen v. Bidwell, 35 Iowa, 88, holding further that an amended answer which is impro-

erly filed, may be stricken on motion; and that no notice of a motion to strike is necessary.

(Note.—There are many other decisions sustaining the rule of paragraph 1 of the text, and under the various revisions.—Ed.)

BRUCK *v.* BROESIGKS, 18 IOWA 393.

1. **Tax Sale of Land—Purchase by County Forbidden by Code of 1851—Power of County to Buy Land at Tax Sale.**—Under the Code of 1851, a county has no power to purchase land at a tax sale. A county cannot purchase land at a tax sale, unless authorized so to do by express statute, p. 395.

Reaffirmed and extended in Miller *v.* Gregg, 26 Iowa 76, 77, holding further that where land incumbered by a mortgage to the school fund and another mortgage to a third person, is sold for taxes, the county authorities have no power under the Code of 1860 or Chap. 148, Acts of 1862, to buy in such tax title, and thereby defeat or cut off the lien of the third person's mortgage.

DARRANCE *v.* PRESTON, 18 IOWA 396

1. **Courts—Jurisdiction—Actions—Service of Notice by Publication, or Personally Outside of State on Non-resident—Judgment**

In Rem.—Service of notice by publication, or by personal service outside of the state, upon a person who is not a resident or citizen of this state, confers no jurisdiction either as to the person or the property of such non-resident, on a court of this state; but when a court of this state has by its process of attachment or otherwise, seized or acquired jurisdiction *in rem* over property of a non-resident, it may perfect its jurisdiction as to the adjudication of the subject-matter by means of such kinds of service, p. 399.

Reaffirmed in Melhop & Kingman *v.* Doane & Co., 31 Iowa 400, 403, 7 Am. Rep. 147; Lutz *v.* Kelly, 47 Iowa 310; Mooney *v.* Union Pac. Ry. Co., 60 Iowa 348, 349, 14 N. W. 344.

Reaffirmed and extended in Harshberger *v.* Harshberger, 26 Iowa 506, holding further that in an action for divorce, a service of notice by publication authorizes the court to render judgment and make all proper orders as to alimony, custody of children and all other matters incident to the divorce, except that it confers jurisdiction as to judgments and orders *in rem*, but not power to render a judgment *in personam*.

Reaffirmed and extended in Hakes *v.* Shupe, 27 Iowa 468; Gary *v.* N. W. Mut. Aid Ass'n, 87 Iowa 28, 53 N. W. 1086; Griffith *v.* Milwaukee Harvester Co., 92 Iowa 639, 61 N. W. 245, 54 Am. St. Rep. 573; Richardson *v.* Richardson, 134 Iowa 245, 111 N. W. 935, holding further that a court can acquire no jurisdiction *in personam* by process served beyond the territorial limits of its jurisdiction upon a de-

fendant who is not a resident therein, and that a judgment rendered thereon is *void ab initio*.

Cited in Newman v. Bowers, 72 Iowa 467, 34 N. W. 213, an action *in rem* wherein the petition was in the name of "Levi Rike," and notice of publication and other proceedings were in the name of "Levi Pike," the court holding the decree therein to be void.

Unreported citation, 50 N. W. 28.

Cross reference. See further on this question, annotations under Weil v. Lowenthal (10 Iowa 575), Vol. I, p. 751.

2. New Trial After Term at Which Judgment Rendered—Proceedings.—A new trial may be granted after the term at which the verdict, report of referee or decision was rendered, for any of the causes set out in Sec. 3112 of the Code of 1860, if proceedings are had under and the facts bring the case within Sec. 3116 of that Code, and provided such application is made within a year after such verdict, etc., was rendered, pp. 400, 401.

Reaffirmed in Ch. & N. W. R. R. Co. v. Gillett, 38 Iowa 437.

3. New Trial—Error of Law not Excepted to.—An error of law occurring on the trial of a cause and not excepted to by the party complaining thereof at the time it was made, is not (under Sec. 3112 of the Code of 1860) a ground for a new trial, p. 402.

Reaffirmed and extended in Snyder v. Eldridge, 31 Iowa 130, 131, holding further that only rulings of the trial court excepted to at the time that they were made, assigned as errors, and insisted upon in argument by the party complaining, will be considered upon appeal.

Cross reference. See further on this question, annotations and cross references under Perkins v. Whittam (14 Iowa 596), ante. p. 292.

4. New Trial—Misconduct of Juror as Ground for.—Where after the jury has retired for deliberation one of the jurors makes false statements, not founded on the evidence, but based upon his supposed personal knowledge, as to matters discrediting one of the parties or one of more of his material witnesses, or as to other matters connected directly or remotely with the case, the parties or the witnesses, and tending to influence the jury against one of the parties, it will constitute such misconduct as will entitle the party prejudiced, to a new trial, upon a verdict being returned against him, pp. 402, 403.

Distinguished and partially overruled in Bryson, Adm'r, v. Ch. B. & Q. Ry. Co., 89 Iowa 685, 57 N. W. 433; Noble v. White, 103 Iowa 363, 72 N. W. 558, holding, as does the present case in argument, that affidavit of jurors are not receivable to impeach a verdict by showing the motives which influenced their decision, or that they were unduly influenced by their fellow jurors.

(Note.—See further, Fulliam v. City of Muscatine, 70 Iowa 436, 30 N. W. 861; Dunlavy v. Watson, 38 Iowa 398; Bingman v. Foster,

37 Iowa 339; Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, important cases qualifying and narrowing, but not citing the text.—Ed.).

Cross references. See further on this question, annotations under Rule 3 of Barton v. Holmes (16 Iowa 252), ante. p. 432; Rule 5 of Davenport v. Cummings (15 Iowa 219), ante. p. 327; Rule 1 of Shepherd v. Brenton (15 Iowa 84), ante. p. 308; Stewart v. B. & M. Riv. R. R. Co. (11 Iowa 62), Vol. I, p. 771.

5. New Trial—Newly Discovered Evidence as Ground—Diligence to Discover—Petition for New Trial—Averments.—An application, by petition, for a new trial on the ground of newly discovered evidence must set out facts constituting due diligence to discover it before the trial, so that the trial court may judge of the sufficiency thereof, p. 404.

Special cross reference. For cases citing, sustaining and explaining the text, see annotations under Carson v. Cross (14 Iowa 463), ante. p. 268; and see, also, note and cross reference there found.

AUTER v. MILLER, 18 IOWA 405

1. Statute of Frauds—Verbal Contract for Sale of Land—Payment of Consideration Taking Transaction Out of—Sufficiency of Evidence.—In order to take a verbal contract for the sale of land out of the Statute of Frauds by reason of the consideration having been paid to the vendor, it must appear that the consideration therefor was fully, finally and unconditionally paid and delivered to him. So, where notes of third persons payable to the order of a purchaser of land under a verbal contract, are delivered to the vendor in payment thereof, but the vendor agrees to so receive them when they are *indorsed* by the purchaser, which is not done, it does not take the contract out of the Statute of Frauds, pp. 408, 409.

Cited in Hobbs v. Brayton, 24 Iowa 599 (abstract—dissenting opinion) the majority court opinion turning on matters constituting estoppel, and the fact that a verbal contract in reference to land was proved by the party sought to be bound, and thus taken out of the Statute of Frauds.

2. Statute of Frauds—Verbal Contract for Sale of Land—Testimony of Defendant Taking Contract Out of Statute—Plaintiff cannot Contradict, etc.—Where in an action on, or for the specific performance of, a verbal contract for the sale of land, the plaintiff seeks to take the case out of the Statute of Frauds by the admission of testimony of the defendant (as provided by Sec. 4010 of the Code of 1860) he must establish the contract by the evidence of the defendant *alone*, and cannot contradict him, or supply any omissions in his testimony by other witnesses, pp. 410, 411.

Reaffirmed and explained in Smith v. Phelps, 32 Iowa 539, holding that a verbal executory contract for the sale of land is not within

the Statute of Frauds when, in an action thereon, it is proved by the party against whom it is sought to be enforced.

Reaffirmed and explained in Powell v. Crampton, 102 Iowa 365, 71 N. W. 579, holding that an oral agreement to lease land is not within the Statute of Frauds when, in an action for its specific performance, it is established by the testimony of the defendant *alone*.

Reaffirmed and explained in Marks v. McGookin, 127 Iowa 718, 104 N. W. 373, holding that where one party to an action seeks to take an oral contract for the sale of land out of the Statute of Frauds by the testimony of the adverse party, the latter's testimony must be sufficient of itself to have such effect.

(Note.—This last decision is under the Code of 1897.—Ed.)

Reaffirmed, extended and qualified in Mighell v. Dougherty, 86 Iowa 484, 485, 53 N. W. 403, 41 Am. St. Rep. 511, 17 L. R. A. 755, holding further that the rule applies under Sec. 3667 of the Code of 1873, to an action based on a sale of personal property within the Statute of Frauds—Secs. 3663 and 3664 of that Code,—except for the testimony of the defendant (person sought to be bound): Holding, however, that where in such case other evidence than that of defendant is introduced to establish the contract, and the court excludes it from the jury in his instructions, the error is cured.

Cited in Porter v. McKinzie, 20 Iowa 464, holding that in order—under Sec. 2742 of the Code of 1860—for an action on a contract to be saved from the bar of the statute of limitation, it must affirmatively appear from the evidence of the defendant *alone*, that the cause of action thereon still justly subsists.

Cross references. See further on this question, annotations under Rule 2 of Lyons v. Thompson (16 Iowa 62), ante. p. 407; Hunt v. Coe and Wells (15 Iowa 197), ante. p. 325.

3. Specific Performance—Discretion of Court of Equity As to Granting Relief.—In an action in equity for the specific performance of a contract for the sale of land, when an agreement is established, it rests within the sound discretion of the court to decree its specific performance, or to remit the plaintiff to his legal remedy, p. 412.

Reaffirmed and explained in Smith v. Shepherd, 36 Iowa 254; Parsons v. Gilbert, Hedge & Co., 45 Iowa 36; Zundelowitz v. Webster, 96 Iowa 490, 65 N. W. 836, holding that specific performance of a contract for the sale of land will not be decreed, when so to do would be inequitable.

Reaffirmed and qualified in Sweeney v. O'Hara, 43 Iowa 38, 39, holding that where an agreement in regard to an interest in realty has been partly performed, its terms are clearly defined and satisfactorily established, and it is not shown to be unconscionable or unreasonable, it must be specifically enforced in equity: Holding, also, that the discretion of the court in the matter of decreeing or refusing to decree specific performance of a contract in relation to land must not be arbitrarily

or capriciously exercised, but should be governed as far as may be, by general rules and principles.

Reaffirmed and qualified in Parsons v. Gilbert, Hedge & Co., 45 Iowa 36, holding that where the vendor at the time of a sale of land, is unable to convey a perfect title, but thereafter becomes able so to do, specific performance will not be decreed at his instance, if the purchaser has sustained actual and serious injury by reason of his inability to so convey at the time of sale: Holding, therefore, that where realty is bought for immediate use by the purchaser, and the vendor is unable to convey a perfect title, whereupon the purchaser buys other realty, that upon the vendor thereafter becoming able to so convey, he cannot obtain specific performance in equity.

(Note.—See further, University of Des Moines v. Polk County Homestead & Trust Co., 87 Iowa 36, 53 N. W. 1080; Clark v. Maurer, 77 Iowa 717, 42 N. W. 522; Palo Alto County v. Harrison, 68 Iowa 81, 26 N. W. 16; Thurston v. Arnold, 43 Iowa 43; Grimes v. Hamilton County, 37 Iowa 290; Richmond v. Dubuque R. R. Co., 33 Iowa 432; Harper v. Sexton, 22 Iowa 442; Rudolph v. Covell, 5 Iowa 525; Young v. Daniels, 2 Iowa 126, 63 Am. Dec. 477, important cases, sustaining, explaining and qualifying, but not citing the text.—Ed.)

HAVELICK v. HAVELICK, 18 IOWA 414

1. Wills—Contest of—Appeal from Order of Probate, or Contest by Action.—Under Sec. 2329 of the Code of 1860, an appeal may be taken by the contestants of a will from the order of the county court allowing or probating it, or they may after such action of the county court commence an original action, in the district, to set it aside, p. 415.

Reaffirmed and qualified in Gilruth v. Gilruth, 40 Iowa 348, 349, holding that where a will is contested in the circuit—formerly county—court, the contestants cannot (under the Code of 1873) demand a jury as a matter of right; and that the circuit court may, upon such a jury trial, set aside the special findings of fact, and admit the will to probate.—But see Leighton v. Orr, 44 Iowa 683, (reaffirming the text), holding that, under Sec. 2353 of the Code of 1873, an action in the district court to set aside a will procured by fraud or by undue influence, must be at law, and either party is entitled to a jury trial therein.

Cited in Waples v. Marsh, 19 Iowa 384, not in point, but upon an analogous question.

Distinguished and narrowed in Gregg v. Myatt, 78 Iowa 704, 705, 42 N. W. 462, holding—under Sec. 2353 of the Code of 1873—that when a party is personally served with notice of a proceeding to probate a will, and fails to appear and make contest therein, or when he appears therein and contests or waives contest of the will, he is thereby estopped from instituting an original action in the district court to set it aside.

(Note.—See further, *Smith v. Jones*, 74 Iowa 462, 38 N. W. 160; *In re Middleton*, 72 Iowa 424, 34 N. W. 193; *Otto v. Doty*, 61 Iowa 23, 15 N. W. 578, important cases sustaining and narrowing, but not citing the text.—Ed.)

2. Appeal—Verdict Against the Evidence—Evidence Conflicting—Affirmance.—Where upon an appeal to the Supreme Court, the record shows that the evidence below was conflicting, the judgment will not be reversed because the verdict was against the evidence, unless it was manifestly so, p. 416.

Reaffirmed in *Sisters of Visitation v. Glass*, 45 Iowa 157.

Reaffirmed and explained in *Conner & Co. v. Mountain*, 28 Iowa 593, holding that when the evidence is conflicting, and the trial court refuses to grant a new trial because the verdict is against the evidence, there must be a very strong and clear case to justify a reversal on such ground upon appeal.

Reaffirmed and extended in *Todd v. Branner*, 30 Iowa 440, holding that where the evidence was conflicting upon the trial, a judgment will not be reversed because the verdict was against the evidence, unless the Supreme Court is satisfied that it is unjust, and that the evidence was not sufficient to convince the judgments, reason and consciences of the jury.

Reaffirmed and extended in *Snyder v. Eldridge*, 31 Iowa 130, holding further that where the evidence on a trial was conflicting, and the trial court refuses to grant a new trial on the ground that the verdict was against the weight of the evidence, such ruling will be affirmed upon appeal.

Cross references. See further on this question, annotations and cross references under Rule 2 of *Brockman v. Berryhill* (16 Iowa 183), ante, p. 423; *State v. Tomlinson* (11 Iowa 401), Vol. I, p. 833.

LOOMIS v. HUDSON, 18 Iowa 416

1. Judgment Lien on Land—Prior Unrecorded Mortgage Superior to—Mistake in Description of Land in—Revivor of Mortgage Canceled by Fraud.—A prior unrecorded mortgage on land is superior to a judgment lien of a creditor of the mortgagor, although the mortgage contain a description of the land, as such mistake may be corrected in equity as against the mortgagor and such a judgment creditor.

A mortgage on land which is procured to be canceled by the fraud of the mortgagor will be revived in equity as against the mortgagor, and his subsequent judgment creditor, pp. 416, 417.

Special cross reference. For cases citing the text, and others on this question, see annotations under *Welton v. Tizzard* (15 Iowa 495), ante, p. 371.

Cross reference. See further, as to paragraph 2 of text, annotations under Rule 1 of *Vannice v. Bergen* (16 Iowa 555), ante, p. 472.

THOMPSON v. OLIVER, 18 IOWA 417

1. Promissory Note—Condition Precedent in—Effect.—Where a note is executed for a certain sum, the maker promising to pay it at a certain date, provided the payee does a certain act or completes a specified work at a specified date, it is unenforceable either by the payee or his assignee, without the condition precedent therein is performed within the time required therefor, p. 419.

Unreported citation, 60 N. W. 629.

Special cross reference. For other cases citing, narrowing, explaining and distinguishing the text, see annotations under B. & M. Riv. R. R. Co. v. Boestler (15 Iowa 555), ante. p. 383.

CADWALLADER & CO. v. BLAIR & VAN NOSTRAND, 18 IOWA 420

1. Appeal—Bill of Exceptions—Instructions or Charge of Court—How Brought for Review upon Appeal.—Where, upon the trial of a civil action by jury, the charge of the court and instructions given or refused are marked by the trial judge "given" or "refused" on the margin thereof, and the exception of a party is noted on the margin of the parts of the charge, or each of the instructions excepted to, it is sufficient—under Secs. 3054 and 3055 of the Code of 1860—to authorize a review upon appeal, although it is the better practice to embody or identify instructions "given" or "refused" and the charge of the court in a bill of exceptions, pp. 421, 422.

Reaffirmed in Phillips v. Starr & Co., 26 Iowa 352.

Reaffirmed in Wells, Adm'x v. B. C. R. & N. R. R. Co., 56 Iowa 523, 9 N. W. 365, under Sec. 2787 of the Code of 1873.

Cited in Kellaher v. City Keokuk, 60 Iowa 406, 15 N. W. 281, a case wherein the Supreme Court refused to review instructions in no manner shown by the record to have been excepted to below, as required by the Code of 1873.

MITCHELL v. GOFF, 18 IOWA 424

1. Appeal to District from County Court—Defective Appeal Bond—Amendment of.—Upon an appeal to the district court from an order or judgment of the county court, a defective appeal bond may—under Sec. 4119 of the Code of 1860—be amended and cured by leave of court, within a reasonable time after the defect is discovered when it will not, or upon such terms as will not, cause essential injury to the adverse party, p. 425.

Distinguished and narrowed in Minton v. Ozias, 115 Iowa 150, 151, 88 N. W. 337, holding that, under Sec. 4553 of the Code of 1897, an appeal from a justice's to a district court is not perfected so as to confer jurisdiction upon the latter, until an appeal bond substantially complying with the requirements of Sec. 4552 of that Code, is filed with and approved by the justice within twenty days from the rendition

of the judgment in the justice's court as provided by Sec. 4548 of that Code: Hence, holding that an appeal bond signed only by the defendants appealing from a judgment in a justice's court without other sureties thereon, confers no jurisdiction on the district court; and they will not be allowed to amend it, or file a new bond in the district court after the expiration of the twenty days, but the appeal will be dismissed.

Distinguished and narrowed in Sutton v. Bower & Perkins, 124 Iowa 59, 60, 99 N. W. 105, holding that where upon an appeal from a justice's to the district court, the appeal bond is given to secure another and entirely different person than the party to the action against whom the appeal is prosecuted [that is, the entirely different person is named as the obligee in the bond] the district court has no jurisdiction, and the party appealing will not, after the statutory period for taking an appeal has expired, be allowed to amend or to file a new bond in the district court, but the appeal will then be dismissed upon motion.—The court, however, says that "were the case one where there was no confusion in persons, but a mere mistake in the initial letters or Christian name of obligee, there could be no serious question of the right to amend."

(Note.—See further, Hudson v. Smith, 111 Iowa 411, 82 N. W. 943; Clark v. Riddle, 101 Iowa 270, 70 N. W. 207; Lynch v. Bruner, 99 Iowa 669, 68 N. W. 908; Bond v. Davis, 37 Iowa 163, important cases in this connection, not citing the text.—Ed.)

COLES v. IOWA STATE MUTUAL INSURANCE CO., 18 Iowa 425

1. Mutual Insurance Companies—Policy Holders are Members—Acceptance and Knowledge of Articles and By-laws by—Resolution or By-law Passed Subsequent to Issuance of Policy.—One who buys a policy of insurance in a mutual insurance company, becomes a member thereof and accepts and is charged with notice of its articles of incorporation and by-laws.—And a resolution or by-law passed by the board of directors of such company subsequent to the issuance of the policy and pursuant to the articles and by-laws allowing annulment for non-payment of assessments, providing that all policies on which the assessment of a certain date (named) is not paid on or before a certain date (named) shall be excluded and debarred, and shall lose all benefit and advantage of his, her or their insurance, insurances respectively for and during the term of such default and non-payment; and notwithstanding, shall be liable and obliged to pay all assessment that shall be made during the continuance of his, her or their policies of insurance, in accordance with the provisions of the articles of incorporation, is binding upon all policy holders in default, after due notice of such resolution at the time named therein, pp. 428, 431, 432.

Reaffirmed and extended in Greely v. Iowa State Ins. Co., 50 Iowa 91, holding further that when the articles of incorporation or the by-

laws of a mutual insurance company authorizes the board of directors to sue for and recover the whole amount of the premium note or notes, and at their option annul a policy of insurance upon the policy holder refusing or neglecting to pay an assessment for thirty days after notice thereof is forwarded to him by mail or otherwise, that such a policy may be forfeited for such refusal or neglect for thirty days after such notice which is duly mailed, should have reached the post office of such delinquent policy holder, according to the ordinary course of the mail.

Reaffirmed and narrowed in *Supple v. Iowa State Ins. Co.*, 58 Iowa 31, 11 N. W. 716, holding that default in payment of assessments by a policy holder in a mutual insurance company having the option to cancel therefor, does not *ipso facto* annul the policy: The company must act by its board of directors as authorized by its articles of incorporation in relation thereto, and the policy holder must have notice of such cancellation or termination of his contract.

Unreported citation, 60 N. W. 238.

Special cross reference. For further cases citing the text and many others on the question, see annotations under Rule 1 of *Simeral v. Dubuque Mut. F. Ins. Co.*, (18 Iowa 319), ante. p. 638.

STATE v. OSTRANDER, 18 IOWA 435

1. Grand Jury—Number Required to Concur In and Return Indictment.—Under the Common Law an indictment may be found and returned by twelve grand jurors, although the grand jury consists of more than twelve and not exceeding twenty-three members; and the same rule applies under the Code of 1860, which requires such jury to be composed of fifteen members. Hence, where an accused person held to answer, challenges one of the grand jury of fifteen, it is proper for the court to direct him to retire from the grand jury room and take no part in the jury's determination of the offense of which the accused stands charged, instead of dismissing such challenged person from the jury: And an indictment returned by the other fourteen jurors, against accused, is good, pp. 442, 443.

Cited in *State v. Salts*, 77 Iowa 197, 39 N. W. 620; *State v. Belvel*, 89 Iowa 412, 56 N. W. 548, 27 L. R. A. 846, upholding the constitutionality (under the amendment of the Constitution adopted in 1884) of Chap. 42, Acts of the Twenty-first General Assembly requiring grand juries to be composed of five members in counties of a certain population, and seven members in counties of a certain population, and allowing an indictment to be returned which is concurred in by four of the jury of five or five of the jury of seven. —The last case holding that when a grand jury is composed of five, when it should be composed of seven, or *vice versa*, that an indictment returned by it is good, when the accused does not object thereto on such ground before pleading to it.

2. Grand Jury—Power of Court to Keep Panel Full.—The district court has power to discharge members of the grand jury for intoxication or other misconduct, and to have the panel filled thereafter from persons summoned for the purpose, pp. 441, 445.

Reaffirmed and extended in State v. Garhart, 35 Iowa 317, holding further that the court may order the sheriff to fill up the panel by summoning a sufficient number of qualified persons, whenever the grand jury, for any cause, is reduced to below the statutory number, either upon first appearance, or afterward.

Cross reference. See further, annotations and cross references under State v. Mooney (10 Iowa 506), Vol. I, p. 737.

3. Grand Jury—Challenge by Accused Held to Answer—Waiver of Objection to Indictment by Such Person.—A defendant who is held to answer must object to any irregularities in the organization or the impaneling of the grand jury at the time it is impaneled and sworn, or he cannot (under Secs. 4691 and 4693 of the Code of 1860) object to an indictment because such jury was not selected, drawn, summoned, impaneled, or sworn as prescribed by law, p. 446.

Reaffirmed and extended in State v. Reid, 20 Iowa 424, holding further that an objection that the court illegally reconvened the grand jury which thereafter returned the indictment against the accused, should, at the latest, be made before pleading to the indictment.

Cited in State v. Kaufman, 51 Iowa 579, 2 N. W. 275, 33 Am. Rep. 148, the case holding that an accused person may waive a statute or even a constitutional provision in his favor; and that he may, therefore, agree to a trial by a jury of less than twelve.—But see State v. Carman, 63 Iowa 133, 18 N. W. 692, 50 Am. Rep. 741, (dissenting opinion citing the text) the majority court holding that an accused person cannot waive his constitutional and statutory right to a jury trial and consent to being tried by the court (under Sec. 4350 of the Code of 1873).

Cross reference. See Rule 2 hereof, and cross reference there found.

4. Change of Venue in Criminal Case—Discretion of Trial Court—Abuse—Appeal—Reversal.—Under Sec. 4733 of the Code of 1860, the district court is vested with a sound judicial discretion in passing upon a motion for a change of venue in a criminal case, and is to decide thereon according to the very right of it; and his ruling thereon will not be ground for reversal, except in case of manifest abuse of such discretion, pp. 447, 448.

Reaffirmed in State v. Beck, 73 Iowa 617, 35 N. W. 684, under the Code of 1873.

Special cross reference. For further cases citing and sustaining the text, and many others, see annotations under Rule 1 of State v. Arnold (12 Iowa 479), ante. p. 80.

5. Appeal—Rulings not Excepted to At Time Made not Reviewed.—Upon an appeal to the Supreme Court, rulings of the trial court which were not excepted to at the time they were made, will not be reviewed, p. 451.

Reaffirmed in Eason v. Gester, 31 Iowa 475, 476.

Cross reference. See further on this question, annotations and cross references under Rule 5 of Davenport Sav. Fund Ass'n v. North American F. Ins. Co. (16 Iowa 74), ante. p. 409.

6. Trial—Jurors—Bias—Challenge.—A challenge to a juror in a criminal case is properly disallowed, where he states that he has not formed an unqualified opinion as to the guilt or innocence of the accused; that if what he has heard should be proved, he has an opinion made up, but that he thinks that he has no prejudice or bias such as will prevent him from hearing the evidence, and giving a verdict in accordance with the law and the testimony. In order for a juror in a criminal case to be disqualified on account of bias, it must appear that he has formed or expressed an unqualified opinion or belief as to the guilt or innocence of the accused, p. 451.

Reaffirmed in State v. Lawrence, 38 Iowa 55.

Reaffirmed and explained in State v. Crofford, 121 Iowa 399, 96 N. W. 891; State v. Ralston, 139 Iowa 49, 116 N. W. 1060, holding that where a juror, in a criminal case, says that if the evidence should turn out as he has heard it, or read it, that he would have an opinion, that such statement is insufficient to sustain a challenge for bias.

(Note.—See further, State v. John, 124 Iowa 237, 100 N. W. 196; State v. George, 62 Iowa 682, 18 N. W. 298; State v. Bryan, 40 Iowa 379; State v. Sater, 8 Iowa 420; State v. Thompson, 9 Iowa 188, 74 Am. Dec. 342, important cases on this question, not citing the text.—Ed.)

7. Appeal—Presumption of Regularity in Proceedings Below.—Unless the record affirmatively shows the contrary it will be presumed upon appeal that the proceedings in the trial court were regular and according to law, p. 452.

Reaffirmed in State v. Gibbs, 39 Iowa 320; State v. Ralston, 139 Iowa 51, 116 N. W. 1061.

8. Indictment—Indorsement of Name of Witness on—Mistake in Name—Sufficiency of Indorsement.—Where the name of a witness indorsed on an indictment is misspelled thereon, but it does not appear that the accused was misled or prejudiced by the mistake, it is sufficient to authorize the introduction of the witness upon the trial. So, where "Lovinia Umpstead" was indorsed as a witness on an indictment, it authorized the introduction of "Lovinia Olmstead" as a witness, the accused not showing that he was thereby misled, p. 453.

Reaffirmed and extended in State v. Mathews, 133 Iowa 400, 401, 109 N. W. 618, holding further that the rule applies to a mistake in

the name of a witness in a notice to the accused for the purpose of introducing a person as a witness whose name is not indorsed on the indictment.

Special cross reference. For further cases citing the text, and many others, see annotations under Rule 4 of State v. McComb (18 Iowa 43), ante. p. 581.

9. Indictment—Evidence—Witnesses—Minutes of Testimony Before Grand Jury to Contradict Witness.—Before a witness who testifies upon the trial of an indictment may be contradicted by the minutes of his testimony before the grand jury, he must be given an opportunity, while on the witness stand, to deny their correctness, or that he made them, p. 456.

Cited in State v. Hull, 26 Iowa 297, the case turning upon other questions.

Overruled in State v. Hayden, 45 Iowa 13-15, holding that the minutes of an examining trial, or of the grand jury are inadmissible to contradict or impeach a witness: But contradictory statements, the proper ground being laid therefor, may be proved by a grand juror or by an examining magistrate.

10. Criminal Law—Trial of Indictment—Witnesses Before Grand Jury—Evidence.—Upon the trial of an indictment the witnesses who were before the grand jury are not confined to their evidence as shown by the minutes returned with the indictment, but may testify to any other competent facts bearing upon the guilt or innocence of accused, p. 456.

Special cross reference. For cases citing the text, and others on the question, see annotations under Rule 2 of State v. Bowers (17 Iowa 46), ante. p. 490.

11. Criminal Law—Use of Deadly Weapon for Attack upon Another—Criminal Intent Presumed from.—A criminal intent is presumed to exist where a person uses a deadly weapon to attack another, p. 457.

Reaffirmed and extended in State v. Hayden, 131 Iowa 8, 107 N. W. 931, holding further that where a person assaults another with a deadly weapon, malice will be thereby presumed, in the absence of direct or implied proof to the contrary.

12. Criminal Law—Accused to be Proved Guilty Beyond Reasonable Doubt—"Reasonable Doubt" defined—Instruction as to, not Error.—Upon the trial of a criminal offense the accused must be proved guilty beyond a reasonable doubt. The reasonable doubt to entitle accused to an acquittal must be real, not captious or imaginary; it must not be a forced or artificial one, but must fairly and naturally arise in the mind after a comparison of the whole evidence and a deliberate consideration of the entire case. If, upon such consideration and comparison, the minds and consciences of the jurors are not abid-

ingly and firmly satisfied of the guilt of accused, and moral certainty thereof is not produced, but the judgment waivers and oscillates, it is the duty of the jury to acquit. If, however, the whole evidence, when taken together, produces such a conviction on the minds of the jury of the guilt of the prisoner, as they would act upon in a matter of the highest importance to themselves, it is their duty to convict. An instruction to the jury upon the trial of a criminal offense embodying the above definition, is not error, pp. 458, 459.

Reaffirmed in State v. Seymour, 94 Iowa 709, 63 N. W. 664; State v. Phillips, 118 Iowa 675, 92 N. W. 876; State v. Hunter, 118 Iowa 693, 92 N. W. 881; State v. Willing, 129 Iowa 73, 105 N. W. 356.

Reaffirmed in State v. Cohen, 108 Iowa 214, 78 N. W. 858, 75 Am. St. Rep. 213, holding the following instruction to be reversible error, to wit:—"By a reasonable doubt as herein instructed, is meant a doubt such as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. *A reasonable doubt is such a doubt as the jury are able to give a reason for.*"

Reaffirmed and explained in State v. Schaffer, 74 Iowa 705, 706, 39 N. W. 89, holding that the following instruction is proper upon the trial of a criminal case, to-wit:—"A reasonable doubt is one which fairly and naturally arises in the mind after considering all of the evidence and carefully examining the whole case. If, you are then not so satisfied and convinced of defendant's guilt that you would act upon that conviction in matters of the highest importance to yourselves, you should give the defendant the benefit of your doubt, and acquit; if you are so satisfied, you should convict him."

Reaffirmed and qualified in State v. Felter, 32 Iowa 53, 54, holding that the reasonable doubt is limited to the general conclusion of the jury upon *all the evidence*: Holding further that where accused pleads insanity as a defense, he must establish it by a preponderance of the evidence, or, which is the same thing, satisfactory evidence thereof.

Reaffirmed and narrowed in State v. Hardin and Henry, 46 Iowa 630, 26 Am. Rep. 174, holding that where an accused person interposes an *alibi* as a defense, he need only, in order to be entitled to an acquittal, to prove it from a preponderance of the evidence, or enough to outweigh the evidence tending to establish the opposite hypothesis, and that an instruction, in such case, requiring the jury to be *fully satisfied* that accused was at another place at the time of the commission of the offense, is reversible error.

Reaffirmed and narrowed in State v. Marshall, 105 Iowa 45, 74 N. W. 766, holding that where the evidence is circumstantial upon which the state seeks to convict a person of a crime or offense, it must

be incapable of any other reasonable conclusion or hypothesis except that of the guilt of the accused; and that an instruction in such case embodying this idea is proper.—But see *State v. Maxwell*, 42 Iowa 212 (reaffirming and explaining the text) holding that the rule that where a conviction is sought upon circumstantial evidence the proof must be incapable of any other rational conclusion except that of the guilt of accused, does not apply when the act constituting the crime or offense is proved by direct evidence, and the *intent* of accused is proved by circumstantial evidence.

(Note.—See further, *State v. Elsham*, 70 Iowa 531, 31 N. W. 66; *State v. Pierce*, 65 Iowa 85, 21 N. W. 195; *State v. Nash & Redout*, 7 Iowa 347, important cases on this question, not citing the text.—Ed.)

BARNEY v. MILLER, 18 IOWA 460.

(Case arising out of some transaction, 22 Iowa 163.)

1. Deeds—General and Particular Description of Land in—Which Governs—When They are Construed Together.—Where a deed to land contains a general description thereof and it is definite and certain of itself, a following particular description in the deed will not limit or restrict the grant which is clear and unambiguous by the general description: But where such general description is indefinite and uncertain, and reference to the particular description must be had in order to ascertain with certainty the subject of the grant, the whole language will be taken together, and, though it may be ambiguous or even contradictory, if, upon the whole instrument there is sufficient to manifest the intention of the parties it is sufficient, pp. 466, 467.

Reaffirmed in Barney v. Ivins, 22 Iowa 164, 165.

Reaffirmed and extended in Lewis v. Sherwin Bros., 129 Iowa 685, 104 N. W. 512, holding that an ambiguity or uncertainty as to the depth of a lot devised and described by number, foot frontage and foot depth, may be rendered certain by extrinsic parol evidence, and by the map of the city wherein the devised land is located.

Cited in Albia State Bank v. Smith, 141 Iowa 261, 119 N. W. 610, holding that where a description in a recorded mortgage on land is such as to point out the tract intended to be mortgaged by application to the existing facts and conditions which are ascertainable upon reasonable inquiry, it is sufficient to constitute constructive notice of the mortgage on such land.

Cited in Hunter v. City of Des Moines, 144 Iowa 545, 546, 123 N. W. 217, holding that where a plat and decree thereon extends the street of a city through a named and described tract of land to a named avenue immediately north thereof, and gives the width of the extended street, it is sufficient, and means that the street is extended the specified width due north to the given avenue.

MUSCATINE TURN VEREIN v. FUNCK, 18 IOWA 469

1. Private Corporations—Resignation of All Officers and Agents Does not Dissolve.—The resignation of the officers and agents of a corporation does not dissolve it; it still retains its corporate existence and powers, although its functions are suspended until new officers and agents are elected or appointed as allowed by its charter, p. 472.

Reaffirmed and extended in Swartley v. Oak Leaf Creamery Co., 135 Iowa 579, 580, 113 N. W. 498, holding further that where a corporation has ceased to elect officers and to transact business, its property in the possession of one of its stockholders may be subjected to the satisfaction of its debts: That such stockholder holds such property in trust for the creditors of the corporation.

Cross reference. See Rule 2 hereof.

2. Private Corporations—Dissolution—Power to Wind up Affairs—Rights of Creditors.—Where a corporation is dissolved by the voluntary act of its stockholders, by the expiration of its charter, or by a decree of forfeiture it still has power, under our statute—Sec. 1171 of the Code of 1860—to act for the purpose of winding up its affairs; and such dissolution does not affect the right of its creditor to be relieved, at least in equity, from the inevitable consequences thereof, p. 472.

Reaffirmed and explained in Muscatine Western R. R. Co. v. Horton, 38 Iowa 45, holding that under Sec. 1171 of the Code of 1860, a corporation dissolved by expiration of its charter, or by the voluntary act of its stockholders, is thereafter kept alive for the purpose of discharging its contracts, disposing of its property, and doing all things necessary to wind up its affairs.—And see *State v. Fogarty*, 105 Iowa 36, 74 N. W. 755; *Commercial Nat'l Bank v. Gilinsky*, 142 Iowa 183, 120 N. W. 478, (reaffirming the text) and holding this proposition under Sec. 1629 of the Code of 1897.

Reaffirmed and explained in Dillon et al. v. Lee et al., 110 Iowa 163, 81 N. W. 247, holding that a corporation until finally dissolved and its affairs settled, has the right (under Sec. 1629 of the Code of 1897) to bring suit to enforce its claims.

Reaffirmed and extended in Commercial Nat'l Bank v. Gilinsky, 142 Iowa 183, 184, 120 N. W. 478, holding further that after a corporation is dissolved by expiration of its charter, by forfeiture thereof, or by voluntary act of its stockholders, then (under Sec. 1629 of the Code of 1897) any debts thereafter contracted by any of its officers, agents or stockholders, except such as are necessary for the winding up of its affairs, are unenforceable against it; but the persons so contracting are individually liable therefor.

3. Judgment by Default in District Court—Insufficient Service of Notice—Presumption on Appeal in Action to Set Aside—When

Judgment Void.—Upon an appeal from a judgment in an action to set aside a judgment by default rendered by the district court, the Supreme Court will presume, unless the contrary be shown by the record, that the district court, before rendering the default judgment passed upon the sufficiency of the service of the notice in the action; and such judgment will not be *void*, unless such service amounted to *no notice*, pp. 472, 473.

Reaffirmed and varied in Clark v. Little, 41 Iowa 500, holding that where a judgment entered on a defective return is sought to be enforced in another action, the defense that the defendant was never legally served with notice and that the court rendering the judgment had no jurisdiction, is available.

Cross reference. See further on this question, annotations and cross references under Boker v. Chapline (12 Iowa 204), ante. p. 33.

STEIN v. CHAMBLESS & BANFORD, 18 IOWA 474, 87 AM. DEC. 411

(Case arising out of this case, 24 Iowa 595.)

1. Executions—Levy before Return Day—Sale After—Procedure.—Where, before the return day of an execution, the sheriff makes a levy thereunder, he may sell the property levied on thereunder after the return day: This should be done by the officer under a writ of *venditioni exponas*, but the fact that the sale is made under an alias execution will not render it invalid, p. 476.

Reaffirmed in Childs v. McChesney, 20 Iowa 438, 89 Am. Dec. 445; Butterfield v. Walsh, 21 Iowa 101, 89 Am. Dec. 557; Thorington v. Allen, 21 Iowa 292; Moomey v. Maas, 21 Iowa 386, 92 Am. Dec. 395.

Reaffirmed and explained in Walton v. Wray, 54 Iowa 533, 6 N. W. 743, holding that where a levy is made under an execution before the return day thereof, it is a sufficient authority for a sale of the property levied on after such day; and that the rule applies equally to executions issued from a court of record, or from a justice's court.

Reaffirmed and extended in Cox v. Currier, sheriff, 62 Iowa 554, 555, 17 N. W. 769, holding further that (under the Code of 1873) when a sheriff levies upon property under an execution before the return day thereof, he may exhaust the property under that execution, no matter what time expires between the levy and the sale.

BOMBEGER, WRIGHT & CO. v. GRIENER, 18 IOWA 477

1. Sales of Personal Property—Absolute and Conditional Warranty—Buyer Failing to Comply with Conditions.—The seller, in a sale of personal property, may make a warranty of the quality of the article sold, absolute or conditional; and if the warranty is conditional the buyer before he can sue for breach thereof, must comply with the conditions.

So, where in the sale of a reaping machine the seller warrants its quality upon the condition that if it fails to meet the warranty the buyer is to return the machine to the seller's agent at a designated place, upon the machine failing to comply with the warranty the buyer must return the machine according to conditions, or tender its return and have it refused, before he can sue for breach of the warranty. Where the contract expressly so provides, the conditions cannot be waived by an agent of the seller; pp. 480, 481.

Reaffirmed in Gammar & Prindle v. Borgain, 17 Iowa 372.

Reaffirmed and explained in McCormick Bros. v. Dunville, 36 Iowa 650, holding that where the warranty does not require a redelivery of the personal property warranted, the purchaser may sue for breach of warranty without tendering it back to the seller.

Reaffirmed and explained in Westbrook v. Reeves & Co., 133 Iowa 661, 111 N. W. 13, holding that a warranty may be upon conditions, and may, also, prescribe remedies and the performance of obligations by the buyer before he may recover for breach thereof.

Reaffirmed and extended as to first paragraph in Aultman, Miller & Co. v. Theirer, 34 Iowa 275, holding further that upon a breach of a warranty which is absolute and unconditional, the buyer may return the warranted article and recover the price paid, or he may retain it and recover of the seller the damages resulting from the breach.

Reaffirmed and extended in Zimmerman v. Robinson & Co., 118 Iowa 119, 120, 91 N. W. 919, a case involving the questions of the sufficiency of the compliance with the conditions of a warranty by the buyer of personalty, and what is insufficient to constitute a waiver of such conditions by the seller.

Reaffirmed and qualified in Padden v. Marsh, 34 Iowa 523, 524, holding that where defendant executed a written warranty of a harvester machine, by the terms whereof if the machine did not comply therewith, the plaintiff was to deliver it to the defendant at a certain place, and upon its failing to so comply, the plaintiff offered to so deliver and defendant told him that he would not receive it, that such delivery was waived, and plaintiff could recover for the breach of warranty without so doing.

(Note.—See further, Berkey v. Leffebure, 125 Iowa 76, 99 N. W. 710; Massilon Co. v. Shirmer, 122 Iowa 699, 98 N. W. 504; Faville v. Lundvall, 106 Iowa 135, 76 N. W. 512; McCormick Co. v. Brower, 88 Iowa 607, 55 N. W. 537; Russell v. Murdock, 79 Iowa 101, 44 N. W. 237, 18 Am. St. Rep. 348; Nichols v. Wyman, 71 Iowa 160, 32 N. W. 258; Hall v. Aetna Mfg. Co., 30 Iowa 215; Hamel v. Tower, 14 Iowa 530; Williams v. Donaldson, 8 Iowa 108; Attix, Noyes & Co. v. Pelan & Anderson, 5 Iowa 337; Buford v. Funk, 4 G. Greene, 493, some important cases on and intimately connected with this question, not citing the text.—Ed.)

CARLETON v. BYINGTON, 18 IOWA 482

(Former Appeal, 17 Iowa 579; Later Appeal, 24 Iowa 172.)

1. Appeal—Review of Errors in Admission or Exclusion of Evidence Below—Objection and Ground of, and Exception Below.—Under Sec. 3107 of the Code of 1860, an error in the admission or the exclusion of evidence, either oral or written, by the trial court will not be reviewed upon appeal, unless the record thereon shows that it was objected to, the grounds of the objection was stated, and its admission or exclusion was duly excepted to below; and where the record shows such facts, such question will only be reviewed upon the objection made below, p. 483.

Reaffirmed and explained in Williams v. Meeker, 29 Iowa 293; Snyder v. Nelson, 31 Iowa 240, holding that unless the bill of exceptions states the grounds of objection to evidence, the lower court's ruling thereon will not be reviewed by the Supreme Court.

Reaffirmed and qualified in Clark v. Connor, 28 Iowa 314, holding that where the party appealing to the Supreme Court, has made a general objection to the admission of evidence which was overruled, and the record fails to show the ground of such objection, the trial court's ruling thereon will not be reviewed; but where the successful party makes a general objection to the admission of evidence below, which is sustained by the trial court, then if the unsuccessful party shows upon appeal that there is no legal or possible ground upon which the trial court's ruling thereon can be sustained, he is entitled to a reversal of the judgment therefor.

HARRISON v. MCKIM, 18 IOWA 485

1. Negotiable Promissory Note—Indorsement in Blank—Oral Evidence of Agreement of Indorsement.—In an action by the indorsee of a negotiable promissory note against the blank indorser thereof, the defendant may prove by parol, the actual agreement under which it was indorsed, thus relieving himself from liability (as that it was indorsed without recourse on him, etc.), pp. 486, 489, 491.

Reaffirmed in Truman v. Bishop, 83 Iowa 700, 50 N. W. 279; First Nat'l Bank v. Crabtree, 86 Iowa 734, 52 N. W. 561.

Reaffirmed and explained in Farmers' Sav. Bank v. Hansmann, 114 Iowa 51, 52, 86 N. W. 32, holding that a blank indorser of a negotiable promissory note, and one who transfers it by writing his name on the back thereof, may, when sued thereon by the indorsee, prove by parol that such indorsement was without consideration.

Reaffirmed and extended in James v. Smith, 30 Iowa 56, holding further that in an action by the indorsee of a negotiable promissory note against the blank indorser thereof, the plaintiff may show by parol evidence, the actual contract of indorsement.

Reaffirmed and extended in Preston v. Gould, 64 Iowa 47, 48, 19 N. W. 835, 52 Am. Rep. 431, holding further that in an action by one blank indorser against another blank indorser of a negotiable promissory note, the plaintiff may plead, and prove by parol, that he was in fact a surety for the defendant; and may recover the amount of the note he was forced to pay to the indorsee.

Reaffirmed and qualified in Skinner v. Church, 36 Iowa 92, holding that the blank indorser of a negotiable promissory note can make parol proof of the actual contract under which it was indorsed which relieves him from liability thereon, only against his blank indorsee, or another person charged with notice thereof; and cannot prove such contract against a subsequent innocent holder, or indorsee thereof, the law fixing the blank indorser's liability to this latter person.

Reaffirmed and narrowed in Geneser v. Wissner, 69 Iowa 120, 121, 28 N. W. 472, holding that in an action by the indorsee of a negotiable promissory note against his blank indorser, the defendant (indorser) may show by parol, that the contract of indorsement was other than that implied by law, but he cannot thereby show that no contract of any description was entered into or intended by the indorsement: That a blank indorsement of such a note implies the contract given to it by law, in the absence of proof of a different one.

Cited in Cheshire v. Taylor, 29 Iowa 494, the court declining to determine the question, and the case turning upon another point.

Distinguished and narrowed in American Emigrant Co. v. Clark, 47 Iowa 674, 675, holding that the rule is inapplicable to an agreement between the drawer and payee of commercial paper.

Distinguished and narrowed in Evans v. Burns, 67 Iowa 181, 25 N. W. 120, holding that the rule is inapplicable to the written assignment of a writing or other contract which contains or purports to contain, a complete expression of the contract of assignment: That parol evidence is inadmissible to put a meaning upon a written assignment which is contrary to its express terms.

Distinguished and narrowed in Iowa Valley State Bank v. Sigstad, 96 Iowa 499, 500, 65 N. W. 409; Farmers' Sav. Bank v. Wilka, 102 Iowa 318, 71 N. W. 200, holding that the rule does not apply in the case of a full indorsement—not in blank—of a negotiable promissory note, and that such an indorsement is governed by the rule that parol evidence is inadmissible to contradict or vary the terms of a written contract: Holding further that where a payee of a negotiable promissory note indorses it in blank, he is bound thereon according to the terms and conditions of the note, and the rule is inapplicable to him, where the note fixes conditions under which parties, indorsers and guarantors, are liable.

RUBLE v. McDONALD, 18 IOWA 493

1. Assignment for Benefit of Creditors—Fraud Vitiates—Participation in by Assignee, Immaterial.—An assignment for the benefit of creditors may be set aside for fraud; and in such case the question of whether or not the assignee participated in or had knowledge thereof, is immaterial, p. 497.

Reaffirmed in Lampson & Powers v. Arnold, 19 Iowa 491.

2. Appeal—Instructions to be Considered Together Upon.—In arriving at whether or not the trial court committed error in giving or refusing instructions to the jury, the Supreme Court will consider all the instructions together, pp. 497, 498.

Reaffirmed and explained in Brown v. Bridges, 31 Iowa 143, holding that if upon appeal it appears that the instructions given by the trial court, when considered together, do not contain a correct exposition of the law, or that they are conflicting or tended to mislead the jury, to the prejudice of the party appealing and complaining, the judgment will be reversed.

TAPPAN v. MORSEMAN, 18 IOWA 499

1. Principal and Agent—Payment of Note or Other Written Security to—Duties of Debtor.—Where a debtor pays or settles a note or other written security to or with a person as the agent of his creditor, he must see that the person paid or settled with is in possession of the writing at the time of the transaction, or he must show that such person had special authority for such purpose, or had been represented by the creditor as having such authority, upon which he (the debtor) acted, or he will not be discharged by such transaction, pp. 502, 503.

Reaffirmed in Security Company v. Graybeal, 85 Iowa 549, 550, 52 N. W. 499, 39 Am. St. Rep. 311.

Reaffirmed and extended in Baumgartner v. Peterson, 83 Iowa 575, 62 N. W. 27, holding that one who makes payments on a negotiable note without the production of the note, does so at his peril—And to the same effect is, Security Company v. Graybeal, 85 Iowa 549, 52 N. W. 499, 39 Am. St. Rep. 311, reaffirming the text.

Reaffirmed and qualified in Wolford v. Young, 105 Iowa 515, 75 N. W. 350; Townsend v. Studer, 109 Iowa 110, 80 N. W. 212, a case wherein a special authority to collect, to the person to whom payments were made, was shown to have been conferred by the creditor.

(Note.—See further, Englert v. White, 92 Iowa 97, 60 N. W. 224; Security Co. v. Kent, 83 Iowa 31, 48 N. W. 1047; Hippee v. Bond, 77 Iowa 235, 42 N. W. 192; Artley v. Morrison, 73 Iowa 132, 34 N. W. 779; Callanan v. Williams, 71 Iowa 363, 32 N. W. 383; Brayley v. Ellis, 71 Iowa 156, 32 N. W. 254; Sax v. Drake, 69 Iowa

760, 28 N. W. 423; *Draper v. Rice*, 56 Iowa 114, 7 N. W. 524, 41 Am. Rep. 88; *Fisher v. Lodge*, 50 Iowa 459, important cases in this connection, not citing the text.—Ed.)

TRUCKS *v.* LINDSEY, 18 IOWA 504.

1. Deed Absolute on Face in Fact a Mortgage—Parol Evidence.—A deed which is absolute on its face may be shown by extrinsic or even by parol evidence to be in fact only a mortgage, pp. 504, 505.

Reaffirmed in *Robertson v. Moline, Milburn & Stoddard Co.*, 88 Iowa 466, 55 N. W. 496; *Laub v. Romans*, 131 Iowa 431, 105 N. W. 102.

Reaffirmed and explained in *Wilson v. Patrick*, 34 Iowa 370, holding that when it is to be determined whether a sale and conveyance be absolute, or only intended as security, the fact that the consideration is grossly inadequate is a strong circumstance, though not conclusive, in support of the claim, that the deed was intended to operate as a mortgage: Holding further—as does the present case in argument—that the fact that the grantee in a deed remained in possession of the lands, is a fact to be taken into consideration in determining whether the deed was absolute or intended as a mortgage.

Reaffirmed, explained and extended in *Green v. Turner*, 38 Iowa 115, holding that parol evidence is admissible to prove that a deed absolute on its face was intended as a security for debt: That where a transaction in relation to land is presented by writings as a conditional sale or contract for re-purchase, still the true intention of the parties may be shown by parol, and from all the facts and circumstances surrounding the transaction.

Reaffirmed, explained and extended in *Crawford v. Taylor, Richards & Burden*, 42 Iowa 263, holding further that any deed or contract to or in relation to land which is made to secure a loan of money is, in equity, a mortgage; and the redemption right attaches to it in favor of the debtor.

Reaffirmed and extended in *Caruthers, Adm'r v. Hunt*, 18 Iowa 579 (abstract), holding further that the fact that a title bond or agreement to convey back upon the payment in a certain time of the consideration in a deed absolute on its face, is simultaneously executed by the grantee to the grantor therein, stamps the deed as a mortgage.

Reaffirmed and varied in *McElroy, receiver v. Allfree, Adm'r*, 131 Iowa 115, 116, 108 N. W. 116, 117 Am. St. Rep. 412, holding that a resulting trust may be established by parol evidence.

Reaffirmed and qualified in *Langer v. Meserve*, 80 Iowa 159, 160, 45 N. W. 732; *Baird v. Reininghaus*, 87 Iowa 169, 54 N. W. 148, holding that when it is sought to show by parol that a deed which is

absolute on its face is in fact a mortgage, as that it was given to secure a loan, the proof thereof must be clear and satisfactory.

Cross reference. See other Rules hereof.

2. Conditional Sale of Land—What Is.—A sale of land with a reservation to the vendor of a right to re-purchase the land within a given time, at an agreed price, is a conditional sale, and, if not resorted to as a device to cover a transaction in fact a mortgage, and to thereby defeat the rights of the mortgagor, will be upheld as a conditional sale, p. 505.

Reaffirmed and explained in Baird v. Reininghaus, 87 Iowa 169, 54 N. W. 148, holding that where by a deed or other instrument conveying or selling land, between a debtor (grantor) and his creditor (grantee), it appears that the debt was extinguished, and the grantor, previous debtor, is invested with the right to re-purchase by a given time and upon the payment of a certain sum, whether the amount be the original debt, with interest, or some other sum, the transaction is a conditional sale.—And this is the rule where such facts are otherwise proved.

Reaffirmed and explained in Bigler v. Jack, 114 Iowa 674-676, 87 N. W. 702, 703, holding that parties may make a contract selling land, with a reservation to the vendor to re-purchase within a given time at an agreed price; that such a contract is a conditional sale, and not a mortgage, and the rights of the vendor are limited by the terms thereof: That the question of whether or not a contract for the sale of land is a conditional sale or is a deed with a defeasance constituting a mortgage, is one of fact and of intention, to be determined from the language of the contract and the circumstances surrounding the transaction.

Reaffirmed and qualified in Green v. Turner, 38 Iowa 115, holding that parol evidence is admissible to prove that a deed absolute on its face was intended as a security for debt: That where a transaction in relation to land is presented by writings as a conditional sale or contract for re-purchase, still the true intention of the parties may be shown by parol, and from all the facts and circumstances surrounding the transaction.

Cross reference. See other Rules hereof.

3. Mortgage and Conditional Sale—Doubt as to Transaction—How Resolved—Equity of Redemption.—Equity attaches the right of redemption to every grant of land which is made as a security for a debt or a loan; and when it is doubtful whether a transaction is a conditional sale of or a mortgage on land, it will be held to be the latter, in order that the equity of redemption be preserved, p. 505.

Reaffirmed in Scott v. Mewhirter, 49 Iowa 489; Barthell v. Syver-son, 54 Iowa 162, 6 N. W. 179; Baird v. Reininghaus, 87 Iowa 169, 54 N. W. 148.

Cited in Moore v. Olive, 114 Iowa 657, 87 N. W. 722, holding that a purchaser of a mortgaged land from the mortgagor only acquires the right of redemption.

BRIDGEMAN v. STEAMBOAT EMILY, 18 IOWA 509

1. Common Carriers—Violation of Contract to Transport Freight—Measure of Damages.—In an action against a common carrier for a violation of its contract to transport freight, or for negligence by it in connection therewith, the measure of damages will be governed by the special circumstances of each case, with a view to do justice, and to afford full compensation and no more, to the plaintiff, p. 512.

Reaffirmed in Cobb, Blasdel & Co. v. I. C. R. R. Co., 38 Iowa 630; Clark v. American Express Co., 130 Iowa 260, 261, 106 N. W. 645.

FRANKLIN v. TWOGOOD, 18 IOWA 515

(Later appeals, 25 Iowa 520, 96 Am. Dec. 73; 27 Iowa 239, 1 Am. Rep. 265.)

1. Pleadings—Demurrer to Answer—Pleading Over—Effect.—By answering after his demurrer to the petition has been overruled, the defendant waives error, if any, of the trial court's ruling on the demurrer, p. 518.

Reaffirmed in Melhop & Kingman v. Doane & Co., 31 Iowa 399, 7 Am. Rep. 147; Phillips v. Hosford, 35 Iowa 594 (abstract.)

Reaffirmed and extended in Coakley v. McCarty, 34 Iowa 107, holding that by the defendant answering after a motion to make the petition more specific has been overruled, he thereby waives the error, if any, as to the ruling.

2. Negotiable Note—Assignment and Indorsement of, Distinguished—Rights of Indorsee and of Assignee.—An indorsement of a negotiable note is the transfer thereof by writing on its back, or on another paper annexed thereto, when, by reason of successive indorsements, it is necessary; while the transfer of such an instrument by a separate writing is an assignment thereof. The indorsee of a negotiable note before maturity and for value, takes the legal title thereto, discharged of all defenses the maker has against the payee, and may sue thereon in his own name; while an assignee thereof, under like conditions, takes it under the same rules which govern the assignment of a non-negotiable note, must sue in the name of his assignor, and takes it subject to all defenses and equities in favor of the maker against the payee or his assignor which are subsisting at the time the maker receives notice of the assignment, pp. 519-521, 523.

Reaffirmed in Hecker v. Boylan, 126 Iowa 166, 101 N. W. 756.

Reaffirmed and explained in Grimm v. Warner, 45 Iowa 108, holding that in order for the holder of negotiable paper to be protected

against equities existing between the original parties, he must acquire it by indorsement before maturity.

Reaffirmed and explained in Bettis v. Bristol, 56 Iowa 42, 8 N. W. 809, holding that a note payable to the payee or order may be indorsed by his agent whose authority is conferred by parol; that where such a note is indorsed by such agent, the indorsement need not show his authority or how it is conferred.

Reaffirmed and explained in Johnson v. Walker, 60 Iowa 319, 320, 14 N. W. 328, holding that one who accepts a note and mortgage as collateral security and by delivery merely, acquires no greater rights than his assignee had thereunder.

Cited with approval in State v. Nine, 105 Iowa 135, 74 N. W. 946, not in point, but upon analogy.

Unreported citation, 106 N. W. 515.

Cross reference. See further on this question, annotations under Younker v. Martin (18 Iowa 143), ante. p. 598.

3. Corporation—Execution of Note and Mortgage to—Estoppel of Mortgagor to Deny Corporate Existence.—One who executes a note and mortgage to a corporation is thereby estopped, in an action thereon, from denying its corporate existence, p. 525.

Reaffirmed and explained in Floyd County v. Morrison, 40 Iowa 189, holding that one who executes a mortgage to secure a loan of money from the school fund, is estopped, when sued thereon, from denying that the county officer named therein was not such in fact; and such instrument will be given the effect intended by the parties.

Reaffirmed and explained in State Security Bank v. Hoskins, 130 Iowa 340, 106 N. W. 765, 8 L. R. A. (New Series) 376, holding that where a corporation acquires realty from a trustee, the *cestui que* trust is estopped to deny the legal capacity of the corporation to acquire and hold it.

Distinguished and narrowed in Capper v. Sibley, 65 Iowa 756, 23 N. W. 154, holding that a party may deny the validity of an instrument, or the legal capacity of the other party thereto, when he (the objecting party) has not received the entire consideration.

BERTRAM v. WATERMAN, 18 IOWA 529

1. Judgment Lien on Land—Revivor of Old Judgment by Scire Facias or Taking a New Judgment by Judgment Creditor.—A judgment creditor may revive his judgment and the right to enforce it by execution, by a *scire facias* proceeding, and such a proceeding continues the lien of the first judgment; but where a judgment creditor obtains a judgment in a later action for the amount of the former judgment and interest, the new or latter judgment, discharges or extinguishes the lien of the former, pp. 530, 531.

Cited in 148 Iowa 675.

Cited in Union Bank of Maryland v. Ames, 37 Iowa 675, the case turning upon other questions.

Special cross reference. For further cases citing the text, and others, see annotations under Rule 2 of Denegre v. Haun (13 Iowa 240), ante. p. 144.

GARDNER v. WESTON, 18 IOWA 533

1. Deed Absolute on Face but in Fact a Trust or Mortgage—Sufficiency of Evidence to Prove—Burden of Proof.—A party who seeks to disturb the title of another who holds under a deed to land, which deed is absolute on its face, even by showing the land to be held in trust, or that the deed is in fact a mortgage, must do so by clear and satisfactory evidence, p. 535.

Reaffirmed in Knight v. McCord, 63 Iowa 430, 19 N. W. 310.

Special Cross Reference. For further cases citing, reaffirming and explaining the text, and others, see annotations under Rule 2 of Cooper v. Skeel (14 Iowa 578), ante. p. 288.

DECATUR COUNTY v. CLEMENTS, 18 IOWA 536

1. Actions—Original Notice to Name Term—Defective Notice—Motion to Correct Error before Appeal—Review.—Under the Code of 1860, an original notice in an action in the district court should name the term at which the defendant is to appear and answer; and such a notice which fails to so state is defective: But where a judgment is rendered thereon by default, and no motion is made by the defendant to set aside the judgment or correct the error before appeal, it will not be reviewed or be grounds for reversal thereon, pp. 536, 537.

Reaffirmed and explained in Pratt v. Western Stage Co., 27 Iowa 364, 365, holding that errors which can be corrected upon motion in the court below, will not be reviewed in the Supreme Court, unless a motion for such correction is made before the prosecution of the appeal.

Cited with approval in Tomlin v. Woods, 125 Iowa 375, 101 N. W. 138, the case turning on other questions.

Cited in Finch v. Billings, 22 Iowa 230, holding that unless exception is taken to an order, decree or other record entry, or a motion is made for its correction in the trial court, it is unavailing upon appeal.

Special cross reference. For further cases citing and explaining the text, see annotations under Rule 1 of Des Moines Branch of State Bank v. Van (12 Iowa 523), ante. p. 88.

Cross reference. See further in this connection, annotations under Pigman v. Denney (12 Iowa 396), ante. p. 66.

WENDLEBONE v. PARKS, 18 IOWA 546

1. Usury—Borrowing Money to Pay Usurious Debt—Transfer of Old Note and Mortgage to New Creditor.—Where a person borrows money with which to pay a debt tainted with usury and secured by mortgage, and thereafter delivers the usurious note and mortgage to the last lender, this last transaction is not usurious, and the note and mortgage will be treated as a new security given to the last lender for the amount loaned, p. 548.

Reaffirmed and explained in Brown v. Cass County Bank, 86 Iowa 535, 53 N. W. 412, holding that the fact that one lends money to pay a usurious debt with full knowledge of the purpose for which it is borrowed, does not render the loan or last debt usurious.

Cross reference. See further on this question, annotations under Switz v. Platts (15 Iowa 298), ante. p. 345.

KRAUT v. CRAWFORD, 18 IOWA 549, 87 AM. DEC. 414

1. Navigable Waters—Riparian Owners—What Land Owned by—Meander Line of Stream.—Where a patent from the United States government to a fractional tract of land refers to the government survey or plat, and it shows the land to be bounded upon a navigable river, and does not show any intermediate tract between the granted or patented one and the river, and none is reserved in the patent, the grantee therein becomes the owner of all the land to the water's edge, is a riparian owner, and is entitled to the full benefit of the river front.

The meander line as shown by such government plat or survey is not a line of boundary, but is made only for the purpose of ascertaining quantity, p. 553.

Reaffirmed in Ladd v. Osborne, 79 Iowa 95, 96, 44 N. W. 236; Schlosser v. Cruickshank, 96 Iowa 417-420, 65 N. W. 345.

Reaffirmed in part in Berry v. Hoogendoorn, 133 Iowa 439, 440, 108 N. W. 925, holding that the meander line of a navigable river in a government survey is not a boundary line.

Reaffirmed and explained in Musser v. Hershey, 42 Iowa 361, 362, 364; Steele v. Sanchez, 72 Iowa 68, 33 N. W. 368, 2 Am. St. Rep. 233; Bennett v. National Starch Mfg. Co., 103 Iowa 211, 72 N. W. 508, holding that a riparian owner of land on a navigable river owns to high water-mark, that is to the edge of the bank: That a riparian owner of land outside of a city, has the right to construct, below high water-mark, bridge piers and landings, and to reclaim the soil, conforming to state regulations and not obstructing navigation; but that these rights depend upon and are appurtenant to the adjacent soil, and are not the subject of sale, except by sale and conveyance of the land along the navigable stream.

Reaffirmed and extended in Steele v. Sanchez, 72 Iowa 67, 68, 33 N. W. 368, 2 Am. St. Rep. 233; Bennett v. Nat'l Starch Mfg. Co., 103 Iowa 210, 72 N. W. 508; Berry v. Hoogendoorn, 133 Iowa 440, 108 N. W. 925, holding further that the rights of a riparian owner along a navigable stream are not changed by it afterward becoming or being declared non-navigable.

Reaffirmed and extended in Steele v. Sanchez, 72 Iowa 68, 33 N. W. 368, 2 Am. St. Rep. 233; Stern v. Fountain, 112 Iowa 98, 83 N. W. 827; Berry v. Hoogendoorn, 133 Iowa 440, 108 N. W. 925, holding further that meandered lines are not boundary lines, but are made to ascertain quantity: Holding further that a riparian owner along a navigable stream or lake owns to high water-mark or to the bank thereof; and that when such high water-mark is changed, either by natural or artificial means, the land owner's line is changed with it, and he owns to the new highwater mark or bank.

Cited with approval in Grant v. Hemphill, 92 Iowa 224, 59 N. W. 265, a case wherein the facts did not bring it within the rule, there being no navigable river or lake to which a government survey of a fractional tract could refer.

Cited in Boynton v. Miller, 22 Iowa 582, not in point, but involving a closely allied subject.

Cited in Barringer v. Davis, 141 Iowa 434, 120 N. W. 70, not in point, but upon analogy.

Distinguished and narrowed in Glenn v. Jeffrey, 75 Iowa 21, 39 N. W. 161, holding that although the meander line on a government survey is not a boundary line, still where such a meander line on a government plat of a fractional tract extends only to and along a bayou some distance from a navigable river, and there is land between such bayou and the stream which was not surveyed by the government, that a grant of the fractional tract by reference to the plat, does not convey the land between the bayou and the river.

2. Navigable Waters—Rights of Riparian Land Owners—Accretions.—Land gained by accretions, belongs to the adjoining riparian land owner along a navigable stream or lake, pp. 553, 554.

Reaffirmed in Bennet v. Nat'l Starch Mfg. Co., 103 Iowa 210, 211, 72 N. W. 508; Stern v. Fountain, 112 Iowa 98, 83 N. W. 827; Berry v. Hoogendoorn, 133 Iowa 440, 108 N. W. 925; Board of Park Commissioners v. Taylor, 133 Iowa 461, 108 N. W. 930.

ANGLE v. MISSISSIPPI & MISSOURI R. R. Co., 18 IOWA 555

1. Common Carriers—Carriage of Freight—Common Law Liability for—Burden of Proof.—A common carrier is responsible for the safe carriage and delivery of goods committed to its care and accepted by it for transportation, except when prevented by the act of God or the public enemy; and in an action against a common carrier for loss of goods received for transportation, the burden of proof is

on the defendant to show circumstances relieving it from liability as above, p. 559.

Reaffirmed in Winner v. Ill. Cent. R. R. Co., 31 Iowa 586, 587.

Reaffirmed and extended in McCoy v. K. & D. M. R. R. Co., 44 Iowa 427, holding further that—under Sec. 1308 of the Code of 1873—a common carrier cannot relieve itself from its Common Law liability even by express contract.

Reaffirmed and narrowed in McCoy v. K. & D. M. R. R. Co., 44 Iowa 426, 427, holding that in an action for injury to or loss of property received by a common carrier for transportation, the burden of proof is on it to show circumstances excusing or relieving it from liability: Holding, however, that a common carrier is not liable in transporting cattle, for injuries which may occur to them because of their own unruliness or viciousness while being transported, or for any injury or damage to them which may be prevented by the use of reasonable care by their owner, if he is in charge of them on the train and is overseeing their transportation; nor is a common carrier liable in damages for any cattle which die by reason of disease, or from failing strength on account of poor flesh, in being transported.

Distinguished in Porter v. Ch. & N. W. Ry. Co., 20 Iowa 77, a case wherein a common carrier was sued as a warehouseman for carelessness in keeping goods in its warehouse after they had arrived at their destination, the court holding that in such case, the rules governing ordinary warehousemen apply.

Distinguished and narrowed in Francis v. Dubuque & Sioux City R. R. Co., 25 Iowa 62, 63, 66, 95 Am. Dec. 769, holding that after goods have arrived at their destination, and have been unloaded and placed in its warehouse or storage room by the common carrier, to be later delivered to the consignee, the relation of common carrier ceases, and it is only liable as warehouseman, or for want of proper care, for any subsequent loss or damage thereof or thereto.

GRINNELL *v.* MISSISSIPPI & MISSOURI R. R. Co., 18 Iowa 570

(Abstract.)

1. Evidence—Opinion of Witness as to Damages.—The opinion of a witness as to the damages to property involved in an action, or the amount of damages the plaintiff has sustained by reason of acts sued on, are inadmissible, p. 571.

Cited in McClay v. Hedge, 18 Iowa 69, not in point.

Special cross reference. For further cases citing and explaining the text and others, see annotations under Rule 4 of *Anson v. Dwight* (18 Iowa 241), ante. p. 620.

2. Appeals from Inferior Courts—United States Revenue Stamp.—The United States Revenue Stamp required by Act of Congress of August 1, 1864, to be affixed to writs or other process upon

appeal from an inferior tribunal to the district court, may be affixed to the paper giving notice of the appeal, p. 571.

Special cross reference. For cases citing the text, see annotations under *Musselman v. Mauk* (18 Iowa 239), ante. p. 619.

PEABODY *v.* REES, 18 IOWA 571

(Abstract.)

1. Negotiable Note—Indorsement for Value and Before Maturity—Subsequent Indorsement After Maturity by First Indorsee—Defenses.—Where a negotiable note is indorsed in good faith, for value and before maturity, and the indorsee, *after it is due*, indorses it to one who has actual knowledge that the consideration therefor has failed, such failure of consideration is no defense to an action thereon by the last indorsee, pp. 571, 572.

Reaffirmed and extended in *Mornyer v. Cooper*, 35 Iowa 260, holding further that the rule is applicable to a defense of either fraud or of want of consideration, in an action by the last indorsee.

YOUNG & SARGENT *v.* PEET, 18 IOWA 574

(Abstract.)

1. Appeal—Review of Questions of Law—Necessity of Exception Below.—Errors involving questions of law which were not excepted to below, will not be reviewed by the Supreme Court, p. 574.

Reaffirmed in *Eason v. Gester*, 31 Iowa 475, 476.

Cross references. See further on this question, Rule 5 of *Davenport Sav. Fund Ass'n v. North American F. Ins. Co.* (16 Iowa 74), ante. p. 409, and cross references there found.

CARUTHERS, ADMINISTRATOR *v.* HUNT, 18 IOWA 576

(Abstract.)

1. Deed Absolute on Face with Separate Contract to Re-convey, a Mortgage.—Where a deed is executed which is absolute on its face, and the grantee simultaneously executes a contract to re-convey to the grantor upon his paying a certain sum amounting to the consideration of the deed and its interest at a certain per cent. per annum on a certain date, the two instruments will, in equity, be treated as a mortgage, p. 579.

Special cross reference. For cases citing the text, and many others, see annotations under Rule 1 of *Trucks v. Lindsey* (18 Iowa 504), ante. p. 674.

2. Deed Absolute on Face—Contract to Reconvey as Part of—Parol Surrender and Cancellation of the Contract to Reconvey.—Where a deed is executed which is absolute on its face, and a contract

is simultaneously executed by the grantee to reconvey to the grantor upon his paying a certain sum, amounting to the consideration and interest, at a given time, the grantor, if of sound mind, may surrender his rights under the contract by a parol agreement with the grantee, whereupon the deed will become absolute, p. 579.

Special cross reference. For cases citing the text and others on the question, see annotations under *Vennum v. Babcock* (13 Iowa 194), ante. p. 137.

PAGE *v.* EWBANK, 18 IOWA 580

(Abstract.)

1. Homestead—Requisites to—Occupancy—To What Debts Homestead Subject.—Actual occupancy and use as a home by the family of the party claiming it, are the essentials to a homestead.

Homestead is subject to the satisfaction of a debt created anterior to the time it is acquired by the debtor as above provided, p. 581.

Special cross reference. For cases citing, sustaining and explaining the text, and others, see annotations under *Hale v. Heaslip* (16 Iowa 451), ante. p. 456.

Annotations to Decisions Reported in Volume 19 Iowa.

MULLARKY, ADM'R v. TOWN OF CEDAR FALLS, 19 IOWA 27.

(Cases arising out of same transaction, 21 Iowa 565; 27 Iowa 227.)

1. Municipal Corporations—Bridges—Right to Construct—Power to Raise Money For.—A city or town has power, under its charter granting to it the control of its streets, to build a free bridge across a river so as to connect its streets on either side thereof; and may issue its warrants or bonds to pay for its construction.

But a town or city has no authority to execute a deed of trust to such a bridge, authorizing the trustees to collect toll, and to defray expenses, and pay the indebtedness therefrom, and to sell the property if final default be made, pp. 23, 24, 26.

Reaffirmed and extended in Freeman v. City of Independence, 123 Iowa 3, 4, 97 N. W. 1084, holding that under Secs. 753 and 757 of the Code of 1897, a city must keep bridges within its corporate limits in repair; and is liable in damages for personal injuries occasioned by such a bridge being out of repair.

Reaffirmed and varied in Hanson v. Vernon, 27 Iowa 71, 1 Am. Rep. 215, holding that the General Assembly has no power to authorize a county, city or other municipal corporation to issue bonds, borrow money, subscribe stock to, or otherwise aid in the construction of a railroad; that such an Act is unconstitutional, and proceedings thereunder will be enjoined.—But in Stewart v. Board of Supervisors of Polk County, 30 Iowa 28-39, 1 Am. Rep. 238; Renwick, Shaw & Crosset v. D. & N. W. Ry. Co., 47 Iowa 512, the power of the General Assembly to enact such a law is upheld, and Hanson v. Vernon is overruled, to this extent.

Reaffirmed and varied in Hanna v. Wright, and School Township of Beaver, 116 Iowa 278, 279, 89 N. W. 1109, holding that a school township has power to contract an indebtedness for the purposes mentioned in Sec. 2783 of the Code of 1897, although it has no contingent funds on hand; and may, under such section, levy a tax to provide a fund to meet such indebtedness.

Reaffirmed, varied and qualified in Witer v. Board of Supervisors of Polk County, 112 Iowa 387, 391, 392, 83 N. W. 1044, holding that the power granted by Secs. 422, 423 of the Code of 1897, to the county board of supervisors to purchase real estate for the erection of county buildings, carries with it the power to create an indebtedness there-

for: But such board has no implied authority, under such sections, or under Secs. 447, 448 of that Code, to issue bonds for the payment of such indebtedness: Holding further that the power of a municipal corporation to issue bonds for corporate indebtedness or expenditures never exists, unless expressly granted.

Reaffirmed, varied and qualified in Swanson v. City of Ottumwa, 131 Iowa 545, 546, 9 A. & E. Ann. Cas. 1117, 106 N. W. 11, 5 L. R. A. 860, holding that Chap. 133, Acts of Nineteenth General Assembly, in reference to the donation of depot grounds, etc., to a railroad corporation, confers upon a city, upon being authorized by the voters as therein provided, to create an ordinary indebtedness by the purchase of such property; but does not confer authority to the city to issue bonds therefor; and bonds so issued are void *ab inito*: Holding, also, that power to a municipal corporation to issue bonds is never implied, but must always be expressly conferred.

Reaffirmed and qualified in Clark v. City of Des Moines, 19 Iowa 223, 87 Am. Dec. 423, holding that a city or town has no authority to lend its credit to aid in the construction of a toll bridge, unless it is specially granted such power by its charter: Holding further that a power to a city "to improve sidewalks, alleys and streets" and "to make by-laws necessary and proper for the good regulation, safety and health of the city," does not authorize it to lend its credit to aid in the construction of a private toll bridge.

Reaffirmed and qualified in Dively v. City of Cedar Falls, 21 Iowa 569, 570, holding that a municipal corporation can only issue bonds, or other negotiable paper, when express authority is granted to it for such purpose; and such bonds and paper, issued by it without such authority, are void in whatever hands they may come.

Cited in Clark v. City of Des Moines, 19 Iowa 227, 87 Am. Dec. 423, holding that where a city pays an admittedly just debt in scrip which is illegal—because intended to circulate as money, in violation of the old Constitution, and the Code of 1851—and thereafter takes up the scrip, and issues warrants for the amount thereof, the warrants are valid and collectible.

Cross reference. See further, in this connection, annotations under Hull & Argalls v. Marshall County (12 Iowa 142), ante. p. 29.

YATES v. SQUIRES, 19 IOWA 26, 87 AM. DEC. 418

1. Master and Servant—Liability of Master for Torts of Servant.—A master is liable for the torts of his servant which are done in the course of the latter's employment, even though without authority, or against express directions, p. 28.

Reaffirmed and explained in Dolan v. Hubinger, and Hubinger Co., 109 Iowa 412, 80 N. W. 515, holding that in order to determine whether or not the master is liable for the tort of his servant, the ques-

tion is not the character of the servant's act, but whether or not it was done within the scope of his duty.

Reaffirmed and qualified in Healy v. Patterson, 123 Iowa 79, 98 N. W. 579, holding that a master is not liable for the acts of his servant, when they are not within the course of employment of the latter.

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, Kincade v. C. M. & St. P. R. R. Co., 107 Iowa 682, 78 N. W. 698; Golden v. Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257; Porter v. C. R. I. & P. R. R. Co., 41 Iowa 358; Donaldson v. M. & M. R. R. Co., 18 Iowa 280—and there are many others to the same effect.—Ed.)

GARBER v. CLAYTON COUNTY, 19 IOWA 29

1. **Appeal from Order of County Board of Supervisors.**—An appeal lies—under the Code of 1860—to the district court from an order of the county board of supervisors refusing to allow a claim of a sheriff which he claims as part of his salary, p. 29.

Reaffirmed and varied in Lippencott v. Allander, 25 Iowa 446, holding that a party may appeal to the district court from an order of the board of supervisors revoking a ferry license.

Reaffirmed, varied and qualified in Newell v. Perkins, 39 Iowa 245, holding that an appeal lies to the district court from the final order of the board of supervisors in the establishment, change, or vacation of a county road: But that under Chap. 160, Sec. 2, Laws of Twelfth General Assembly, no appeal lies from orders of the county auditor in relation thereto, as they are subject to review and approval by such board.

Distinguished and narrowed in Lippencott v. Allander, 23 Iowa 537, 538, holding that no appeal lies—under Sec. 267 of the Code of 1860, the section under which the text is decided—from the action of the board of supervisors in granting or refusing a ferry license.

Cross references. See further in this connection, annotations under Rule 1 of Prosser v. Wapello County (18 Iowa 327), ante. p. 639; Umbarger v. Bean (15 Iowa 256), ante. p. 338.

BURR v. WILCOX, 19 IOWA 31

1. **Actions—Original Notice—What to Contain—Sufficiency of.**—Where an original notice in an action in the district court warns the defendant to appear and answer before Noon of a certain day of the month and year, it is sufficient under Sec. 2812 of the Code of 1860, although the date named therein be later than the *second day* of the next succeeding term; but in such case no default shall be taken against the defendant until the time named in the notice: However, a default entered at such time will not be set aside because of insufficiency of the notice, pp. 32, 33.

Reaffirmed and explained in Knapp, Stout & Co. v. Haight, 23 Iowa 76, holding that where an original notice names the day, month and year on which the defendant is to appear and answer—it being a day of the next succeeding term of court—it is sufficient.

Cited in Owens v. City of Marion, 127 Iowa 474, 103 N. W. 382, holding that where a statute fixes a time within which after notice, parties may do certain acts, that the fact that the notice fixes a different or less period, renders it irregular or defective, *voidable*, not *void*: In such a case a party cannot set aside, or enjoin acts of a board, or municipal body, because of insufficiency of notice.

Cross references. See further on this question, annotations under Des Moines Branch of State Bank v. Van (12 Iowa 523); Sweet v. Porter (12 Iowa 387), ante. pp. 88 and 64, respectively.

FREERKING v. FREERKING, 19 IOWA 34

1. **Divorce—Inhuman Treatment by Husband Endangering Life of Wife.**—Under Sec. 2533 of the Code of 1860, a wife is entitled to a divorce where the husband is guilty of such inhuman treatment as endangers her life, p. 36.

Reaffirmed and explained in Cole v. Cole, 23 Iowa 437, holding that for a husband to deny medical aid and other treatment and attention to his sick wife, constitutes a ground for divorce under the statute of the text: That that which would be inhuman treatment such as would endanger such a wife's life, might fall far below the statutory cruelty to a wife in good health and of vigorous constitution.

Reaffirmed and explained in Aitchison v. Aitchison, 99 Iowa 104, 107, 68 N. W. 577, holding that treatment by the husband which is calculated to affect the mind of his wife so as to destroy her health and ultimately endanger her life, or which involves, by natural consequences, a permanently injurious and prejudicial effect upon her health, perilous to life, is sufficient to constitute a ground for divorce. —Decision under Sec. 2223 of the Code of 1873, corresponding to section of the text.

Reaffirmed and qualified in Carlisle v. Carlisle, 99 Iowa 249, 250, 68 N. W. 682; Prather v. Prather, 99 Iowa 395, 68 N. W. 807, holding that a wife cannot [decisions under Code of 1873] obtain a divorce on account of inhuman treatment of the husband, when it was caused by her own misconduct.

Cross reference. See further on this question, annotations under Beebe v. Beebe (10 Iowa 133), Vol. I, p. 659.

SARGENT v. CHUBBUCK, 19 IOWA 37

1. **Homestead—Sale of and Purchase of New Homestead with Purchase Price.**—Where a homestead is sold, and a new one purchased with its proceeds, the latter has the same homestead character and exemption as the former, p. 39.

Reaffirmed in Robb, Adm'r v. McBride, 28 Iowa 387, 388; Marshall v. Ruddick, 28 Iowa 490; Benham v. Chamberlin & Co., 39 Iowa 359.

Reaffirmed and explained in Benham v. Chamberlin & Co., 39 Iowa 359; Cowgell v. Warrington, 66 Iowa 668, 24 N. W. 268, holding that where homestead is sold, the vendor has a reasonable time thereafter in which to invest the proceeds in another homestead, and to remove his family thereto, and occupy it.

Reaffirmed and extended in Benham v. Chamberlin & Co., 39 Iowa 359; Lay v. Templeton, 59 Iowa 685, 13 N. W. 766, holding further that where a second homestead is purchased in part with the proceeds of a previous homestead, together with other funds, the second or new one is exempt from debts contracted by the owner thereof after the occupancy of the old homestead as such, although they be contracted before the acquisition of the new one.

Reaffirmed and extended in Green v. Farrar & Wheeler, 53 Iowa 430, 5 N. W. 560, holding further that where homestead is sold by its owner, and a new one acquired, with the proceeds, in the name of his wife, the latter has the same character as the former: Holding further that a conveyance of homestead by a husband to his wife, does not change its homestead character.

Reaffirmed and narrowed in Rogers v. Raisor, 60 Iowa 356, 14 N. W. 318, holding that where homestead in this state is sold, and its proceeds invested in another homestead in another state, the latter does not have the same character as the former, and is subject to the satisfaction of debts created by its owner before its acquisition.

Cited in Hickey v. Davidson, 129 Iowa 393, 105 N. W. 681, dissenting opinion, the majority opinion not in point.

Distinguished and narrowed in Elston and Green v. Robinson, 21 Iowa 533, 534, holding that a judgment debtor cannot, after the rendition of a judgment against him, occupy land as a homestead, and thus defeat the lien of the judgment creditor thereon.

Unreported citation, 93 N. W. 381.

Cross reference. See further on this question, annotations and cross references under Rule 2 of Pearson v. Minturn (18 Iowa 36), ante. p. 579.

HELPHREY v. ROSS, 19 IOWA 40

1. **Mortgage on Land to School Fund—Foreclosure and Sale—Title Derived by—Tax Lien.**—Where, under Sec. 811 of the Code of 1860, land is sold under a decree foreclosing a mortgage thereon to the school fund, and the state becomes the purchaser, it takes the fee simple title free from all liens for taxes; and a purchaser of such decretal title from the state takes it free of such liens, p. 42.

Reaffirmed in Miller v. Gregg, 26 Iowa 76, 77, holding that where land incumbered by a mortgage to the school fund and another mort-

gage to a third person, is sold for taxes, the county authorities have no power, under the Code of 1860, or Chap. 148, Acts of 1862, to buy in such tax title, and thereby defeat or cut off the lien of the third person's mortgage.

Special cross reference. For further cases citing, explaining and extending the text, see annotations under Jasper County for use, etc. v. Rogers (17 Iowa 254), ante. p. 523.

TOWN OF MCGREGOR v. BAYLIES, 19 IOWA 43

1. Constitutional Law—Special Legislation—Laws Concerning Cities and Towns.—Under the Constitution of 1857 the General Assembly has no power to amend, or repeal an act incorporating a city or town in this state. All laws on this subject must be of a general nature. This constitutional prohibition applies and extends to such special laws amending, or repealing special acts of incorporation adopted and in force prior to the taking effect of the Constitution. The intention of the Constitution on this subject is to leave cities and towns the control of their own municipal affairs, subject to the Constitution and the general laws of the state. The General Assembly can pass a general law under which all cities and towns may proceed to repeal their previous charters and substitute others of their own formation or creation, or it may by a general law, give cities and towns general power to amend, change, or modify their charters, pp. 46, 48.

Cited with approval in United States Express Co. v. Ellyson, 28 Iowa 375, the court holding that the General Assembly has power to prescribe the manner in which particular classes of persons, real and legal, may be taxed; and that an amendment to the general revenue law prescribing the manner of assessment of express and telegraph companies and corporations, is not a special law, and is Constitutional.

Special cross reference. For cases citing and explaining the rule, and many others, see annotations under Rule 1 of Ex parte Pritz (9 Iowa 30), Vol. I, p. 540.

Cross reference. See further on this question, annotations under Davis & Bro. v. Woolnough (9 Iowa 104), Vol. I, p. 549.

2. Construction of Constitution and Statutes.—In construing a constitution or a statute, the court will inquire as to the condition of the prior constitution or law it is designed to remedy, the evils or defects for which the previous one failed to provide, what remedy is provided by the new one and its reason; and will give it that construction which will suppress the mischief and advance the remedy, p. 46.

Reaffirmed and explained in Halsey & Co. v. City of Belle Plain, 128 Iowa 471, 104 N. W. 496, holding that in construing a constitutional provision the court will do so by ascertaining the particular object thereof, which is to be derived primarily from the words employed

giving to them their natural meaning and as they are commonly understood; but, if necessary to a fuller understanding, the court may read and consider the debates in the Constitutional Convention, any contemporary legislation having relation to the subject-matter; and may take notice of the evil as manifestly sought to be remedied or guarded against, and of the conditions to be affected, then existing or reasonably to be apprehended in the future, as disclosed by the authentic history of the state.

3. Constitutional Law—Statutes—Construction Favorable to Constitutionality Where Doubtful.—Courts will declare a statute unconstitutional only when such fact is palpable; if it be doubtful as to whether or not it is constitutional, it will be upheld, p. 49.

Special cross reference. For cases citing and explaining the Rule, and many others, see annotations under Rule 2 of *Morrison v. Springer* (15 Iowa 304), ante. p. 346.

Cross reference. See further on this question, annotations under *Duncombe v. Prindle* (12 Iowa 1), ante. p. 1.

JOHNSON *v.* HOPKINS, 19 Iowa 49

1. Limitation of Actions—Actions on Written Contracts, or to Recover Real Estate—When Barred.—Under the Code of 1860, an action upon a written contract, or for the recovery of real estate must be commenced within ten years after the cause of action accrues, or it will be barred, pp. 52, 53.

Reaffirmed and extended in *Newman v. De Lorimer*, 19 Iowa 248; *Jamison v. Perry*, 38 Iowa 18, holding further that the rule applies both at law and in equity; and that an action to foreclose a mortgage on, or a deed of trust to land, is barred after ten years from the accrual of the cause of action.

Reaffirmed and extended in *Nelson v. Worrall*, 20 Iowa 472; *Harbour v. Rhinehart*, 39 Iowa 674, holding further—as does the present case in argument—that the rule applies to an action in equity to enforce an implied or a resulting trust in relation to land.

Reaffirmed and extended in *City of Pella v. Scholte*, 24 Iowa 293, 85 Am. Dec. 729, holding further that a right to land by adverse possession for the statutory period may be acquired, or lost, by the public in and to public realty.

Reaffirmed and narrowed in *Campbell v. Long*, 20 Iowa 385-388; *Colvin v. McCune*, 39 Iowa 507, holding that where the ten years has run or a part of a year remains to run when an infant arrives at majority, the infant has one year after arriving at his majority in which to commence action.

Cross references. See further on this question, annotations under Rule 1 of *Newman v. De Lorimer* (19 Iowa 244), *Infra.* p. 722. See further in this connection, annotations under Rule 1 of *Jones v. Hockman* (12 Iowa 101), ante. p. 19.

JOHNSON v. HARMON, 19 IOWA 56

1. Mortgage on Land—Right of Junior Incumbrancer to Redeem from Sale Under Foreclosure by Senior.—A junior incumbrancer who is not made a party to an action by a senior to foreclose a lien on land, may redeem from a sale thereof under a decree therein, p. 56.

Special cross reference. For cases citing, explaining and sustaining the rule, and many others, see annotations under *Heimstreet v. Winnie* (10 Iowa 430), Vol. I, p. 723.

2. Mortgage on Land—Redemption by Junior Incumbrancer from Sale Under Senior Foreclosure Decree—Amount to be Paid.—A junior mortgagee not a party to an action of a senior mortgagee to foreclose a lien on land, may bring his action to foreclose his lien on and redeem the land, after its sale under decree in the senior's action; but redemption must be by paying the amount of the senior's debt, and not by paying the amount the mortgaged property brought under the foreclosure sale, p. 60.

Reaffirmed and explained in *Iowa County v. Beeson*, 55 Iowa 264, 7 N. W. 597, holding that where a purchaser of land at a tax sale seeks to redeem from a sale under decree of the foreclosure of a mortgage on the land for money borrowed from the school fund, and after the statutory period of redemption has expired, (the tax sale purchaser not having been made a party to the action foreclosing the mortgage), he can do so only by paying the amount of the mortgage debt, and not by paying the amount which the land sold for at the sale under the decree.

Reaffirmed, explained and extended in *Newell v. Pennick*, 62 Iowa 124, 125, 17 N. W. 433, holding—under Secs. 3102, 3103, and 3321 of the Code of 1873—that a junior mortgagee who is not made a party to an action by a senior mortgagee for the foreclosure of a mortgage on land, may redeem from a sale made under a decree therein after the time prescribed for redemption by the statute; and that such redemption may be from the senior mortgagee, his assignee, or the purchaser at the sale.

Reaffirmed, explained and extended in *Spurgin v. Adamson*, 62 Iowa 665, 667, 18 N. W. 295, 296, holding that a senior mortgagee, or his assignee, in possession of mortgaged land, either before foreclosure or under a foreclosure sale or deed made thereon, must, upon redemption by a junior incumbrancer, account for rents and profits, and, in a proper case, be credited for improvements made by him on the land.—The rule applying equally to a purchaser at the decretal sale of foreclosure of the senior mortgage: Holding further that in an action to redeem by a junior incumbrancer against a senior mortgagee, or his assignee, or a purchaser at the senior's decretal sale, the plaintiff need not tender the amount of the senior's mortgage debt, interest and

costs, when he prays for rents and profits, asks for an accounting, and pleads that he is ready and willing to pay a balance found.

Reaffirmed and extended in Knowles v. Rablin and Corwith, 20 Iowa 104, holding further that the purchaser of a portion of mortgaged real estate can only redeem from the mortgagee by paying his entire debt: And this is the rule where redemption is made either before or after foreclosure.

Reaffirmed and varied in Phelps v. Pope, 53 Iowa 693, 6 N. W. 43, holding the rule to apply to the rights of the holder of a junior mechanic's or materialman's lien on land.

Reaffirmed and qualified in Gower v. Winchester, 33 Iowa 305, 307, 308, holding that the right of a junior mortgagee to bring his action for foreclosure and redemption from a senior mortgagee's debt, is barred unless commenced within ten years after his cause of action for foreclosure accrued.

Cited with approval in Raymond v. Whitehouse, 119 Iowa 136, 93 N. W. 294, the case turning upon another point.

Distinguished and narrowed in Tuttle v. Dewey, 44 Iowa 307, 309, holding that the holder of a junior mortgage on land who is made defendant in an action for the foreclosure of a senior mortgage, can redeem after sale under the decree, by paying the amount bid thereat, with interest, within the time allowed therefor by statute—Code of 1873—although the senior mortgagee has bid in the property for less than his mortgage debt.

Cross references. See rule 1 hereof. See further on this question, annotations under Ten Eyck v. Casad (15 Iowa 524), ante. p. 378; Street v. Beal (16 Iowa 68), ante. p. 408.

ADAMS v. BEALE, 19 IOWA 61

1. **Tax Deed—What Prima Facie Evidence of—Tax Deed as Evidence of Title.**—Under Sec. 784 of the Code of 1860, a tax deed is *prima facie* evidence only of the payment of the tax, while it is *conclusive* evidence that the property sold was listed, assessed, levied upon, advertised, sold, etc., as required by law; and oral evidence is admissible to prove the payment of such taxes by the tax purchaser, p. 66.

Cited in Stryker v. Polk County, and Diffin, treasurer, 22 Iowa 137; Iowa Homestead Land Co. v. Webster County, 21 Iowa 233, the cases turning upon other questions.

Special cross reference. For further cases citing the text, and many others, see annotations under Allen v. Armstrong (16 Iowa 508), ante. p. 465.

2. **Tax Sale of Homestead—Redemption by Wife—Time Allowed for.**—A wife may—under Sec. 779 of the Code of 1860—redeem from a tax sale of homestead owned by her husband; and she

may so do within one year after the disability of coverture is removed, pp. 67-69.

Reaffirmed in Pfiffner v. Krapfel, 28 Iowa 34.

Reaffirmed and qualified in First Congregational Church of Cedar Rapids, et al v. Terry and Park, 130 Iowa 518-520, 107 N. W. 307, 114 Am. St. Rep. 443, holding that when the wife of the owner of homestead of a life estate buys the land at a tax sale, she will acquire no title as against her husband, or others having an interest therein, but will be held to hold it in trust for all parties interested.

Cited in Boling v. Clark, 83 Iowa 484, 50 N. W. 58, holding that the right of the wife to sue for homestead is barred by another's adverse possession thereof for ten years; but that the rule is different as to dower.—This last question, however, not being involved.

Cited in McClure v. Braniff, 75 Iowa 43, 39 N. W. 173, holding that a wife may intervene in an action in equity against her husband in order to protect her homestead interest.

Cited in Chase v. Abbott, 20 Iowa 158, on other questions of the homestead right of the wife.

Cited in Lyon v. Welsh, 20 Iowa 580, the case involving the right of the wife to plead usury against a note secured by a mortgage on homestead.

Cited in Clarke, trustee v. Sherman, et al, 128 Iowa 356, 103 N. W. 983, not in point.

Cited in Sayers v. Childers, 112 Iowa 679, 680, 84 N. W. 938, 939, the case turning on other questions involving homestead.

Cross reference. See Rules 3 and 4 hereof, in this connection.

3. Tax Sale of Land—Who an "Owner" and May Redeem—Construction of Redemption Laws.—Any right which in law or in equity amounts to an ownership of land sold for taxes, or any right of entry upon it, or to its possession or enjoyment, or to any part of it, which may be deemed an estate, makes the holder an "owner," and entitles him to redeem from such tax sale.

Redemption clauses in revenue statutes are to be liberally construed in favor of one seeking to redeem, pp. 68, 69.

Reaffirmed in Foster v. Bowman, 55 Iowa 243, 7 N. W. 515; Cummings v. Wilson, 59 Iowa 16, 12 N. W. 748; Lynn v. Morse, 76 Iowa 670, 39 N. W. 206; Paxton v. Ross, 89 Iowa 664, 57 N. W. 430; Swan v. Harvey, 117 Iowa 62, 63, 90 N. W. 490; Lane v. Wright, and Richart, 121 Iowa 379, 96 N. W. 903, 100 Am. St. Rep. 362.

Reaffirmed and explained in Busch v. Hall, 119 Iowa 282, 93 N. W. 357, holding that a mortgagee, or any one having an interest in or lien upon land sold for taxes may redeem; but that such redemption must be exercised by action after the tax deed issues.

Reaffirmed and qualified in Curl v. Watson, 25 Iowa 39, 95 Am. Dec. 763; Rice v. Nelson, 27 Iowa 151, holding that where a person by reason of owning any interest in land sold for taxes has a right to

redeem, he may redeem the whole, and the purchaser may require this of him.—But see *Jacobs v. Porter*, 34 Iowa 346-348, (reaffirming the text), holding that where land is sold for taxes after the death of its owner, but for taxes accruing during his lifetime, and there are children of decedent who are adults and children who are infants at the time of the sale, that the infants, upon attaining their majority, may redeem their undivided interest therein, but not the whole, from such tax sale.—This case expressly overruling *Curl v. Watson*, and impliedly overruling *Rice v. Nelson*, to this extent: Holding further that an infant, upon arriving at majority, may redeem his undivided interest in land sold for taxes, without redeeming the whole, and that another part owner thereof must redeem as required for persons not under disability.

Reaffirmed and qualified in *First Congregational Church of Cedar Rapids, et al v. Terry and Park*, 130 Iowa 519, 107 N. W. 307, 114 Am. St. Rep. 443, holding that a person who has a right to redeem land from a tax sale cannot, by taking a tax title, or by redeeming, eliminate or defeat the rights of others jointly interested; and that in such case, the redemption will operate in favor of all, or the tax title will vest in such person redeeming, as a trust estate for the benefit of all.

Cited in *Crum v. Cotting*, 22 Iowa 422, holding that a purchaser at a tax sale of land, which is made pending an action to foreclose a mortgage thereon, is charged with notice of and is bound by the proceedings therein.

Cited in *Getchell & Martin Lumber & Mfg. Co. v. Peterson & Sampson, et al*, 124 Iowa 606, 100 N. W. 552, on the question of what constitutes an "ownership" of land, and who is an "owner," the case involving other questions.

Cross references. See other rules hereof. See further on this question, annotations under Rule 3 of *Burton v. Hintrager* (18 Iowa 348), ante. p. 642; *Byington v. Rider* (9 Iowa 566), Vol. I, p. 629.

4. Tax Sale of Land—Subsequent Repeal of Redemption Statute—Effect.—The repeal of Sec. 779 of the Code of 1860, by Chap. 178, Acts of 1862, p. 226, does not affect the right of a married woman to redeem homestead from a sale for taxes made before the repealing law took effect, within one year after coverture is removed, as provided in such section of the Code, pp. 69, 70.

Reaffirmed in *Penn v. Clemans*, 19 Iowa 378; *Stewart v. Corbin*, 25 Iowa 148, holding that under Chap. 173, Acts of 1862, homestead can only be sold for taxes due thereon; and if it be sold for other taxes, or together with other land for taxes, the sale is void.

Reaffirmed and extended in *Myers v. Copeland*, 20 Iowa 25, holding that Chap. 173, Acts of 1862—repealing the section of the text—does not apply to a tax sale of land of a married woman made before it went into effect.

JOHNSTON *v.* JOHNSTON, 19 IOWA 74

1. Statute of Frauds—Real Estate—Parol Gift of—Specific Performance—Burden and Sufficiency of Proof.—A court of equity will not specifically enforce a parol gift of land, when the evidence is not clear and satisfactory that the gift was executed by the donor, and that the donee took and held possession thereof thereunder, p. 81.

Reaffirmed and extended in Briles *v.* Goodrich, 116 Iowa 518, 90 N. W. 355, holding further that in an action for specific performance of a verbal contract to convey land, the burden is on the plaintiff to prove the contract by clear, definite and conclusive evidence.

(Note.—See further, McDonald *v.* Basom, 102 Iowa 419, 71 N. W. 341; Truman *v.* Truman, 79 Iowa 506, 44 N. W. 721; Williamson *v.* Williamson, 4 Iowa 281, important cases in this connection, not citing the text.—Ed.)

Cross references. See further on this question, annotations under Auter *v.* Miller (18 Iowa 405), ante. p. 656; Williamson *v.* Williamson (4 Iowa 279), Vol. I, p. 312.

WILGUS *v.* GETTINGS, 19 IOWA 82

1. Actions—Appearance, Waiver by—Justice's Court—Appeal from to District Court—Appearance by Defendant Waives Irregularities.—Where a court has jurisdiction of the subject-matter of an action, a mere irregularity in a process, or its service, is waived by voluntary appearance by the defendant; and where defendant appears and moves for a continuance of an action in the district court, he thereby waives all irregularities in the manner of the taking an appeal in such action from a justice's to the district court, and in the giving of notice thereof, pp. 83, 84.

Reaffirmed, explained and extended in Farmers' Mut. Telephone Co. *v.* Howell, 132 Iowa 23, 25, 26, holding that where a justice's court and the district court have concurrent jurisdiction of the subject-matter of a cause of action, that such an action, if brought in the justice's court may be transferred to the district court by consent of the parties: That jurisdiction of the person may be waived or consented to, but jurisdiction of the subject-matter must be conferred by law.

(Note.—See further, Porter *v.* Welsh, 117 Iowa 144, 90 N. W. 582; Schrader *v.* Hoover, 87 Iowa 654, 54 N. W. 463; German Bank *v.* American Ins. Co., 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316; Evans *v.* Phelps, 77 Iowa 526, 42 N. W. 432; Groves *v.* Richmond, 56 Iowa 69, 8 N. W. 752; Danforth *v.* Thompson, 34 Iowa 243; Davidson *v.* Wheeler, Morris 238, important cases in this connection, not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Dicks *v.* Hatch (10 Iowa 380), Vol. I, p. 707.

FISHER v. MOORE, 19 IOWA 84

1. Actions—Tender—Admission by.—Where defendant tenders a certain amount into court as the amount due the plaintiff in the action, he thereby admits that the plaintiff is entitled to judgment for such an amount, and cannot thereafter claim that a less amount is due the plaintiff, p. 86.

Reaffirmed and qualified in Sheriff v. Hull, 37 Iowa 178, holding that where the verdict against defendant is for less than the amount tendered and kept good by him, and the court thereupon enters judgment thereon and orders (as is allowed by Sec. 3138 of the Code of 1860) that the amount tendered and paid into court be paid to plaintiff, such latter order cures the defect in the verdict and judgment.

Reaffirmed and qualified in Ahrens v. Fenton, 138 Iowa 563, 115 N. W. 235, holding that a tender by defendant of the sum sued on by the plaintiff, does not preclude him from pleading a counterclaim in such action, arising upon a wholly independent transaction.

Cross references. See Rule 2 hereof. See further on this question, annotations under Rule 2 of Brayton v. Delaware County (16 Iowa 44), ante. p. 401.

2. Actions—Tender into Court—Judgment for Less than Tender to be Paid from Money in—Execution on Judgment will be Enjoined.—Where plaintiff recovers less than the amount tendered and kept good by the defendant, and makes no objection to his judgment therefor, it is his duty to collect his judgment and costs from the amount in the hands of the clerk (it exceeding the judgment and costs), and an execution on such a judgment will be enjoined upon complaint of the defendant, p. 86.

Cited with approval in Ahrens v. Fenton, 138 Iowa 563, 115 N. W. 235, the case turning on other questions.

YANT v. BROOKS, 19 IOWA 87

1. Bridges—Taxation for—Submission to Vote at General Election—Fiscal Powers of County Board of Supervisors.—Chap. 22, of the Code of 1860, vests in the county board of supervisors the care and management of the county's fiscal affairs and of its property previously exercised by the county judge. Such Chapter gives the board of supervisors the power to submit a question of taxation to the voters, for the construction of or to *aid in* the construction of bridges where the probable cost will exceed two thousand dollars; but such question must be submitted at a *general* and not a *special* election, pp. 89-91, 93.

Reaffirmed and extended in Bell v. Foutch, 21 Iowa 127, 129, holding further that the rule is applicable to the erection of a bridge over a river and within the limits of a city, unless the county board of supervisors be deprived of such power by express provision of the charter

of the city: Holding further that the rule gives the county board of supervisors the power to aid others in constructing a free bridge within such city limits, if the board does not part with its supervisory power over it when it is so constructed.

Reaffirmed and extended in Starr & Rand v. Board of Supervisors of Des Moines County, 22 Iowa 497, 498, holding that by the Chapter of the Code of 1860, mentioned in the text, the same powers are conferred upon the board of supervisors for the purpose of submitting a question to the voters for the authority to levy a tax for public purposes—such as the erection of public buildings, etc.—and such powers must be exercised by such board in the same manner as formerly exercised by the county judge.

Reaffirmed and qualified in Cedar Rapids & Mo. River R. R. Co. v. Boone County, 34 Iowa 51, holding that under Sec. 986 of the Code of 1860, the board of supervisors may submit to the voters, at a *special* election, the question of the ratification of a contract to convey swamp lands to aid in the construction of a railroad.

Cited with approval in Morseman v. Younkin, 27 Iowa 358, not in point, but upon analogy.

2. Statutes—Repeal by Implication not Favored.—The repeal of a statute by implication is not favored, and courts will give effect to several statutes on the same subject, if possible, p. 91.

Reaffirmed and explained in State v. Shaw, 28 Iowa 79, 4 Am. Rep. 159, holding that in order for a new statute to work a repeal of an old one by implication, there must be an absolute repugnancy between them.

Cross references. See further on this question, annotations under Rule 2 of Baker & Griffin v. Steamboat Milwaukee (14 Iowa 214), ante. p. 229; Rule 1 of Duncombe v. Prindle (12 Iowa 1), ante. p. 1.

STATE v. KNIGHT, 19 IOWA 94

1. Grand Jury—Irregular Selection of Names for, etc.—Challenge.—Where, under the Code of 1860, the judges of election in the various townships return eighty-five instead of seventy-five names from which to select a grand jury, but the extra names are stricken before the jury is drawn, and fifteen jurors are thereafter drawn and summoned, the return of the extra names is not a ground of challenge to the jury: Nor is it a valid objection to such grand jury that the lists of the jurors selected by such election judges were not copied in the election book, p. 95.

Reaffirmed in State v. Rorabacher, 19 Iowa 156.

Reaffirmed and explained in State v. Beckey, 79 Iowa 371, 373, 44 N. W. 680; State v. Pierce, 90 Iowa 510, 511, 58 N. W. 893, holding that a challenge to a grand jury on the ground of technical irregularities in its selection not affecting the substantial rights of accused,

must be overruled: That the statute in relation to the selection of the grand jury is directory, and substantial compliance therewith is all which is required.

Reaffirmed and extended in State v. Brandt, 41 Iowa 632 (and same in effect on page 600); State v. DeBord, 88 Iowa 105, 55 N. W. 80; State v. Edgerton, 100 Iowa 65, 69 N. W. 281, holding further that an indictment will not be set aside because of irregularities in the selection of the grand jury where they do not affect or prejudice the substantial rights of the accused: A substantial compliance with the statute is all which is required.

Distinguished and narrowed in State v. Russell, 90 Iowa 570, 572, 573, 58 N. W. 916, 28 L. R. A. 195, holding that the statute of 1886, requiring among other things that not more than one person shall be drawn as a grand juror from any civil township, is mandatory, and that an indictment returned by a grand jury, two of which are from the same civil township, must be set aside upon motion made by accused before pleading thereto (where the accused was not held to await the action of the grand jury, and had no opportunity to object to or challenge it before the indictment was returned).

(Note.—See further, State v. Dusbrow, 130 Iowa 22, 8 A. & E. Ann. Cas. 190, 106 N. W. 264; State v. Bowman, 73 Iowa 110, 34 N. W. 767; State v. Carney, 20 Iowa 82; State v. Gillick, 7 Iowa 287; Dutell v. State, 4 G. Greene 125, important cases on this question, not citing the text.—Ed.)

Cross reference. See further, annotations under Rule 1 of State v. Ansaleme (15 Iowa 44), ante. p. 301.

2. Change of Venue in Criminal Cases—Discretion of Trial Court—Reversal on Appeal.—The trial court is vested with a sound judicial discretion in deciding upon a motion for a change of venue in criminal cases, and he is to rule thereon according to the very right of it: His ruling thereon will not be ground for reversal, unless it is clearly shown that such discretion was abused, p. 96.

Reaffirmed in State v. Hale, 65 Iowa 577, 22 N. W. 683.

Cited with approval in State v. King, 37 Iowa 468, the court holding that evidence improperly admitted, and erroneous instructions given in a criminal prosecution when no prejudice is wrought the defendant, and other rulings of like character, do not demand the reversal of a judgment of conviction.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others, see annotations under Rule 2 of State v. Ingalls and King (17 Iowa 8), ante. p. 480.

3. District Court—Power of Adjournment—Completing Trial After Expiration of Regular Term.—Where at the close of a regular term of the district court of one county a trial of a cause is pending, the court may adjourn to a certain day the term of the court of the

county wherein the next term is to commence, and complete the trial of the cause pending in the court of the first county, p. 99.

Reaffirmed in State v. Clark, 30 Iowa 170, 171; State v. Van Auken, 98 Iowa 686, 68 N. W. 458, holding that the district court may adjourn the regular term of court in one county, and go to another county and hold a special term of court.

Reaffirmed and extended in In re Estate of Hunter, 84 Iowa 391, 392, 51 N. W. 21, holding further that the district court may adjourn court in one county to a day past the regular term thereof, go to another county and hold court, and then reconvene the first court on the day named and for which it was set, and enter a final order and sign a bill of exceptions in a cause pending in the first court at such adjourned term: That the court may adjourn from time to time as occasion demands.

Cross reference. See further on this question, annotations and note under Weaver v. Cooledge (15 Iowa 244), ante, p. 334.

4. Criminal Law—Conspirators and Co-defendants—Acts and Declarations—When Admissible Against Another Conspirator or Co-defendant.—The acts and declarations of one conspirator or co-defendant done and made preceding or at the time of the commission of a crime or offense, are admissible against all indicted therefor; but, as a general rule, the acts or declarations of one conspirator or co-defendant done and made after the commission of the crime or offense are inadmissible against others indicted therefor, p. 101.

Reaffirmed in State v. Green, 20 Iowa 427.

5. Evidence—Test of Competency.—The object of evidence is to arrive at the truth; and whatever circumstances tend to this end are admissible, if not of a nature to mislead rather than to guide: Whether evidence is proper often depends upon the circumstances of the case, p. 101.

Reaffirmed in State v. Cruise, 19 Iowa 318.

JOHNSON v. DODGE, 19 IOWA 106

1. Actions—Attachment in Justice's Court—Notice by Publication—Requisites of Notice.—The fact that a notice by publication in an attachment action in a justice's court does not name or specify the township for which he is justice, when it gives the name of the justice and the county in which he is such officer, and is otherwise correct, is not a fatal defect, pp. 107, 108.

Reaffirmed and extended in Ulber v. Bunn, sheriff, and Sutton, 143 Iowa 263, 119 N. W. 270, holding further that an original notice in an action in a justice's court is sufficient which names the justice and the county for which he is officer, although it does not state, or incorrectly states, the township wherein he acts.

2. Attachment Action—Service of Notice by Publication—No Personal Judgment to be Rendered in.—In an attachment action in which the defendant is served with notice by publication only, and in which he does not enter his appearance, no personal judgment can be rendered, and no general execution after exhausting the attached property can be ordered against the defendant, p. 108.

Reaffirmed in Taylor & Farley Organ Co. v. Plumb, 57 Iowa 36, 10 N. W. 283, holding that a judgment upon service of notice by publication in a justice's court is a judgment *in rem*, and may be set aside upon proper application within two years, under Sec. 2877 of the Code of 1873.

Reaffirmed and explained in Smith v. Griffin, 59 Iowa 410, 13 N. W. 423, holding that in a proceeding by attachment, when the defendant has not been personally served with process, the judgment should be *in rem* and not *in personam*.

Cited with approval in Cooper v. Smith, 25 Iowa 270, holding that where no process is served on the defendant, nor property attached, nor garnishee charged, nor appearance entered, a judgment against the defendant based upon a publication of the pendency of the suit, will be void, and may be impeached collaterally or otherwise, and forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it.

Cited with approval in Melhop & Kingman v. Doane & Co., 31 Iowa 400, 7 Am. Rep. 147, a case involving the effect of a foreign judgment, holding that in order for a judgment to be valid, the court must have jurisdiction both of the subject-matter and of the parties.

CROSSEN v. WHITE, 19 IOWA 109, 87 AM. DEC. 420

1. Pleadings—Petition—What Defects in are Cured by Verdict.—A defect in a petition which may be reached by motion or by demurrer, is cured by verdict, p. 111.

Reaffirmed and explained in Cahill v. Ill. Cent. R. R. Co., 137 Iowa 584, 115 N. W. 218, holding that when an issue has in fact been submitted to the jury, the fact that it was not technically raised by the pleadings, is cured by verdict.

Reaffirmed and extended in Egleston v. Brassfield, 38 Iowa 699 (abstract), holding further that defects in pleadings which are assailable by motion or by demurrer, are cured by verdict and judgment.

Cross references. See further on this question, annotations under Rule 2 of Doniphan & Hughes v. Street (17 Iowa 317), ante. p. 533; Rule 3 of Veach v. Thompson (15 Iowa 380), ante. p. 353, and cross references there found.

2. Appeal—Evidence Not Objected to Below—Review.—Where evidence is not objected to in the district court, the question of whether or not it was properly received will not be reviewed upon appeal, pp. 111, 112.

Reaffirmed and explained in Marr v. B. C. R. & N. Ry. Co., 121 Iowa 120, 96 N. W. 717; *In re* Assignment of Snyder, 138 Iowa 557, 114 N. W. 616, holding—as does the present case—that when parol evidence of a contract within the Statute of Frauds is introduced upon the trial without objection, it cannot afterward be objected to upon appeal.

Reaffirmed and extended in Webster v. Cedar Rapids & St. P. R. R. Co., 27 Iowa 318, holding further that where an error may be corrected by motion in the district court, it will not be reviewed upon appeal, unless a motion therefor is made in such lower court before prosecuting the appeal.

Reaffirmed and extended in Byers v. Johnson, 89 Iowa 282, 56 N. W. 451, holding further that questions not raised below will not be reviewed or considered upon appeal to the Supreme Court.

Cited in 148 Iowa 304, 126 N. W. 1133.

Distinguished and narrowed in Benedict v. Bird and Engle, 103 Iowa 618, 72 N. W. 769, holding that where in an action for breach of an oral contract to convey land, the defendant pleads the Statute of Frauds, and the plaintiff replies thereto and pleads facts constituting an exception to such statute, the defendant does not waive his right to rely upon the statute by failure to object to any evidence offered by plaintiff, but may move for a peremptory instruction at the close of all of the plaintiff's evidence.

PILMER v. BRANCH OF STATE BANK AT DES MOINES, 19 IOWA 112

(Former appeal, 16 Iowa 321.)

1. Appeal—Verdict Against Weight of Evidence—When not Ground for Reversal—Conflicting Evidence.—Where the evidence on the trial below was conflicting, its sufficiency was a question for the jury, and the refusal of the trial court to grant a new trial in such case will not be a ground for reversal, p. 113.

Reaffirmed and explained in Snyder v. Eldridge, 31 Iowa 130, holding that where the evidence on a trial was conflicting, and the trial court refuses to grant a new trial on the ground that the verdict was against the weight of the evidence, such ruling will be affirmed upon appeal.

Reaffirmed and qualified in Conner & Co. v. Mountain, 28 Iowa 593 (abstract), holding that where the evidence is conflicting, and the trial court refuses to set the verdict aside on the ground that it is against the evidence, there must be a very strong and clear case of the verdict being against the weight of the evidence made out on appeal, or the judgment will not be reversed for such cause.

Reaffirmed and qualified in Todd v. Branner, 30 Iowa 440, holding that where the evidence adduced below was conflicting, the Supreme Court will reverse the judgment because the verdict was against the

weight of the evidence, only when fully satisfied that it was insufficient to convince the judgments, reason and consciences of the jury.

Cross references. See further on this question, annotations and cross references under Rule 2 of *Rosierz v. Van Dam* (16 Iowa 175), ante. p. 422; Rule 2 of *Templin v. Iowa City* (14 Iowa 59), ante. p. 206.

2. Negotiable Instrument, or Bill of Exchange—Rights of Payee or Holder.—One in possession of a negotiable instrument or a bill of exchange, is *prima facie* owner thereof, and may erase an indorsement thereon, and recover as a holder or as a payee, independent of such indorsement, p. 114.

Reaffirmed in *Jones v. Berryhill*, 25 Iowa 293.

Reaffirmed and explained in *King v. Gottschalk*, 21 Iowa 514; *Rubey v. Culbertson*, 35 Iowa 266, holding that a person who has possession of a note payable to order, but not indorsed to him, may sue thereon; and the production by the plaintiff of the note upon the trial, is *prima facie* evidence of ownership, and authorizes a recovery, unless plaintiff's ownership be disproved.

Reaffirmed and explained in *Rubey v. Culbertson*, 35 Iowa 266, holding that in an action on a negotiable note payable to order, proof of possession of the note by plaintiff is *prima facie* evidence of his ownership; and is admissible in evidence independent of a written assignment on the back of the paper.

Cross reference. See further in this connection, annotations under *Yunker v. Martin* (18 Iowa 143), ante. p. 598.

PIERSON *v.* HEISEY, SHERIFF, 19 IOWA 114

1. Fraud—Gift by Parent to Child—When Valid.—Where a father who is solvent, makes a good faith gift of personal property to his child, and the latter takes possession thereof, and thereafter uses and controls it, such transaction is valid as against the subsequent creditors of the father, even though, after the time of the gift, the property remains in the house of the father with whom the child resides, pp. 115, 116.

Reaffirmed and extended in *Bolton v. Bailey*, 122 Iowa 730, 98 N. W. 560, holding further that while a gift may not be sustained to the detriment of the donor's creditors, it is nevertheless true that it is valid, and will be upheld if the donor retains property sufficient to pay his debts: Holding further that the burden is on a person attacking a gift for fraud, to plead and prove that the donor had creditors and was insolvent at the time of making the gift.

Distinguished in *Willey v. Backus*, 52 Iowa 402, 403, 3 N. W. 432, a case wherein the proof failed to show a delivery of the property to, and control and possession thereof by the donee; and it was therefore held invalid.

Special cross reference. For further cases citing the text, see annotations under *Smith v. Hewett* (13 Iowa 94), ante. p. 123.

WEBSTER COUNTY *v.* TAYLOR, 19 IOWA 117

1. Counties—Liability for Acts of County Judge or Other County Officer—Extent of.—Where a county judge or other county officer does acts wholly beyond the corporate powers and duties, the county is not bound thereby. The written statute law is the source and charter of a county's power, beyond which it cannot go, p. 120.

Reaffirmed and explained in *State v. Haskell*, 20 Iowa 281, holding that the unauthorized act of a public agent or officer whose powers are defined by express statute, does not bind his principal or the public.

Reaffirmed, explained and extended in *Harrison v. Palo Alto County*, 104 Iowa 387, 73 N. W. 873, holding that municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed.

Distinguished in *Bradley & Sherman v. Delaware County*, 57 Iowa 553, 10 N. W. 898, holding that where a claim for medical attendance upon the poor of a township and upon the order of the trustees thereof, is filed before the board of supervisors, without a certificate of the township trustees as provided by statute, which board allows a portion of such claim, that such action waives objection to the failure to have it certified by the trustees, in an action against the county for the disallowed portion thereof.

Distinguished and narrowed in *Hawk v. Marion County*, 48 Iowa 474, 475, holding that under Secs. 279, 303 and 796 of the Code of 1873, the county board of supervisors has implied power to offer a reward for the recovery of money stolen from the county, and that the county is liable to the person earning the reward; but such board has no power under such sections to offer a reward for the arrest and conviction of a person stealing the county's money or property.

Cross reference. See further on this question, annotations and cross reference under *Estep v. Keokuk County* (18 Iowa 199), ante. p. 612.

2. Swamp Lands—Power of County to Appoint Agents in Relation to.—The county has power to incur expenses of an agent in the selection of its swamp lands, and transferring the proofs thereof to the Secretary of State, or state land office. But whether, prior to the Act of April 8, 1862, the county had power to allow a claim for services and expenses of a county agent before the federal department at Washington, in relation to its swamp lands, is doubtful, and if it existed at all, the agent claiming therefor must make satisfactory proof of good faith of all parties, pp. 121, 122.

Reaffirmed and narrowed in Baker v. Washington, 26 Iowa 154, holding that a county agent can only be appointed to render services in relation to county swamp lands before the department at Washington, by strict compliance with the Act mentioned in the text.

Distinguished in Allen v. Cero Gordo County, 34 Iowa 64, holding that a county may contract with a person whereby he is to render all services, prepare all proofs, furnish all agents and counsel, and prosecute its claims for swamp lands before the department at Washington, such person to be paid therefor in a portion of the lands, money or scrip recovered.

KEYES & CRAWFORD v. TAIT, 19 IOWA 123

1. Public Road or Highway—Proof of Establishment—Presumption of Regularity of Proceedings.—Where a road was established under the statute of 1843, requiring that before viewers could be appointed the commissioners were to be satisfied that notice of the filing of the petition had been given as required by law, and the record shows that the viewers were appointed, the road established, and it has since been used as such without challenge, this, when accompanied by extrinsic proof that the notice was given as required by law, is sufficient proof of the legal establishment thereof, p. 125.

Reaffirmed in Biglow v. Ritter, 131 Iowa 214, 108 N. W. 219.

Reaffirmed and extended in State v. Prine, 25 Iowa 233; *McColister v. Shuey*, 24 Iowa 366, holding that where in a proceeding to establish a public road the county court, upon presentation of the petition, finds that there has been proper notice given, which finding is entered of record, it is sufficient to show that the court acquired jurisdiction by proper notice.

Reaffirmed and extended in Pagels v. Oaks, 64 Iowa 200, 201, 19 N. W. 422, holding further that where the record in a proceeding for notice required by Sec. 936 of the Code of 1873, is necessary to be filed in the county auditor's office before he may proceed to establish a road; but such officer may—under Secs. 937, 938 of that Code—be satisfied thereof by other proof, or from personal knowledge; and the burden is on the party assailing the establishment of a road for want or such notice, to prove that it was not in fact given as required by law.

Reaffirmed and extended in Larson v. Fitzgerald, 87 Iowa 407, 54 N. W. 442, holding further that where the record in a proceeding for the establishment of a highway recites that the court found "that all the requirements of the law were performed," that such recital established jurisdiction.

Reaffirmed and qualified in State v. Anderson, 39 Iowa 276, holding that where the record in a proceeding to establish a road fails to show that notice was given, or that the question was decided upon,

and no extrinsic proof of compliance with the law in this respect is made, the road is not established.

Cross reference. See further on this question, annotations under *State v. Berry* (12 Iowa 58), ante. p. 10.

2. Public Roads and Highways—Establishment of.—A substantial compliance with the statute in reference to the establishment of a public road or highway, is all which is required, pp. 124, 125.

Reaffirmed in *McCollister v. Shuey*, 24 Iowa 365.

3. Adverse Possession—Establishment of Public Road or Highway by—Limitation of Action to Recover Real Estate.—Under the Code of 1860, ten years' user by the public of a public road or highway under a claim of right, bars the claim of the owner of the soil: Especially is this true where such road has been controlled, repaired and improved by the county during such period, without objection by the land owner, pp. 125, 126.

Reaffirmed in *State v. Welpton*, 34 Iowa 145, 146.

Reaffirmed and explained in *State v. Tucker*, 36 Iowa 486, 487, holding that to establish a highway by prescription there must be an actual public use, general, uninterrupted, continued for the period of the statute of limitation and under a claim of right.

Reaffirmed and extended in *City of Pella v. Scholte*, 24 Iowa 293, 85 Am. Dec. 729, holding further that a right to land by adverse possession for the statutory period may be acquired, or lost by the public in and to public realty.

Reaffirmed and extended in *Manderschid v. City of Dubuque*, 29 Iowa 79, 82, 83, 4 Am. Rep. 196, holding further that continued and uninterrupted use of lands by the public as a highway for the statutory period of limitation for the recovery of real estate, raises the presumption of a dedication to public use.

Reaffirmed and extended in *Manderschid v. City of Dubuque*, 29 Iowa 82, 83, 4 Am. Rep. 196, holding further that work done by proper authority, to repair roads used as highways, is sufficient to establish a presumption of acceptance thereof by the proper public authorities, of such ways dedicated to public use.

Reaffirmed and varied in *Overman v. May*, 35 Iowa 97, holding that the right of the public, through its officers, to use stone within the limits of a highway in a reasonable and proper manner in its repair, will not authorize it to go into a stone quarry in the bed of a river, which is no part of the highway, except that it is spanned by a bridge constituting part of it, and remove stone therefrom to build culverts in and repair other streets in a city; and that in such case, there being no statutory dedication, the owner of the land adjacent to the river owns such land, and may recover for the stone.

Reaffirmed and varied in *Baldwin v. Herbst*, 54 Iowa 169, 6 N. W. 257, holding that a public road or highway may be proved to be such

by the record establishing it, or by the written dedication made by the owner of the land, or by prescription.

Cross references. See further on this question, annotations and notes under Rule 1 of *Brown v. Jefferson County* (16 Iowa 339), ante. p. 443; *Robinson v. Lake* (14 Iowa 421), ante. p. 259.

PRESTON *v.* DAY, Ex'r, 19 IOWA 127

1. Decedent's Estate—Failure to Present Claim within Statutory Period—Equitable Circumstances and Relief—Laches of Creditor.—Where a creditor has full knowledge of the death of his debtor and of the appointment of an administrator, and negligently fails to present his claim within one year and a half, his debt is barred, and he is not entitled to equitable relief, under Sec. 2405 of the Code of 1860, pp. 128, 129.

Special cross reference. For cases citing the text, and many others, see annotations under *Ferrall v. Irvine, Adm'r* (12 Iowa 52), ante. p. 8.

MOON *v.* MOON, 19 IOWA 130

1. Appeal of Chancery Action—Review.—In order to justify a review by the Supreme Court of the action of the district court in an equitable action, the transcript must show that all the evidence adduced below is before the appellate court. This rule applies to an appeal in an action for divorce which is tried according to the second method provided by Secs. 2999 and 3000 of the Code of 1860, pp. 132, 133.

Cited in *Cole v. Cole*, 23 Iowa 439, a case wherein the issue in an action for divorce and alimony was submitted to the jury, the court holding further that equitable actions tried according to the second method of Sec. 3000 of the Code of 1860 (by oral evidence) are reviewed upon appeal as ordinary actions; and where in such case, the evidence is conflicting, a judgment will not be reversed because the verdict of the jury, or finding of the court, was against the weight of the evidence.

Cross references. See further on this question, annotations under *Van Orman v. Spafford, et al* (16 Iowa 186), ante. p. 425; *Anderson v. Easton & Son* (16 Iowa 56), ante. p. 406.

WOLFF *v.* VAN METRE, 19 IOWA 134

(Later appeal, 23 Iowa 397.)

1. Husband and Wife—Power of Wife to Mortgage Property to Secure Husband's Debt.—Under the Code of 1860, a wife may mortgage her separate property to secure the debt of her husband; but she is not bound personally or beyond the mortgaged property for such a debt, pp. 135, 136.

Special cross reference. For cases citing, sustaining, etc., the text, and many others, see annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

BURLINGTON & MISSOURI RIVER R. R. CO. v. HAYNE, 19 IOWA 137

1. Taxation and Revenue—Lands Granted to Railroads in Aid of Their Construction—When Subject to Taxation.—Where, under the Act of Congress of May 15, 1856, granting lands to the state of Iowa in aid of the construction of certain lines of railroad, such a railroad company accepts some of such land from the state, it is subject to taxation upon the performance by the company of the conditions provided in the Act, p. 140.

Cited in Sioux City & St. P. R. R. Co. v. Osceola County, 43 Iowa 324, the case involving the construction of the Act of Congress of May 12, 1864, Chapters 134, 144 of the Acts of Eleventh (Iowa) General Assembly, and Chapter 34, Acts of Fifteenth (Iowa) General Assembly, and involving a similar, but not parallel question.

STATE v. TURNER, 19 IOWA 144

1. Trial—Instructions—Rules of Law, Not Reasons for, to be Stated in.—In his instructions to the jury the court must state the law applicable to the case, but is not required to give the reasons for the law given.

So, the court, upon the trial of an indictment, is not bound to give an instruction as to the effect of verbal confessions or admissions of the accused, pp. 148, 149.

Reaffirmed in State v. Rorabacher, 19 Iowa 160.

Reaffirmed and explained in Muldowney v. Ill. Cent. R. R. Co., 32 Iowa 178, holding that where there is no evidence, or where essential or integral elements of a cause of action or defense, are entirely without proof, the trial court may properly give a peremptory instruction, or direct the jury as to the kind of verdict to be rendered; but where there is evidence tending in any degree to establish the cause of action or defense, the trial court must not take the case from the jury or pronounce an opinion as to the sufficiency or weight of the evidence, except in cases where the proof is documentary: That it is the peculiar province of the jury to decide questions of fact, the weight and sufficiency of evidence, and the credibility of witnesses, and instructions must be confined to rules of law only.

Cross reference. See further on this question, annotations and cross references under Napper v. Young (12 Iowa 450), ante. p. 72.

2. Criminal Law—Evidence of Good Character of Accused.—Upon the trial of an indictment, evidence of the general good character of the accused is admissible to rebut the presumption of guilt arising from circumstantial evidence; but in such case good character is

no defense, where the offense is positively or strongly proved, but will be considered by the jury in arriving at their verdict, p. 149.

Reaffirmed and extended in State v. Northrup, 48 Iowa 585, 586, 30 Am. Rep. 408; State v. Wolf, 112 Iowa 464, 84 N. W. 538, holding further that in all criminal cases, the good character of the accused is for the consideration of the jury; and they are to determine the weight to be given thereto, without instruction thereon by the court.

(Note.—See further, State v. Ormiston, 66 Iowa 143, 23 N. W. 370; State v. Donevan, 61 Iowa 278, 16 N. W. 130; State v. Clemons, 51 Iowa 274, 1 N. W. 546; State v. Gustafson, 50 Iowa 194, important cases on this subject not citing the text.—Ed.)

3. Criminal Law—Sufficiency of Verdict of Guilty—Special Verdict.—Where upon the trial of an indictment for aiding to conceal stolen goods, the jury returns a verdict finding the accused “guilty of aiding in concealing the stolen property mentioned in the indictment, as charged therein,” and assessing the value of the property at one thousand dollars, the verdict is equivalent to and is, in effect, a general verdict of guilty.

A special verdict is where the jury finds the facts only, leaving the judgment to the court; and it must present the conclusions of fact, and not the evidence on which they were based, and they must be so presented that nothing remains to the court but to draw conclusions of law from them, pp. 150, 151, 153.

Reaffirmed and extended in State v. Arthur, 21 Iowa 325, holding further that where a verdict of conviction is so fatally defective as that the court is unable to render judgment thereon, the jury should be directed to retire for further deliberation, and to put it into proper form; but that where this is not done, a new trial may be ordered, and the defective verdict will not bar another trial.

Reaffirmed and qualified in State v. Austin, 109 Iowa 122, 80 N. W. 304, holding that—under Sec. 4772 of the Code of 1897—a verdict finding accused “guilty of the crime of assault with intent to commit a felony” is insufficient: That in such case the trial court should require the jury to retire and designate in their verdict the specific offense the accused is found guilty of an assault with intent to commit; and that a judgment based upon such indefinite verdict will be reversed upon appeal: Holding, also, that Sec. 4772, above mentioned, authorizes the conviction of an accused person, only for an assault with intent to commit the felony specified in the indictment.

Cited in Helphrey v. Ch. & R. I. R. R. Co., 29 Iowa 483, the court holding that a verdict, whether general or special, is good if it expresses the intention of the jury upon the matters in issue, with sufficient certainty to enable the court to pronounce judgment thereon.

4. Receiving and Aiding in Concealing Stolen Property—Sufficiency of Evidence to Convict.—In order to convict one under an

indictment for receiving and aiding in concealing stolen property, knowing it to be stolen, it is not necessary to prove that the accused actually received and concealed it. It is sufficient if he was present, knew it was stolen property, and saw it hidden by another, afterwards keeping silent and refusing to give information to the officer searching for it, unless these facts be satisfactorily explained. Knowledge by the accused of the property having been stolen may be inferred from the circumstances of the case, pp. 153, 154.

Cited in State v. Smith, 88 Iowa 4, 55 N. W. 17; State v. Levich, 128 Iowa 374, 105 N. W. 335, holding that upon the trial of an indictment for receiving stolen goods knowing them to have been stolen, that proof that the defendant received them with knowledge that they were stolen is sufficient to convict, without other proof of his guilty intent.

STATE v. RORABACHER, 19 IOWA 154

1 Grand Jury—Irregular Selection of Names for, etc.—Challenge.—Where, under the Code of 1860, the judges of election in the various townships return eighty-five instead of seventy-five names from which to select a grand jury, but the extra names are stricken before the jury is drawn, and fifteen jurors are thereafter drawn and summoned, the return of the extra names is not a ground of challenge to the jury: Nor is it a valid objection to such grand jury that the lists of the jurors selected by such election judges were not copied in the election book, p. 156.

Special cross reference. For cases citing and explaining the text, and many others, see annotations under State v. Knight (19 Iowa 94), ante. p. 697.

2. Trial — Continuance — Grounds for — Judicial Discretion—Abuse—Reversal.—A continuance may—under Code of 1860—be granted for any cause (not resulting from the fault or negligence of the applicant) which satisfies the trial court that substantial justice will thereby be more nearly obtained: But in determining such applications, the trial court cannot act arbitrarily, or in violation of the manifest rights of the parties; he has a sound judicial discretion in such cases which will not be reviewed upon appeal, except in case of abuse thereof, and resulting prejudice to the substantial rights of the party complaining, pp. 157, 158.

Reaffirmed in State v. Reid, 20 Iowa 419; State v. Hasty, 121 Iowa 514, 515, 96 N. W. 1117, this last case being under the Code of 1897.

Cross references. See Rule 3 hereof. See further on this question, annotations under State v. Cox (10 Iowa 351), Vol. I, p. 703.

3. Trial—Continuance—Absence of Witness as Ground—What Application to State—Absent Impeaching Witness.—When an application for a continuance is based upon the absence of a witness it

must state, besides diligence and other requirements, facts showing reasonable grounds of belief that his attendance or testimony will be procured by the next term; and a mere *belief* of the applicant that the testimony can be so procured, is insufficient.

When an application for a continuance is based upon the absence of witnesses who would, if present, impeach the adverse party's witnesses, the motion rests most peculiarly within the discretion of the trial court, and his ruling thereon will seldom, if ever, be disturbed upon appeal, pp. 157, 158.

Reaffirmed as to first paragraph in State v. Burns, 124 Iowa 210, 99 N. W. 722.

Reaffirmed as to second paragraph in State v. Hasty, 121 Iowa 514, 515, 96 N. W. 1117.

4. Evidence—Rebuttal.—Evidence cannot be introduced in rebuttal to sustain the testimony of a witness introduced in chief, when such last testimony has been in no manner impeached or attacked, pp. 158, 159.

Distinguished in State v. Vincent, 24 Iowa 574, 575, 95 Am. Dec. 753, holding that when the credibility of a witness is impeached by direct testimony of his want of reputation for truth, or of his general moral character, or by proof of his having made or testified to different and conflicting statements, he cannot, as a general rule, be supported by evidence that statements of the facts made by him before the trial correspond with his evidence: But if the witness is charged with a design to misrepresent, on account of his changed relation to the parties or the cause, evidence of like statements before such change of relation, may be admitted; or, if it is attempted to be shown that the evidence is a recent fabrication, or when long silence concerning an injury is construed against the injured party, as in cases of an indictment for rape, in such cases it is proper to show that the witness made similar statements soon after the transaction in question.

5. Trial—Instructions—Rules of Law, Not Reasons For to be Stated in.—In his instructions to the jury the court must state the law applicable to the case, but is not required to give the reasons for the law given.

So, the court, upon the trial of an indictment, is not bound to give an instruction as to the effect of verbal confessions or admissions of the accused, p. 160.

Special cross reference. For cases citing, etc., the text, see annotations under Rule 1 of State v. Turner (19 Iowa 144), ante. p. 707.

6. Trial—Instructions—Refusal of Instruction Already Covered.—It is not error for the court to refuse to give an instruction substantially covered by others given, pp. 160, 161.

Reaffirmed in Robinson v. Ill. Cent. R. R. Co., 30 Iowa 404, 405; *Todd v. Branner*, 30 Iowa 441, 442.

Cross references. See further on this question, Rule 2 of Peck v. Hendershott (14 Iowa 40), ante. p. 201; Rule 4 of Trustees of Iowa College v. Hill (12 Iowa 462), ante. p. 75.

7. Criminal Law—Reasonable Doubt—Instructions.—It is a reasonable doubt *by the jury* and not *by any one member* thereof that justifies an acquittal, p. 161.

Reaffirmed and explained in State v. Hamilton, 57 Iowa 598, 11 N. W. 6, holding that although a juror is not to surrender his convictions as to the guilt or innocence of accused, or his reasonable doubt of the guilt of accused, unless convinced, still an instruction on this point is improper: That the usual instructions as to the measure of proof in criminal cases is all which is required.

Reaffirmed and narrowed in State v. Stewart, 52 Iowa 286, 287. 3 N. W. 101, holding that an instruction defining a *reasonable doubt* as "such as arises in the minds of the whole jury" is misleading and reversible error, as the jury might understand it to mean that a juror is to yield his convictions, unless the reasonable doubt held by him is not concurred in by the others.

MOBERLY v. ALEXANDER, 19 IOWA 162

1. False and Fraudulent Representations—Measure of Damages.—In an action for damages for false and fraudulent representations inducing a purchase of land by plaintiff from defendant, the measure of damages is the difference between the value of the land purchased at the date of the contract, and the amount the land would have been worth at that time had it been as represented, p. 164.

Reaffirmed in Stewart v. Jack, 78 Iowa 156, 42 N. W. 634.

Special cross reference. For further cases citing, sustaining and qualifying the text, and many others on the question, see annotations and note under Rule 1 of Gates v. Reynolds (13 Iowa 1), ante. p. 107.

STATE v. SCHLAGEL, 19 IOWA 169

1. Indictment—Indorsement of Names of Witnesses on—Sufficiency of.—The indorsement on an indictment of the initials of the Christian name of a witness, together with his Surname, is sufficient to authorize his introduction as a witness on the trial, p. 170.

Special cross reference. For cases citing the text, and many more on the question, see annotations under Rule 4 of State v. McComb (18 Iowa 43), ante. p. 581.

2. Criminal Law—Testimony of Accomplice—Sufficiency of Corroboration to Authorize Conviction.—The testimony of an accomplice is sufficient to authorize the conviction of one charged with a crime or offense, where such accomplice is corroborated by other witnesses in any material point or on any material part of his testimony, p. 171.

Reaffirmed in State v. Hennessy, 55 Iowa 300, 301, 7 N. W. 642; State v. Allen, 57 Iowa 435, 10 N. W. 807; State v. Van Winkle, 80 Iowa 22, 45 N. W. 390; State v. Thompson, 87 Iowa 673, 54 N. W. 1078; State v. Hall, 97 Iowa 404, 66 N. W. 726.

(Note.—See further, State v. Wart, 51 Iowa 587, 2 N. W. 405; State v. Thornton, 26 Iowa 80, some cases sustaining and explaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations and note under State v. Tulley (18 Iowa 88), ante. p. 590.

3. Trial—Instructions—Refusal of Instructions Covered by Others.—It is not error for the court to refuse to give instructions which are substantially covered by others given, p. 172.

Reaffirmed in State v. Fogarty, 105 Iowa 38, 74 N. W. 755.

Cross reference. See further on this question, annotations and cross references under Rule 6 of State v. Rorabacher (19 Iowa 154), ante. p. 709.

CRAWFORD v. PAINE, 19 IOWA 172

1. Pleadings—Petition—Amendment of Petition in Injunction Action After Motion to Dissolve.—Under the Code of 1860, the plaintiff may amend his petition in an injunction action after a motion to dissolve the writ has been made and while it is pending; and if the petition, as amended, states a good cause for the injunction, and it is not overcome by the adverse showing, the motion must be overruled and the injunction continued. In such a case it is error for the court to refuse to permit such amendment to be filed, p. 176.

Reaffirmed, varied and explained in Pride v. Wormwood, 27 Iowa 262, holding that where a party's request to amend is reasonable and its refusal works manifest injustice, it will be ground for reversal.

Reaffirmed and qualified in Des Moines Nav. & R. R. Co. v. Carpenter, Register of Land Office, 27 Iowa 492, 493, holding that where, after a motion to dissolve an injunction is made, the plaintiff files a new petition and asks for a new writ, instead of filing an amended petition, the Supreme Court will not presume upon appeal from an order dissolving an injunction, that the court below considered the new petition in passing upon the motion: In such case such fact must affirmatively appear from the record upon the appeal.

Cross reference. See further on this question, annotations under Rule 2 of Seevers, Adm'r v. Hamilton (11 Iowa 66), Vol. I, p. 773

2. Injunction to Restrain Forcible Entry and Detainer Proceeding—When Allowed.—Injunction lies to restrain proceedings in an action of forcible entry and detainer only when certain and manifest irreparable injury would result to the complainant were such injunction not granted, p. 177.

Reaffirmed in Paton v. Lancaster, 38 Iowa 497.

CRABTREE v. MESSERSMITH, 19 IOWA 179

1. **Appeal—Verdict Against Evidence as Ground for Reversal—Evidence Conflicting.**—Where the evidence upon the trial was conflicting, the judgment will not be reversed because the verdict was against the evidence, unless it affirmatively appears upon appeal that it was palpably against the weight thereof, p. 180.

Special cross reference. For cases citing the text, and others, see annotations under Rule 1 of *Pilmer v. Branch of State Bank* (19 Iowa 112), ante. p. 701.

2. **Contract or Note Payable in Specific Property—When Becomes Money Demand—Rights of Creditor.**—Where a contract or a note is payable in personal property, to be delivered at a particular time, and the debtor fails to deliver it at the time agreed upon, it becomes a money demand, and the creditor may sue thereon without demanding the property, p. 181.

Cited in *Fay v. Fitzpatrick*, 130 Iowa 281, 105 N. W. 399, holding that where hay is purchased to be delivered at once, and the seller fails to make such delivery after payment therefor is made, the purchaser may sue for the purchase price without demand on the seller for such delivery.

Cross reference. See further on this question, annotations, note and cross reference under Rule 1 of *State v. Shupe* (16 Iowa 36), ante. p. 399.

3. **Contract to be Performed at Certain Time—Renunciation or Inability to Perform by Promisor—Breach—Action by Promisee.**—Where a contract is to be performed by one of the parties thereto at a certain time, and before such time such promisor expressly renounces the contract or disables himself from performing it, the other party or promisee may sue for breach thereof before the time of performance, p. 182.

Reaffirmed in *Halloway v. Griffith*, 32 Iowa 412, 413, 7 Am. Rep. 208; *Richmond v. D. & S. C. R. R. Co.*, and the *I. C. R. R. Co.*, 40 Iowa 276; *McCormick v. Basal*, 46 Iowa 236; *Inman Mfg. Co. v. American Cereal Co.*, 124 Iowa 740, 100 N. W. 861; *Quarton v. American Law Book Co.*, 143 Iowa 529, 125 N. W. 94.

Reaffirmed and explained in *Kuhlman v. Wieben*, 129 Iowa 189, 190, 105 N. W. 446, 2 L. R. A. (New Series) 666; *Fay v. Fitzpatrick*, 130 Iowa 281, 105 N. W. 399, holding that where one party to a contract expressly renounces it, or puts it out of his power to perform it, the other party thereto may sue thereon without tender or demand.

Reaffirmed and narrowed in *Kiisel v. Mut. Reserve L. Ins. Co.*, 131 Iowa 56, 57, 107 N. W. 1028, holding that the rule is only applicable when a party puts it out of his power to comply with a contract, or expressly and unequivocally renounces it.

Unreported citation, 121 N. W. 1013.

CALLANAN & INGHAM *v.* SHAW, 19 IOWA 183

1. **Receivers—Appeal from Order Appointing or Refusing to Appoint.**—Under Secs. 2631 and 3495 of the Code of 1860, an appeal lies to the Supreme Court from an order of the district court appointing or refusing to appoint a receiver, pp. 183, 184.

Cited in Richards *v.* Burden, 31 Iowa 309, the court holding that appeals can only be prosecuted from *final* orders and judgments; that intermediate errors of law in the proceedings excepted to at the time they were made, may be determined upon such an appeal: Hence, holding that an appeal cannot be prosecuted from a ruling of a referee, sustained by the trial court, that a certain witness offered before him was incompetent to testify.

Cited in Brown *v.* Harper, 54 Iowa 549, 6 N. W. 748, holding that—under Secs. 3163, 3164 of the Code of 1873—an appeal lies to the Supreme Court from an order of the district court re-committing a matter or cause to arbitrators as allowed by Sec. 3427 of that Code.

SCOTT'S ADM'RS *v.* GILL, 19 IOWA 187

1. **Vendor and Purchaser—Purchaser of Realty Assuming or Covenanting to Pay Mortgage or Lien Debt—Rights of Mortgagee or Lienholder.**—Where the purchaser of real estate on which there is a mortgage or other lien assumes and agrees to pay the lien debt, the mortgagee or lienholder may sue the purchaser, and is entitled to a foreclosure of the lien, and to a personal judgment and general execution against him for the amount of the mortgage or lien debt, p. 188.

Reaffirmed in Luney *v.* Mead, 60 Iowa 470, 15 N. W. 290.

Special cross reference. For further cases citing and sustaining the text, see annotations under Moses *v.* Clerk of Dallas District Court (12 Iowa 139), ante. p. 27.

Cross reference. See further on this question, annotations under Corbett *v.* Waterman (11 Iowa 86), Vol. I, p. 778.

LOWE *v.* GRINNAN, 19 IOWA 193

1. **Trust Deed—Sale of Land Under—Validity—Rights of Subsequent Incumbrancer.**—A sale of land under and in strict accordance with the terms of a power in a deed of trust is valid, and cuts off the rights of the grantor (debtor) and a subsequent incumbrancer, unless there be some extrinsic equity in favor of the latter, pp. 196, 197.

Cited in Standish *v.* Dow, 21 Iowa 368, holding that where a mortgage on land recites that it is taken subject to a prior trust deed, that the mortgagee takes subject to the terms and conditions of the latter; and where such trust deed allows foreclosure of the equity of redemption by notice, etc., that a purchaser at a sale under a decree in an action foreclosing the mortgage, where the sale is made after

foreclosure as therein provided, takes subject to the rights of the purchaser at the trust deed foreclosure sale.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a direct attack of a trust sale.

CLARK v. CITY OF DES MOINES, 19 IOWA 199, 87. AM. DEC. 423

1. Municipal Corporations—Powers of Officers and Agents of—Duty of Persons Dealing with.—Agents, officers, or even the city council of a municipal corporation cannot bind it when they exceed their lawful powers.—And this applies to the issuance of negotiable or non-negotiable paper as evidence of debt by such agents or officers, etc., without authority; and such paper is *void*.

The duties and powers of officers of a municipal corporation are prescribed by statute, and persons dealing with them are charged with knowledge of the extent thereof, pp. 209-211.

Reaffirmed in Webster County v. Taylor, 19 Iowa 120; King v. Mahaska County, 75 Iowa 335, 39 N. W. 638; Cedar Rapids Water Co. v. City of Cedar Rapids, 117 Iowa 260, 90 N. W. 749; Citizens' Bank of Des Moines v. City of Spencer, 126 Iowa 105, 101 N. W. 645.

Reaffirmed and explained in State v. Haskell, 20 Iowa 281, holding that the unauthorized act of a public agent or officer, whose powers are defined by express statute, does not bind his principal or the public.

Reaffirmed and explained in Reichard v. Warren County, 31 Iowa 392, 393; McPherson v. Foster Bros., 43 Iowa 60, 61, 22 Am. Rep. 215; Harrison v. Palo Alto County, 104 Iowa 388-390, 73 N. W. 874; Cedar Rapids Water Co. v. City of Cedar Rapids, 117 Iowa 260, 90 N. W. 749, holding that persons dealing with municipal officers, or other public agents acting under delegated powers must, at their peril, ascertain for themselves whether in fact and in law the authority being exercised exists.

Reaffirmed and extended in Field v. City of Des Moines, 39 Iowa 579, 585, 18 Am. Rep. 46, holding further that where a city passes an ordinance in excess of authority conferred, authorizing an officer to do an act or acts, the ordinance is void, and the city is not liable for the act or acts of the officer done thereunder.

Reaffirmed and extended in McPherson v. Foster Bros., 43 Iowa 70, 71, 22 Am. Rep. 215; Heins v. Lincoln, mayor, 102 Iowa 78, 71 N. W. 192, holding further that power to a municipal corporation to issue bonds or other negotiable paper in payment or as evidence of debt must be expressly conferred, or such bonds or paper issued by it will be *void*.

Reaffirmed and extended in Witter v. Board of Supervisors of Polk County, 112 Iowa 391, 392, 83 N. W. 1045, holding further that a county has no implied power to issue negotiable bonds for a debt created in the purchase of a court-house site, and that (under Sec.

423 of the Code of 1897) when such a site costs more than two thousand dollars, the question must be submitted to a vote of the people.

Reaffirmed and extended in Harrison County v. Ogden, 133 Iowa 11, 110 N. W. 33, holding further that indebtedness contracted by a county board in excess of authority is invalid; and no action can be maintained thereon, nor a recovery had upon a *quantum meruit* based thereon: That a county is not estopped by the unauthorized acts of its officers, either in attempting to incur indebtedness or in attempting to ratify unlawful obligations already entered into.

Cited in Burdick v. Babcock, 31 Iowa 572 (dissenting opinion), the majority court opinion not in point, but upon analogy.

Cited in Iowa R. R. Land Co. v. Sac County, 39 Iowa 142 (dissenting opinion), the majority court opinion not in point.

Cited in Hospers v. Wyatt, 63 Iowa 267, 19 N. W. 265, not in point, but upon analogy.

Cited in Windsor v. City of Des Moines, 110 Iowa 188, 81 N. W. 480, 80 Am. St. Rep. 280, not in point, but upon analogy.

Distinguished in Bradley & Sherman v. Delaware County, 57 Iowa 553, 10 N. W. 898, holding that where a claim for medical attendance upon the Poor of a township upon the order of the trustees thereof, is filed before the board of supervisors, without a certificate of the township trustees as provided by statute, which board allows a portion of such claim, that such action waives objection to the failure to have it certified by the trustees, in an action against the county for the disallowed portion thereof.

Cross references. See Rules 3 and 5 hereof. See further on this question, annotations under Estep v. Keokuk County (18 Iowa 199), ante. p. 612; Rule 2 of City of Burlington v. Kellar (18 Iowa 59), ante. p. 585; Clark, Dodge & Co. v. City of Davenport (14 Iowa 494), ante. p. 272; Reynolds v. Nichols & Co. (12 Iowa 398), ante. p. 67; Hull & Argalls v. Marshall County (12 Iowa 142), ante. p. 29.

2. Municipal Corporations—Warrants of are Promissory Notes.—Warrants drawn by the proper city officers directing the city treasurer to pay the amounts thereof to bearer, are not bills of exchange, but are, in legal effect, the promissory notes of the city, p. 211.

Reaffirmed and explained in Clark v. Polk County, 19 Iowa 256, 258, holding that county warrants are not negotiable; but they may be assigned, and the assignee may sue thereon in his own name, subject to any defense which might have been made against the payee thereof. —And to the same effect is Shepherd v. Dist. Township of Richland, 22 Iowa 596; National State Bank of Mt. Pleasant v. Indep. Dist. of Marshall, 39 Iowa 496 (reaffirming the text), applying this rule to an order of a school district:

Reaffirmed and extended in Dively v. City of Cedar Falls, 21 Iowa 570, holding further that unless expressly authorized by charter, a municipal corporation has no power to issue negotiable paper as an evidence of debt, and that such paper, when issued without express authority, is subject to the same defenses in the hands of an innocent holder or indorsee for value and who took it before maturity, as it is in the hands of the original payee or holder.

Reaffirmed and extended in Sioux City v. Weare, 59 Iowa 100, 12 N. W. 788, holding that when a city issues negotiable paper as evidence of a debt when it has only authority to issue non-negotiable paper therefor, the paper so issued is to be given the effect and be treated as non-negotiable paper.

Cited in Skiff v. Cross, 21 Iowa 461, not in point.

Cited in Griffith v. Burden, 35 Iowa 142, not in point.

3. Municipal Corporations—Express and Implied Powers—Construction of Powers.—A municipal corporation has and can only exercise powers expressly granted, and those incidental and essential to effectuate powers expressly granted and to carry out the purposes of the corporation; and all municipal powers receive a strict construction, p. 212.

Reaffirmed in Becker v. Keokuk Water Works, 79 Iowa 422, 44 N. W. 695, 18 Am. St. Rep. 377; *Heins v. Lincoln*, 102 Iowa 77, 71 N. W. 191.

Reaffirmed and explained in McNamara v. Estes, 22 Iowa 254, holding that the power of a municipal corporation to levy and collect taxes, particularly special assessments, must be clearly conferred; and such an Act will receive a strict construction.

Reaffirmed and explained in City of Keokuk v. Scroggs, 39 Iowa 450-452, holding that general language at the conclusion of a provision of a statute conferring powers on a city, is taken in connection with, and limited by, special powers therein enumerated; and that municipal corporations have only such powers as are expressly granted by charter or general law, and such implied powers as are essential to effectuate the purposes of the corporation, which powers are strictly construed: Holding, therefore, that where the charter of a city does not specially confer on it the power to prevent, by ordinance, the building of frame buildings within a fire limit fixed by it, the general language in such a charter which follows the specification of powers, does not confer power to pass such an ordinance, and it is void.

Reaffirmed and extended in Merriam v. Moody's Ex'rs, 25 Iowa 170; *Burdick v. Babcock*, 31 Iowa 572; *Alrich v. Paine, et al*, 106 Iowa 467, 76 N. W. 815, holding further that a municipal corporation has only the powers expressly granted, those necessarily implied or incident to powers expressly granted, and those absolutely essential and indispensable to the declared objects and purposes of the cor-

poration; and that any fair doubt as to the existence of such a corporate power is to be resolved against it, and against the corporation.

Reaffirmed and extended in McPherson v. Foster Bros., 43 Iowa 58, 22 Am. Rep. 215, holding further that an act of a municipal corporation in excess of power conferred is void: Hence, holding that negotiable bonds issued by a city, county, or other municipal corporation without authority, are void, even in the hands of *bona fide* holders.

Reaffirmed and extended in Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 241, 91 N. W. 1084, holding further that a contract made by a municipal corporation without express or implied statutory authority, is void *ab initio*.

Reaffirmed and extended in Harrison County v. Ogden, 133 Iowa 11, 110 N. W. 32, holding further that indebtedness contracted by a county board in excess of authority is invalid; and no action can be maintained thereon, nor a recovery had upon a *quantum meruit* based thereon: That a county is not estopped by the unauthorized acts of its officers, either in attempting to incur indebtedness or in attempting to ratify unlawful obligations already entered into.

Cited in 146 Iowa 141, 121 N. W. 870.

Cross references. See Rule 1 hereof, and cross references there found. See further, annotations under City of Mt. Pleasant v. Breeze (11 Iowa 399), Vol. I, p. 831.

4. Municipal Corporations—Power to Issue Negotiable Paper.—Power to a municipal corporation to issue negotiable paper must be expressly conferred, and will not be implied, p. 214.

Reaffirmed and extended in Swanson v. City of Ottumwa, 131 Iowa 546-548, 9 A. & E. Ann. Cas. 1117, 106 N. W. 11, 5 L. R. A. (New Series) 860, holding further that negotiable bonds issued by a city, county, or other municipal corporation without authority are void, even in the hands of *bona fide* holders.

Cross reference. See further rules hereof, and cross references there found.

5. Municipal Corporations—Warrants Issued Without Authority—Duties and Rights of Assignee of.—It is the duty of the assignee of a warrant issued by the officers or agents of a municipal corporation to ascertain the extent of the authority of such officers or agents; and if it was issued without authority, he cannot recover against the corporation thereon, p. 215.

Reaffirmed in Boardman v. Hayne, 29 Iowa 343; Eastman, Bovee & Co. v. Dist. Township of Lyon, 40 Iowa 439; McPherson v. Foster Bros., 43 Iowa 60, 22 Am. Rep. 215.

Cross reference. See further on this question, annotations under Rule 1 hereof.

6. Usury—Municipal Warrants.—Where municipal warrants are issued at a rate of one dollar for every seventy-five cents of a

debt of, or judgment against a municipal corporation, such warrants are usurious and illegal to the extent of the amount which they represent which is not actually due, p. 219.

Reaffirmed in Eastman, Bovee & Co. v. Dist. Township of Lyon, 40 Iowa 439; Wormley v. Dist. Township of Carroll, 43 Iowa 686 (abstract), applying the rule under different, but similar states of fact.

Reaffirmed and extended in Austin v. Walker, 45 Iowa 529, holding further that a note executed for borrowed Gold which bears the highest legal rate of interest, and for more than the amount of the market value of Gold, is usurious.

7. Municipal Corporations—Over-Allowance of Claim.—Whether a municipal corporation is bound by the action of its council in allowing and agreeing to pay a sum clearly, distinctly and ascertainably greater than is legally due a debtor, is doubted, p. 219.

Cited in State v. Young, 134 Iowa 511, 512, 13 A. & E. Ann. Cas. 345, 110 N. W. 295, holding that settlements made by authorized officers of the state, county, or other municipal body, with its officers or employes are on the same footing as settlements between individuals, and cannot be attacked except for fraud or mistake.

Distinguished in Bradley & Sherman v. Delaware County, 57 Iowa 553, 10 N. W. 898, holding that where a claim for medical attendance upon the Poor of a township upon the order of the trustees thereof, is filed before the board of supervisors, without a certificate of the township trustees as provided by statute, which board allows a portion of such claim, that such action waives objection to the failure to have it certified by the trustees, in an action against the county for the disallowed portion thereof.

Unreported citation, 115 N. W. 612.

Cross reference. See other rules hereof, in this connection.

8. Municipal Corporations—Lending Credit for Private Enterprise.—A municipal corporation has no power to lend its credit to an individual to aid in the construction of a toll-bridge, or other private enterprise, pp. 223, 224.

Special cross reference. For cases citing the text, and many others on the question, see annotations under State ex rel. B. & M. Riv. R. Co. v. Wapello County (13 Iowa 388), ante. p. 165.

9. Municipal Corporations—Warrants Issued in Lieu of Illegal Scrip.—Municipal warrants issued for a just debt, but in lieu of illegal municipal scrip surrendered, are valid, pp. 225, 226.

Cited with approval in Grimmell, Ex'x v. Warner, 21 Iowa 13, the case turning on other questions.

STATE v. JOHNSON, 19 IOWA 230

1. Appeal—Refusal of Instructions as Ground for Reversal—Insufficient Record.—A judgment will not be reversed upon appeal because of the refusal of the trial court to give certain instructions,

although they were proper, where the record does not show all the instructions which were given, pp. 233, 234.

Reaffirmed in Bower & Co. v. Stewart, 30 Iowa 581; Chase v. Scott, 33 Iowa 312.

2. Criminal Law—Circumstantial Evidence—Degree of Required to Convict—Appeal—Reversal.—In order to authorize a conviction upon circumstantial evidence, it must be inconsistent with any other rational conclusion than that of the guilt of accused; and where, upon appeal, it is clear that the verdict of conviction was not based upon evidence of this character, the judgment will be reversed, as against the evidence, pp. 235, 236.

Reaffirmed and explained in State v. Whitbeck, 145 Iowa 39, 123 N. W. 986, holding that upon the trial of a criminal prosecution dependent entirely upon circumstantial evidence, it is sufficient for the court to instruct the jury that in order to convict accused on such evidence, the circumstances should all concur to show that he committed the crime and be inconsistent with any other rational conclusion.

Reaffirmed and varied in State v. Brady, 121 Iowa 570, 97 N. W. 65, 12 L. R. A. (New Series) 199, holding that in submitting a criminal prosecution depending entirely upon circumstantial evidence, the court must carefully instruct the jury as to the degree of proof required for a conviction.

Unreported citation, 91 N. W. 806.

Special cross reference. For further cases citing and explaining the text, and others, see annotations under State v. Tomlinson (11 Iowa 401), Vol. I, p. 833.

Cross references. See further on this question, annotations under Rule 2 of State v. Elliott (15 Iowa 77), ante. p. 307; Rule 2 and 3 of State v. Cross (12 Iowa 66), ante. p. 12. See also, in this connection, annotations under Rule 12 of State v. Ostrander (18 Iowa 435), ante. p. 662.

JONES v. JONES, 19 IOWA 236

1. Appeal—Verdict Against Evidence as Ground for Reversal—Evidence Conflicting.—Where the evidence below was conflicting, the judgment will not be reversed upon appeal because the verdict was against the evidence, p. 238.

Reaffirmed and qualified in Starker & Co., v. Luse & Mahana, 33 Iowa 596 (abstract), holding that in order to justify a reversal of a judgment because the verdict of the jury was against the evidence, it must be clearly and manifestly unsustained by the evidence: And this rule applies equally to the finding or decision of the lower court, upon the trial of a law action without a jury.

Special cross reference. For further cases citing, sustaining and qualifying the text, see annotations under Rule 1 of Pilmer v. Branch of State Bank (19 Iowa 112), ante. p. 701.

2. **Husband and Wife—Right of Wife to Sue Husband—Secs. 2499-2503 of the Code of 1860, Construed.**—Under the Code of 1860, the property of the wife does not vest in the husband upon marriage. Secs. 2499-2503 of the Code of 1860, requiring notice of ownership to be recorded by the wife where her personalty is in the joint possession of herself and husband, affects only the rights of creditors of the husband, or *bona fide* purchasers thereof from him.

A wife who leaves her husband for cause, or who is driven away by him without cause may (under the Code of 1860) maintain replevin in her own name against him for her personal property, pp. 239, 240, 242.

Reaffirmed in *Graves v. Graves*, 36 Iowa 313, 314, 14 Am. Rep. 523, holding that a wife may sue her husband in her own name for maintenance, where they have separated on account of the conduct of the husband.

Reaffirmed and extended in *Mitchell & Sons v. Sawyer and Wife*, 21 Iowa 583, holding further that—under the Code of 1860—where a wife has separate property she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of the husband: Holding further, however, that money earned by a wife, and real estate therewith purchased is subject to the satisfaction of her husband's debts.

Reaffirmed and extended in *Lower v. Lower*, 46 Iowa 527, holding further that a wife may recover of the heirs of her husband for money borrowed by the husband under an agreement that it be repaid to her; and that in such case the statute of limitation does not commence to run until the death of the husband: Holding further that such debt does not draw interest during the life of the husband.—But see *Logan v. Hall*, 19 Iowa 495-499 (reaffirming the text) to the same effect, except that the question of the statute of limitation was not involved or decided upon: Holding further, however, that where the husband borrows money of his wife, there may be circumstances allowing it to draw interest from date, instead of from the death of the husband, as is the general rule.—And see *Rice v. Crozier*, 139 Iowa 631, 117 N. W. 985 (reaffirming the text), holding that under the Code of 1873, a wife may sue her husband for a debt due her, and the statute of limitation commences to run from the time of the maturity of the debt, as she can then sue therefor.

Cited in *King v. Gottschalk*, 21 Iowa 514, the court holding that a wife may *give* and *deliver* to her husband, notes or other choses in action; and that in such case the husband may sue thereon in his own name.

Cited in *McKee v. Reynolds*, 26 Iowa 582, the court holding that as a general rule a contract between a husband and wife made during coverture, whereby one of them releases dower in the real estate of the other is unenforceable at law, although enforceable under equi-

table circumstances in equity; but deeds for the separation of husband and wife are valid and effectual both at law and in equity, provided their object be an actual and immediate separation; and if a husband, in pursuance of an agreement to separate, makes a grant to his wife of his right of dower in her property, and she pays him the consideration therefor, it is binding at law, but not if she only executes a note therefor which she never pays; and such note is unenforceable at law.

(Note.—Sec. 2203 of the Code of 1873 abrogates the rule of this last case as to agreements of separation between husband and wife. See annotations under *Robertson v. Robertson*, 25 Iowa 350, Vol. 3, not yet published.—Ed.)

Cited in Gray v. Ferreby, 36 Iowa 150, holding that where the wife's personal property is in the possession of her husband, that if the wife file a statutory notice as to ownership before levy under an attachment or execution for a debt created *prior* to the taking of possession by the husband, such property will be exempt therefrom: Holding further that in the absence of recorded or actual notice, such property is subject to the husband's debt irrespective of when it is created.—But see *Patterson v. Spearman, Clark and Seeley*, 37 Iowa 43, (citing the text) holding that under Sec. 2505 of the Code of 1860, as amended by Chap. 126, Laws of 1870, the wife's personalty in the possession of the husband is not subject to the satisfaction of his debt created before marriage, although she does not file the statutory notice.

Cited in Grant v. Green, 41 Iowa 93 (dissenting opinion), the majority court holding that under the Code of 1873 (Sec. 2507 thereof), the wife is bound for the expenses incurred in the necessary restraint, protection and care of her insane husband; and that where she renders such services herself, she cannot charge the estate of the husband therewith; and that a contract between her and such husband's guardian agreeing to pay her therefor, is without consideration.

Cited in Heacock v. Heacock, 108 Iowa 549 (dissenting opinion), 79 N. W. 356, 75 Am. St. Rep. 273, the majority court holding that a note given by a husband to his wife is (under the Code of 1873) unenforceable by her, unless she pleads and proves in her action thereon that it was given as a consideration for or in relation to her separate money or property.

Cross references. See further in this connection, annotations under Rule 3 of *Logan v. Hall* (19 Iowa 491), *Infra.* p. 752; Rule 2 of *Jones v. Crosthwaite* (17 Iowa 393), *ante.* p. 546; *Wright v. Wright* (16 Iowa 496), *ante.* p. 464; *Duncan v. Roselle* (15 Iowa 501), *ante.* p. 372.

NEWMAN *v.* DE LORIMER, 19 IOWA 244

1. **Limitation of Actions—Action to Foreclose a Mortgage of Deed of Trust.**—Under Sec. 2740 of the Code of 1860, an action upon a written contract, or for the recovery of real estate must be com-

menced within ten years after the cause of action accrues, or it will be barred; and the rule applies to an action to foreclose a mortgage on, or deed of trust to, land, pp. 246, 247.

Reaffirmed in Jamison v. Perry, 38 Iowa 18.

Reaffirmed in Johnson v. Hopkins, 19 Iowa 53, holding that an action in equity for the specific performance of a contract concerning real estate must be brought within ten years from the accrual of the cause of action (under Code of 1860).

Reaffirmed in Bacon v. Chase, 83 Iowa 530, 50 N. W. 26, holding that the statute of limitation applies both at law, and in equity.

Reaffirmed and extended in City of Pella v. Scholte, 24 Iowa 293, 85 Am. Dec. 729, holding further that a right to land by adverse possession for the statutory period may be acquired, or lost, by the public in and to public realty.

Reaffirmed and extended in Gower v. Winchester, 33 Iowa 306-308, holding further that the right of a junior mortgagee to bring his action for foreclosure, and redemption from a senior mortgagee's debt is barred, unless commenced within ten years after his cause of action for foreclosure accrued.

Reaffirmed and extended in Day v. Baldwin, 34 Iowa 383, 384, holding further that the rule applies to an action to foreclose a vendor's lien on land; and that in such an action, the admissions of a nominal party (defendant) will not affect the rights of the real party (defendant) in interest.

Reaffirmed and extended in Harbour v. Rhinehart, 39 Iowa 674, holding further that the rule applies to an action in equity to enforce an implied or a resulting trust in relation to land.

Reaffirmed and extended in Crawford v. Taylor, Richards & Burden, 42 Iowa 263; Smith v. Foster, 44 Iowa 443, holding further that the right of a mortgagor to maintain an action to redeem from a mortgage on land, is barred ten years after the right to foreclose accrues to the mortgagee.

Reaffirmed and extended in Ball v. Keokuk & N. W. Ry. Co., 62 Iowa 754, 16 N. W. 594, holding further that a defendant cannot interpose an equitable defense based upon a written contract and seeking to enforce an equitable right to real estate, after ten years from the accrual of the cause of action or defense pleaded.

Reaffirmed and qualified in Hendershott v. Ping, 24 Iowa 137, holding that the statute does not apply—under Sec 2742 of the Code of 1860—when it appears from the answer or the testimony of a debtor, that the cause of action still justly subsists.—The case, however, turning on the limitation of an action on a judgment under Subdivision 5 of Sec. 2740 of the Code of 1860.

Reaffirmed and qualified in Green v. Turner, 38 Iowa 119, holding that the statute of limitation does not run in favor of a mortgagee of land who holds possession of the property after the payment of the

debt, and under the mortgage; as in such case he will be treated as holding in trust for the mortgagor: That such statute will in such case, commence to run in favor of the mortgagee, when his possession and claim to the land becomes adverse to the mortgagor.

Cited in 147 Iowa 541, 126 N. W. 371.

Distinguished in Gillett v. Hill, 32 Iowa 222, 223, holding that a party relying upon a foreign statute of limitation to bar an action in this state, must plead and prove it.

2. Mortgage on Land—Nature of.—A mortgage on land is not an estate therein, but simply a lien for the debt it is given to secure, p. 246.

Reaffirmed in Gower v. Winchester, 33 Iowa 306; Tuttle v. Dewey, 44 Iowa 308; Robertson v. Moline, Milburn & Stoddard Co., 88 Iowa 467, 55 N. W. 496; Boggs v. Douglass, 105 Iowa 346, 75 N. W. 186; Busch v. Hall, 119 Iowa 282, 93 N. W. 357.

Reaffirmed and explained in White v. Rittenmeyer, 30 Iowa 272, 273, holding that the interest of the mortgagor in land mortgaged is, before entry and foreclosure, an estate of inheritance, the mortgagee's interest being, in such case, no greater than a lien.

Reaffirmed and explained in Warren v. Davenport Fire Ins. Co., 31 Iowa 469, 7 Am. Rep. 160, holding that a mortgagee has an insurable interest in the mortgaged property; but that in case of loss he is only entitled to the amount of his debt: Holding, also, that the rule is applicable as to the insurable interest of a stockholder of a corporation in the corporate property.

Reaffirmed and explained in Swan v. Yapple, 35 Iowa 249, holding that the right of a mortgagee, or his assignee, under a mortgage of land is a mere chattel interest, inseparable from the debt it is given to secure, ceasing when it is discharged, and is no interest or estate in the mortgaged land; and that a judgment creditor has no lien on such an interest, nor will a sale thereof under an execution in favor of the judgment creditor pass any title thereto.

Reaffirmed and varied in Tuttle v. Dewey, 44 Iowa 307, 308, holding, also, that the holder of a junior mortgage on land who is made defendant in an action for the foreclosure of a senior mortgage, can redeem after sale under the decree, by paying the amount bid thereat, with interest, within the time allowed therefor by statute—Code of 1873—although the senior mortgagee has bid in the property for less than his mortgage debt.

Cross references. See further on this question, annotations under Rule 2 of Burton v. Hintrager (18 Iowa 348), ante. p. 642; Rule 3 of Baldwin v. Thompson (15 Iowa 504), ante. p. 374.

3. Trust Deed to Land—Title and Rights of Grantee in.—The grantee in a deed of trust to land takes the legal title, and holds it in trust for the purposes and under the conditions and limitations of the instrument.

Unless expressly granted such power by the trust deed the grantee cannot maintain an action of ejectment against the grantor, either before or after his default, p. 246.

Reaffirmed and extended in Devin v. Hendershott, 32 Iowa 194, holding further that the grantee in a deed of trust takes the legal title and is entitled to the benefit of covenants running with the land.

Reaffirmed and varied in Ingle v. Culbertson, 43 Iowa 272, holding that where the grantor in a deed of trust complies with the conditions before sale or foreclosure, a reconveyance is unnecessary, but it is sufficient for the trustee to release the deed on the margin of the record where the instrument is recorded.

Cross reference. See further on this question, annotations under Rules 2-4 of Cook & Sargent v. Dillon (9 Iowa 407), Vol. I, p. 598.

CLARK v. POLK COUNTY, 19 IOWA 248

1. Counties—Warrants of, not Negotiable—Rights of Assignee of—Powers of County Officers—Duties of Persons Dealing With.—A county warrant is not a negotiable instrument; but it may be assigned, and the assignee may sue thereon in his own name, but subject to the same defenses which might have been made against the payee thereof. The clerk of the county board of supervisors has no power to issue a negotiable county warrant.

The duties and powers of county officers are prescribed by statute, and persons dealing with them are charged with notice to the extent thereof, pp. 251-253, 257, 258.

Special cross reference. For cases citing, sustaining, etc., the text, and many others on the question, see annotations under Rule 1-5 of Clark v. City of Des Moines (19 Iowa 199), ante. p. 715.

2. County Warrants—Action on—Illegal Issuance—Insufficient Defense of.—In an action on a county warrant, it is insufficient as a defense, for the county to set up in its answer that the warrant was issued without a *recorded vote* of the county board of supervisors: If the vote had actually been taken, and the warrant been ordered issued as required by law, the failure of the clerk of the board to record the vote will not invalidate the warrant, p. 250.

Reaffirmed in Long v. Boone County, 36 Iowa 66.

3. Construction of Statutes, Contracts, etc.—Public Policy.—In the construction of statutes, contracts, etc., public policy may be considered where authorities are conflicting, or the principle is uncertain; but public policy should not override principle or overturn or run counter to an unbroken current of authorities, p. 256.

Reaffirmed in Morseman v. YOUNKIN, 27 Iowa 358.

BATES v. CHICAGO & NORTHWESTERN RY. CO., 19 IOWA 260

1. Actions—Personal Service of Original Notice on Non-Resident Defendant and Outside of State—When Confers no Jurisdiction.—No jurisdiction is acquired (under the Code of 1860) by a court of this state, in an ordinary personal action, by the personal service of original notice outside of the state on a non-resident defendant, pp. 261, 263.

Reaffirmed and extended in Kelly v. Norwich Fire Ins. Co., 82 Iowa 140, 47 N. W. 987, holding further that a court can acquire no jurisdiction *in personam* by process served beyond the territorial limits of its jurisdiction upon a defendant who is not a resident therein, and that a judgment rendered thereon is void *ab initio*.

Distinguished in Miller v. Davison, 31 Iowa 439, holding that in an action wherein service by publication is allowed, personal service on the defendant outside of the state supersedes the necessity for service by publication, and is sufficient for the purpose of such a case.

Unreported citation, 50 N. W. 28; 129 N. W. 496.

Special cross-reference. For further cases citing and explaining the text, and many others, see annotations under Rule 1 of Darrance v. Preston (18 Iowa 396), *ante*. p. 654.

GELPCKE, WINSLOW & CO. v. BLAKE, 19 IOWA 263

1. Written Contracts—Parol Evidence as to Consideration or Want of.—Want of, failure of, illegality of, or the true amount of the consideration of written contracts may be shown by parol or other extrinsic evidence; but this rule does not allow such evidence to be admitted to show a consideration adverse to that expressed upon the face of such written instrument, p. 267.

Reaffirmed and explained in Blair v. Ruttolph, 72 Iowa 33, 33 N. W. 350; Kelly v. Ch., M. & St. P. Ry. Co., 93 Iowa 444, 61 N. W. 960, holding that when, by the express terms of the written agreement a particular condition is made the consideration for the undertaking, it is no more competent to contradict or vary its terms by parol evidence as to the consideration by which it is supported, than as to its other conditions.

Reaffirmed, explained and qualified in De Goey v. Van Wyk, and Uithoven, 97 Iowa 496, 497, 66 N. W. 789; Lane v. Richards, 119 Iowa 27, 91 N. W. 787, holding that when the consideration is expressed and is fully and unmistakably stated in a written instrument, a party thereto cannot add to, change or vary it by parol evidence; but that this rule does not apply to third persons and strangers to the instrument.

Reaffirmed and extended in Allen v. Bryson, 67 Iowa 594, 595, 25 N. W. 822, 56 Am. Rep. 358, holding further that a bill of sale cannot be varied or limited by proof of a contemporaneous parol agreement by which it was in fact a bailment.

(Note.—See further, *Courtwright v. Strickler*, 37 Iowa 382; *Lewis v. Day*, 53 Iowa 575, 5 N. W. 753; *First Nat'l Bank of Grundy Center v. Snyder Bros.*, 79 Iowa 191, 44 N. W. 356; *Benson v. Haywood*, 86 Iowa 107, 53 N. W. 85; *Tabor & Northern Ry. Co. v. McCormick*, 90 Iowa 446, 57 N. W. 949; *Kracke v. Homeyer*, 91 Iowa 51, 58 N. W. 1056, important cases on this question, not citing, but explaining the text. N. B.—The text, its citing cases, and the cases of this note, do not seem to involve Custom, Fraud, Accident or Mistake.—Ed.)

Cross reference. See further in this connection, annotations and cross references under *Hurd v. Gallaher* (14 Iowa 394), ante. p. 253.

2. Private Corporations—Cancellation of Subscription to Stock and Release of Subscriber.—A private corporation may, in good faith, cancel a subscription to stock, and release a subscriber from liability thereon, without the express consent of its stockholders, p. 268.

Distinguished and narrowed in *Singer, Nimick & Co. v. Given*, 61 Iowa 96, 97, 15 N. W. 859, holding that a corporation cannot make any arrangement with its stockholders or subscribers to stock to the prejudice of its creditors: That the rule is incapable to a cancellation of a subscription to stock of a corporation to the prejudice of the creditors of the latter: And that a subscriber to stock in a corporation is liable to a creditor thereof, to the amount subscribed for, whether it was to have been paid in money or in property: Provided the subscriber has not paid the amount of his subscription to the corporation.

DORR, EX'R *v.* STOCKDALE, 19 IOWA 269

1. Res Adjudicata—When Applies and to Whom.—A judgment upon the merits binds only parties and their privies. So, the administrator and creditors of a decedent are not estopped by a judgment in an action in which the heirs of decedent are parties, but in which they are not joined, pp. 272, 273.

Special cross reference. For cases citing the text, and many others, see annotations under Rule 1 of *Myers v. Johnson* (14 Iowa 47), ante. p. 203.

SIMMS *v.* HERVEY, 19 IOWA 273

1. Deed or Mortgage of Land by Married Woman—Acknowledgment.—A deed or mortgage to or of land or releasing dower therein by a married woman is (under the Code of 1860) valid as between the parties thereto without acknowledgment, pp. 287, 288.

Reaffirmed in *Lake v. Gray*, 30 Iowa 419; *Kruger v. Walker*, 94 Iowa 511, 63 N. W. 322, holding that a deed or other conveyance is good as between the parties and all persons having knowledge of its existence, although defectively acknowledged, or without any acknowledgment, or whether recorded or unrecorded.

Reaffirmed and extended in Richmond v. Tibbles and Husband, 26 Iowa 477-482, holding further that under the Code of 1860, a wife is liable for breach of covenants contained in a deed to her own land.

Reaffirmed and varied in Robertson v. Robertson, 25 Iowa 352-354, holding that under the Code of 1860, a wife may sell and convey her separate property to her husband without the intervention of a trustee, and such conveyance is valid, in the absence of fraud: Hence, holding that an agreement of separation between husband and wife, which is based upon a sufficient consideration and is not tainted with fraud, whereby the wife relinquishes her dower and releases the husband from a claim for future maintenance, is valid.

(Note.—Sec. 2203 of the Code of 1873 abrogates the rule of this last case as to agreements of separation between husband and wife. See annotations under Robertson v. Robertson, 25 Iowa 350, Vol. 3, not yet published.—Ed.)

Cited in Childs v. McChesney, 20 Iowa 436, 89 Am. Dec. 545, the court holding that where a wife joins in a deed of her husband to land, the covenants therein do not bind her personally, or estop her from subsequently acquiring title thereto under an execution sale, and adverse to the grantees in such deed.

Cited in Edwards v. Sullivan, 20 Iowa 503, the court holding that where a wife joins in the granting and covenanting parts of a deed of her husband to real estate, and signs and acknowledges the instrument in due form, she thereby conveys all her interest therein.

Cited in McKee v. Reynolds, 26 Iowa 584, 585, the court holding that as a general rule a contract between a husband and wife made during coverture, whereby one of them releases dower in the real estate of the other is unenforceable at law, although enforceable under equitable circumstances in equity; but that deeds for the separation of husband and wife are valid and effectual both at law and in equity, provided their object be an actual and immediate separation; and if a husband, in pursuance of an agreement to separate, makes a grant to his wife of his right of dower in her property, and she pays him the consideration therefor, it is binding at law; but not if she only executes a note therefor which is never paid; and such note is, in such case, unenforceable at law.

Cross reference. See note under Richmond v. Tibbles, above in this connection.

Cited in Huston v. Seeley, 27 Iowa 198, not in point, but on the rights of the mortgagee in a mortgage of a wife to land wherein the husband joined and conveyed or relinquished dower.

Distinguished in McDaniel v. Large, 55 Iowa 313, 7 N. W. 632. a case of a deed executed by a husband and wife under the statutes of 1843.

2. Mortgage to Land—Execution of With Grantee Blank—Filing in Name of Grantee without Written Authority—Validity

and Effect.—A deed or mortgage of lands intended to circulate or float in business channels and when it finds an owner to have his name inserted as grantee in the absence of the grantor is not effective as a conveyance, without authority in writing for the insertion of such name, though the transaction may, in certain cases, give equitable right; but no equity will exist in favor of the owner of such an instrument, when the grantor receives and retains no benefits therefrom, and does not ratify the negotiation of the instrument, and the filling in of the blank, pp. 297, 298.

Cited in Creveling v. Banta, 138 Iowa 55, 115 N. W. 601, holding that the delivery of a deed or mortgage to land, carries with it the authority to insert or cause to be inserted the name of the grantee and the consideration, if they are left blank therein; and that as to innocent purchases, such an instrument passes the legal title to the grantee whose name is so inserted.

Distinguished in Owen v. Perry, 25 Iowa 423-426, 96 Am. Dec. 49, holding that where a deed is executed with the grantee and the consideration blank, and it is afterwards filled in as to amount of consideration, terms and grantee, under a written authority to an agent to make sale of the property and deliver the deed to the purchaser, it is valid as against innocent purchasers and third persons without notice: And the same rule applies to a mortgage on land.

Distinguished in Clark v. Allen, 34 Iowa 192, holding that although a deed executed with the name of the grantee blank, does not divest the grantor of the legal title, and that the subsequent insertion of the name of a grantee, without the consent or ratification of the grantor, does not have this effect, still, where such grantee pays the purchase price under such a deed, it gives him the equitable title to the land; and he has the right to enforce a conveyance by such grantor of the legal title thereto to him: And that this equity is subject to contract and sale by the grantee, or to sale under execution against him.

Distinguished and narrowed in Devin v. Himer, 29 Iowa 300, 301, holding that where a deed is executed with the name of the grantee blank because the grantor does not know it, and it is delivered to the grantee intended, who fills in his name, and the grantor thereafter ratifies and claims the benefit of the delivery of the perfected deed, it is valid.

Overruled in Swartz v. Ballou, 47 Iowa 193, 194, 29 Am. Rep. 470, holding that where a deed is executed with the name of the grantee blank, and is delivered to an agent with an express or implied authority to fill in the blank and perfect the conveyance, it is valid.—And such authority to such agent may be given by parol: Holding further that this rule is most strongly to be invoked in favor of an innocent purchaser for value.

(Note.—See further, *McClain v. McClain*, 52 Iowa 272, 3 N. W. 60, sustaining the last two cases, next above.—Ed.)

STATE v. THOMPSON, 19 IOWA 299

1. Indictment — Sufficiency of Allegations — Evidence — Variance.—Under the Code of 1860, it is sufficient if the offense in an indictment is charged in ordinary language and in such manner as to enable a person of common understanding to know what is intended; and if the evidence to support it is such as would not mislead such a person, it is sufficient, and will not constitute a variance. Technical errors or defects in the indictment or the proof, not affecting the substantial rights of the accused, will be disregarded, pp. 300, 301.

Reaffirmed in *State v. Williams*, 20 Iowa 100; *State v. Raymond*, 20 Iowa 584, 585; *State v. Smith*, 88 Iowa 2, 55 N. W. 17; *State v. Dankwardt*, 107 Iowa 710, 77 N. W. 496.

Reaffirmed and explained in *State v. Dankwardt*, 107 Iowa 708-710, 77 N. W. 496, holding that where the means used to accomplish a crime named in the statute are fully set forth in the indictment, and then it follows the language of the statute, it is sufficient.

Reaffirmed and explained in *State v. Martin*, 125 Iowa 717, 101 N. W. 638, holding that the rule is the same under Sec. 5289 of the Code of 1897: Holding, also, that an indictment which charges an offense in the language of the statute is sufficient in all cases, where the statutory definition states the material facts constituting the offense.

Reaffirmed and extended in *State v. Johnson*, 26 Iowa 415, 96 Am. Dec. 158, holding further that the facts charged in an indictment as constituting the offense must be stated with sufficient exactness for the acquittal or conviction upon the trial thereof to be pleaded in bar to another prosecution for the same offense.

Cited in *State v. King*, 37 Iowa 468, 469, the court holding that evidence improperly admitted, erroneous instructions given, and other rulings of a like character, are not cause for reversal of a judgment in a criminal prosecution, unless the accused was prejudiced thereby.

Cited in *State v. Clark*, 80 Iowa 520, (dissenting opinion), 45 N. W. 910, the majority court holding that an indictment must be direct and certain in regard to and as to the facts necessary to constitute the offense charged; and that an indictment cannot be aided by intendment, or by an omission supplied by construction.

(Note.—See further, *State v. Shanks*, 116 Iowa 206, 89 N. W. 977; *State v. Fisher*, 106 Iowa 658, 77 N. W. 456; *State v. Porter*, 105 Iowa 677, 75 N. W. 519; *State v. Whalen*, 98 Iowa 662, 68 N. W. 554; *State v. Brewer*, 53 Iowa 735, 6 N. W. 62; *State v. Curran*, 51 Iowa 113; *State v. Close*, 35 Iowa 570; *State v. Hockenberry*, 30 Iowa 504, some important cases in this connection.—And there are many others to the same effect.—Ed.)

2. Forgery Defined.—Forgery is the false making of any writing, or materially altering it, with intent to defraud, where the writing, if genuine, might be apparently of legal efficacy, or the foundation of a legal liability, p. 303.

Reaffirmed in State v. Wooderd, 20 Iowa 547; State v. Johnson, 26 Iowa 413, 96 Am. Dec. 158; State v. Sherwood, 90 Iowa 552, 58 N. W. 912, 48 Am. St. Rep. 461.

Cross references. See further on this question, annotations under Rules 2-4 of State v. Pierce (8 Iowa 231); Rules 2 and 3 of State v. Calendine (8 Iowa 288); Rule 1 of State v. Barrett (8 Iowa 536), Vol. I, pp. 506, 511, and 535, respectively.

KEY CITY GAS LIGHT CO. v. MUNSELL, 19 Iowa 305

1. Injunction by Owner of Land to Restrain Sale Under Execution Against Another.—Injunction lies in favor of the owner of land to restrain the sale thereof under an execution against another, pp. 307, 308.

Reaffirmed, extended and qualified in Wiedner v. Thompson, 66 Iowa 285, holding further that where an execution is levied upon real property upon which the judgment is not a lien, the court will enjoin the sale to prevent a cloud from being cast upon the title: Holding, however, that injunction does not lie in favor of a senior lienholder to prevent a junior lienholder from selling the land for his junior lien.

Cited in Traer v. Lytle, 20 Iowa 302; Standish v. Dow, 21 Iowa 369, actions in equity to quiet title to land.

PRICE, ASSIGNEE v. BRAYTON, 19 Iowa 309

1. Mortgage on Land—Fixtures Passing With Upon Foreclosure—Nursery Trees.—Fixtures made by the mortgagor of land after the execution of the mortgage becomes part of the realty, as between the mortgagor, the mortgagee and a purchaser at a foreclosure sale. So, nursery trees planted by the mortgagor of land after the execution of the mortgage become part of the realty, and pass to a purchaser at a sale under foreclosure, p. 311.

Reaffirmed and extended in Adams v. Beadle & Slee, 47 Iowa 440, 441, 29 Am. Rep. 487, holding further that nursery trees planted by a mortgagor of plants become part of the realty, and pass to the purchaser of the land at a sale under a decree of foreclosure: And that this is the rule, although the mortgagor had executed a chattel mortgage on the trees before such sale.

Reaffirmed and varied in Van Wagner v. Van Nostrand, 19 Iowa 526, holding that a conveyance of land without exceptions or reservations therein, passes, not only the earth, but everything attached thereto, whether by nature, as trees, herbage, etc., or artificially, by man, as fences, buildings, etc.: And that the removal of a building thereon at the time of the conveyance by a tenant who had erected it prior there-

to, with right of removal, is a breach of the covenant of general warranty in such conveyance.

Reaffirmed and varied in Stillman v. Flenniken, 58 Iowa 453, 454, 10 N. W. 844, 43 Am. Rep. 120, holding that a smutter placed in a mill as a part thereof, and necessary for the purpose of grinding buckwheat and rye, passes to a purchaser of the mill and machinery at a sheriff's sale thereof under a special execution against the owner of the mill, although the smutter was only loaned to the mill owner, the execution purchaser not knowing this latter fact at the time of his purchase.

Reaffirmed and varied in Wilson & Co. v. Cass County, 69 Iowa 147, 28 N. W. 484, holding that nursery stock is a part of the realty, and should be assessed for taxation with it; but that where an assessor assesses the nursery stock separately from the land of which it is a part, and the rate of taxation for both land and personalty is the same, such error is immaterial.

Distinguished in Johnson v. Tantlinger, 31 Iowa 502, 503, holding that in an action by the grantee of land against the grantor for conversion by the latter of crops growing on the land at the time of the conveyance, the defendant (grantor) may plead and prove, at least in mitigation of plaintiff's (grantee's) claim that the specific crops were the produce of his labor, whereby they were brought from an immature to a mature condition, and that this labor was done with the plaintiff's knowledge and consent.—The court declining to decide whether growing crops will pass as realty under a deed to land.

STATE v. CRUISE, 19 IOWA 312

1. Criminal Law—Evidence—Corroboration of Accused by Declarations of one Jointly Indicted—Proof of Such Declarations.—

Where upon the separate trial of one jointly indicted with another for the commission of a crime, the state claims and introduces evidence that the crime was committed on a particular date, and that a certain important incident occurred and certain things were done by the accused and his co-defendant on the date of the crime and after its commission; and the accused and his co-defendant both testify that the incident occurred, and the acts in connection therewith were done by them on a date prior to the date of the alleged commission of the crime, statements and declarations of the co-defendant as to the incident made to a third person in relation thereto, and narrative thereof, and made before the alleged date of the commission of the crime, are competent, both as independent evidence, and as evidence corroborating the testimony of the co-defendant, pp. 313-318.

Reaffirmed, explained and varied in Boy v. First Nat'l Bank of Oskaloosa, 25 Iowa 257, holding that declarations of a witness are admissible where it is claimed that his relation to the case or parties interested discredits him, or on account of such relations, he designedly

makes false statements, and it is shown that the declarations, agreeing with the evidence, were made before such relations existed.

Cited in State v. Vincent, 24 Iowa 575, 95 Am. Dec. 753; Kesselring v. Hummer, 130 Iowa 149, 106 N. W. 502, holding that when the credibility of a witness is impeached by direct testimony of his want of reputation for truth, or of his general moral character, or by proof of his having made or testified to different and conflicting statements, he cannot, as a general rule, be supported by evidence that statements of the facts made by him before the trial correspond with his evidence: But if the witness is charged with a design to misrepresent on account of his changed relation to the parties or the cause, evidence of like statements before such change of relation may be admitted; or, if it is attempted to be shown that the evidence is a recent fabrication, or when long silence concerning an injury is construed against the injured party, as in cases of an indictment for rape, in such cases it is proper to show that the witness made similar statements soon after the transaction in question.

GILBERT v. MOLINE WATER POWER & MFG. CO., 19 IOWA 319

1. **Judicial Notice—Geographical Facts and Boundaries.**—

Courts of this state take judicial notice of geographical facts and boundaries. So, courts of this state take judicial cognizance of the fact that Rock Island is within the jurisdiction of the State of Illinois and forms part of its territory for judicial and all other purposes, p. 320.

Reaffirmed and extended in Darrah v. Watson, 36 Iowa 118, holding further that courts of this state will take judicial notice of the division of Virginia and the formation of West Virginia.

2. **Mississippi River—Concurrent Jurisdiction of Courts of Iowa and Illinois.**—Courts of Iowa and Illinois have concurrent jurisdiction of offenses committed, or of injuries inflicted on the Mississippi River: But a court of Iowa has no jurisdiction of an action to abate a nuisance maintained on the Illinois side thereof, pp. 320-322.

Reaffirmed in Buck v. Ellenbolt, 84 Iowa 396-398, 51 N. W. 23, 15 L. R. A. 187.

Cited in Little v. Green, 144 Iowa 496, 498, 499, 123 N. W. 369, 370, the court holding that a slough in this state connected with and in part fed by the Mississippi River, is not a part of such river; and that the Fish Laws, forbidding seining, etc., Secs. 2539, 2540 of the Code Supplement of 1902, are applicable thereto, Sec. 2547 thereof being inapplicable.

Distinguished in State v. Mullen, 35 Iowa 200, 201, 206, 207, holding that the courts of Iowa and Illinois have concurrent jurisdiction to punish one guilty of maintaining a nuisance on a boat in the Mississippi River, and to abate it, on whatever side of the river the nuisance may be maintained, it not being permanently located on either side.

SUNDERLAND v. SUNDERLAND, 19 IOWA 325

1. Resulting Trust—Money to Buy Land Furnished by Husband, Title taken by Wife—Presumption from.—Where a husband buys and pays for land, and takes the title in the name of his wife, the presumption is very strong, though not conclusive, as between them, and as between the wife and the heirs of the husband, that he intended to make an advancement to or a provision for the wife; and the rule is the same where the husband permits his wife to purchase land with his money, and take the title in her name, pp. 328, 329.

Reaffirmed in Andrew v. Andrew, 114 Iowa 525, 87 N. W. 494.

Reaffirmed, extended and explained in Cotton v. Wood, 25 Iowa 45, 46; Culp v. Price and Watkins, 107 Iowa 135, 136, 77 N. W. 849, holding further that if the person to whom the conveyance is made be one for whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded, *prima facie*, as an advancement, and the burden will rest on the one who seeks to establish the trust for the benefit of the payer of the consideration, to overcome the presumption in favor of the legal title by sufficient evidence.

Cited in Logan v. Hall, 19 Iowa 198, not in point, but involving the rights of a wife on a note executed to her by her husband for borrowed money.

2. Resulting Trust in Land—Parol Evidence to Establish—Sufficiency of.—Where money for the purchase of land is furnished by one person, and the title to the land is taken by another, a trust results in favor of the former.

A resulting trust in land may be established by parol evidence; but such evidence for such purpose, must be clear, decisive and satisfactory, or the legal title will not be disturbed, pp. 328, 329.

Reaffirmed and qualified in Burden v. Sheridan, 36 Iowa 127, 128, 135, 136, 14 Am. Rep. 505, holding that no trust results in favor of a person who has paid no part of the purchase money of land, on account of the breach of a verbal contract in relation thereto; and parol evidence is inadmissible to prove such a contract.

Reaffirmed as to second paragraph in Hyatt v. Cochran, 37 Iowa 310; Culp v. Price and Watkins, 107 Iowa 136, 77 N. W. 849.

Reaffirmed and extended as to first paragraph in Mallory v. Luscombe, 31 Iowa 271, holding further that a purchaser of real estate who purchases with knowledge that a third person claims a prior equity, or a title therein or thereto, takes subject to it.

Reaffirmed and extended as to second paragraph in Andrew v. Andrew, 114 Iowa 526, 87 N. W. 494; Malley v. Malley, 121 Iowa 240, 96 N. W. 752, holding further that one who asks to establish a resulting trust by parol evidence, and to ingraft it on the legal title, must do so by evidence that is clear, certain, and practically overwhelming.

Reaffirmed and narrowed as to second paragraph in Amidon, trustee v. Snouffer, Ex'x et al, 139 Iowa 161, 117 N. W. 45, holding that in the absence of fraud an *express trust* cannot be established by parol evidence; but that an *implied trust* may.

Cross reference. See further on this question, annotations, note and cross references under Rule 2 of Cooper v. Skeel (14 Iowa 578), ante. p. 288.

3. Resulting or Implied Trust in Land—Parol Evidence to Establish—Delay of Party Claiming—Effect.—When parol evidence alone is relied on to establish a resulting or an implied trust, in land, the long and unexplained delay of the person asserting the right thereto, is a material circumstance against the establishment thereof, p. 329.

Reaffirmed in Maple v. Nelson, 31 Iowa 328.

Cross reference. See Rule 1 hereof, and cross reference there found, in this connection.

HUGHES AND DIAL v. SHEAFF, 19 IOWA 335

1. Deed to or Contract for Sale of Land Absolute on Face—Contract for Repurchase—When a Mortgage and When Conditional Sale.—Whether a deed which is absolute on its face, or a contract for the sale of land with a collateral agreement as a part of the transaction for the repurchase by the grantor or vendor, by a certain time, upon the payment of a certain sum, will be treated as a mortgage or as a conditional sale depends upon the intention of the parties and the facts and circumstances surrounding each transaction of the kind. If it appears in such a case that the deed or contract of sale was as a matter of fact given or made to secure a debt, it will be construed to be and will be treated as a mortgage. In all such cases where there is a doubt as to the nature of the transaction, the deed or contract will be treated as a mortgage, pp. 343, 344.

Reaffirmed in Green v. Turner, 38 Iowa 115; Crawford v. Taylor, Richards & Burden, 42 Iowa 263; Barthell v. Syverson, 54 Iowa 162, 163, 6 N. W. 179; Stroup v. Haycock, 56 Iowa 731, 732, 10 N. W. 258; Baird v. Reininghaus, 87 Iowa 169, 170, 54 N. W. 148; Bigler v. Jack, 114 Iowa 675, 676, 678, 87 N. W. 703; Laub v. Romans, 131 Iowa 431, 105 N. W. 104; Keeline v. Clark, 132 Iowa 365, 106 N. W. 258.

Reaffirmed and extended in Baird v. Reininghaus, 87 Iowa 169, 170, 54 N. W. 148; Bigler v. Jack, 114 Iowa 678, 87 N. W. 704, holding that the burden is on the party seeking to have a deed absolute on its face declared a mortgage, to establish such fact by clear, satisfactory and convincing evidence.

Reaffirmed and qualified in Stroup v. Haycock, 56 Iowa 731, 732, 10 N. W. 258; Bridges v. Linder, 60 Iowa 192, 14 N. W. 218; Baird v. Reininghaus, 87 Iowa 169, 54 N. W. 148; Bigler v. Jack, 114 Iowa 676, 87 N. W. 703, holding—as does the present case in argument—

that if an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a specified time, does not create a mortgage but a conditional sale, and the grantee holds the premises subject to the right of the grantor to demand a reconveyance according to the terms of the agreement.

Unreported citation, 130 N. W. 909, 132 N. W. 74.

Cross reference. See further on this question, annotations under *Trucks v. Lindsey* (18 Iowa 504), ante. p. 674.

BERRYHILL v. JACOBS, 19 IOWA 346

(Later Appeal, 20 Iowa 246.)

1. **Appeal—Errors Which may be Corrected Below—Necessity of Motion to Correct Before Appeal.**—Errors which may be corrected below upon motion, will not—under Sec. 3545 of the Code of 1860—be considered or reviewed upon appeal to the Supreme Court, unless a motion to so correct is made in the trial court before the appeal is prosecuted.

So, where a judgment by default is entered in the district court upon a notice served by publication, a motion to set it aside must be made and overruled therein, before it will be reversed upon appeal, pp. 348, 349.

Reaffirmed as to first paragraph in Pratt v. Western Stage Co., 27 Iowa 364, 365; *Savings Bank of Decorah v. Horn*, 41 Iowa 56.

Reaffirmed and extended in Wile v. Wright, Adm'r, 32 Iowa 461, holding further that where, in an action against a personal representative, judgment is erroneously entered against him as individual, instead of as representative, he cannot complain thereof upon appeal, unless he called the trial court's attention thereto, and moved its correction before prosecuting the appeal.

Cross reference. See further on this question, annotations under *Pigman v. Denney* (12 Iowa 396), ante. p. 66.

REED v. DARLINGTON, 19 IOWA 349

1. **Pleadings—Set-off—Right to Plead—Nature of.**—In order to enable a party to plead a set-off, it must exist primarily in his favor. A set-off is not a defense, but is in the nature of a cross-action, p. 353.

Unreported citation, 10 N. W. 629.

MERRIT v. FISHER, 19 IOWA 354

1. **Landlord and Tenant—Landlord's Lien and Attachment—Construction of Statute.**—The statute granting a lien for rent, and an attachment to a landlord will be strictly construed; such right and remedy is purely statutory, and will receive no enlargement by construction.

If the statutory remedy by attachment is not broad enough for a landlord's purposes, he may have recourse to the usual and ordinary remedies in favor of other creditors, p. 356.

Reaffirmed in Ward v. Walker, Mace, Garrett & Co., 111 Iowa 614, 82 N. W. 1029.

Reaffirmed and explained in Clark v. Haynes, 57 Iowa 98, 10 N. W. 293, holding that where a landlord attaches property of a tenant before rent is due, he takes only the rights given by a general attachment.

Reaffirmed and qualified in Garner v. Cutting, 32 Iowa 554, holding that a landlord may, before the rent is due, enjoin the fraudulent removal of property on which he has a lien, out of the state or beyond his reach; or he may enjoin his tenant from committing a fraud whereby his lien is about to be injured or destroyed.

2. Landlord and Tenant—"Rent" Defined.—Rent is defined to be a certain profit to be paid the landlord either in money, provisions, chattels, or labor issuing out of and as value of or return for the use of lands and tenements, p. 357.

Reaffirmed in Lacey v. Newcomb, 95 Iowa 295, 63 N. W. 706.

Reaffirmed and extended in Secrest v. Stivers and Brown, 35. Iowa 581, 582, holding further that where a tenant agrees and contracts with his landlord to gather the latter's share of crops raised on leased premises, and fails or refuses to gather such crops, and the landlord is compelled to do so, the labor the tenant agreed to perform in gathering the crops is part of the rent, and the landlord is entitled to a lien for the value thereof, which is performed by him.

Reaffirmed and extended in Townsend & Knapp v. Isenberger, 45 Iowa 671, 672, holding further that crops reserved to a land owner by a lease, are rent; but that in such case the ownership of the tenant therein continues until they are set apart by him to the land owner.

3. Landlord and Tenant—Attachment of Landlord Allowed for Rent Due Only.—A landlord is entitled, under the Code of 1860, to an attachment for rent due, and which has accrued within one year previous to the filing of his affidavit, and on the premises therein described: He is not entitled to such attachment for damages by reason of breach of conditions of the lease, or failure of the tenant to perform his contract, or for any other claims against the tenant except for rent, p. 357.

Reaffirmed and explained in Lebner v. Balsley, 103 Iowa 679, 680, 72 N. W. 789, holding that where a landlord takes a note of his tenant for rent due and other items, and the note does not show what amount thereof is for rent, he thereby waives his landlord's lien; and a landlord's attachment issued therefor is illegal and wrongful, and the tenant is entitled to damages by reason thereof.

Reaffirmed and explained in Hilman v. Brigham, 117 Iowa 71, 72, 90 N. W. 491, holding that—under the Code of 1897—a landlord

has a lien on property of the tenant specified by statute, for rent due and to become due, but he has no right to the possession of any such property until some part of his rent is due; and that a tenant or a purchaser from him may maintain replevin for any such property seized under the landlord's attachment, when no part of his rent was due at the time of the issuance of the writ.

Reaffirmed and qualified in Brown v. Cairns, Bolton & Foster, 107 Iowa 731, 734, 77 N. W. 480, holding that the landlord can attach for rent before it becomes due under his lease, when nothing but time is wanting to fix an absolute indebtedness, and that upon the time arriving when it is to be due, the obligation of the defendant (tenant) to pay becomes absolute, whether he uses the premises or not.

Cross reference. See further in this connection, annotations under Grant v. Whitwell, Marsh & Talbott (9 Iowa 152), Vol. I, p. 555.

PATTERSON v. PRATT, 19 IOWA 358

1. Attachment and Garnishment—Money in Custody of Court or Officer.—Under the Code of 1860, money in custody of a sheriff or constable, or a fund in court may be attached or garnished in the way pointed out by statute, p. 361.

Reaffirmed in Hoffman v. Wetherill, 42 Iowa 90, holding that money of a defendant may—under the Code of 1873—be garnished in the hands of the sheriff; and that this rule applies where money is received by a sheriff in the discharge of his official duties for the purpose of collecting a claim.

2. Fraud—Abuse of Process.—No one can derive any advantage or benefit by fraudulent conduct, or by an abuse of a process of the law, pp. 361, 362.

Special cross reference. For cases citing and explaining the text, and others on the question, see annotations under Rules 1 and 2 of Pomroy & Co. v. Parmlee (9 Iowa 140), Vol. I, p. 554.

CHILDS v. GRISWOLD, 19 IOWA 362

1. Resulting Trust in Land—Parol Evidence to Establish—Sufficiency of.—Parol evidence is admissible to establish a resulting trust in land; but in such case such evidence must be clear and unequivocal, or the legal title will not be disturbed, p. 364.

Reaffirmed and extended in Hyatt v. Cochran, 37 Iowa 310; Trout v. Trout, 44 Iowa 474, holding further that parol evidence, in order to establish a resulting trust in land, must be clear, satisfactory, and conclusive.

Cross reference. See further on this question, annotations and cross reference under Rules 2 and 3 of Sunderland v. Sunderland (19 Iowa 325), ante. p. 733.

LONGHURST v. STAR INSURANCE CO., 19 IOWA 364

1. **Fire Insurance Policy—Mistake in Description of Interest Insured.**—Where a policy of fire insurance on the interest of a mechanic as secured by lien on the property insured, described the interest of the mechanic as that of "mortgagee," and both the insured and the local agent of the insurer understood at the time of the delivery of the policy that such description covered the interest of the insured, such policy will be reformed in equity so as to express the true interest insured, pp. 368, 369.

Reaffirmed and explained in Esch Bros. v. Home Ins. Co. of New York, 78 Iowa 342, 43 N. W. 232, 16 Am. St. Rep. 443, holding that if the applicant for insurance correctly states his interest, and distinctly asks for an insurance thereon, and the agent of the insurer agrees to comply with his request, and assumes to decide upon the form of the policy to be written for that purpose, and by mistake of law adopts the wrong form, a court of equity will reform the instrument so as to make it insurance upon the interest named.

Cited in City of Burlington v. Gilbert, 31 Iowa 368, 7 Am. Rep. 143, holding that in order for equity to reform a written instrument for mistake, the mistake must be mutual: Holding further, that in the absence of fraud, equity will not relieve from a mistake which ordinary vigilance would have prevented.

2. **Fire Insurance Policies—Limitation in on Time to Sue—Policy on Interest of Mechanic an Exception.**—Where a by-law or condition attached to and made a part of a policy of fire insurance limits the time in which action is to be commenced in case of loss, it is, in the absence of qualifying circumstances, valid.

But where a policy of fire insurance insuring the interest of a mechanic or matrilman in a building, contains such a provision, and he uses all diligence to obtain a judgment for his lien, and makes his proof of loss and the value of his interest, and pursues his remedy against the company with ordinary diligence, such provision limiting the time to commence action, is inoperative, pp. 370-372.

Special cross reference. For cases citing the text, see annotations under Rule 2 of Stout v. City Fire Insurance Co. of New Haven (12 Iowa 371), ante. p. 62.

Cross reference. See further in this connection, annotations under Carter v. Humbolt Fire Ins. Co. (12 Iowa 287), ante. p. 48.

PENN v. CLEMANS, 19 IOWA 372.

1. **Taxation and Revenue—Homestead—Sale of for Taxes—Sale of with Other Land—Effect.**—Under Chap. 173, Acts of 1862. homestead can only be sold for taxes due thereon; and if it be sold together with other land for taxes, the owner may redeem the home-

stead by paying the taxes due thereon, penalty and interest, without redeeming the other land sold with it, pp. 377, 378.

Reaffirmed and extended in Stewart v. Corbin, 25 Iowa 147, 148, holding further that homestead can only be sold—under laws of the text—for taxes due thereon; and if it be sold for other taxes, or together with other land for taxes, the sale is void.

Distinguished and narrowed in Salter v. City of Burlington, 42 Iowa 533, 534, holding that in order to exempt homestead from liability for sale for taxes on other property, it must—under the laws of the text—be listed separately as homestead.

2. Tax Sale of Land—Redemption from—Who Cannot Redeem—Effect of Redemption by Person not Allowed to.—A person having no interest in land cannot redeem from a tax sale thereof; and if such a person attempts to so redeem, it will have no effect whatever on the right or title of the tax sale purchaser, pp. 378, 379.

Reaffirmed and varied in Jacobs v. Porter, 34 Iowa 343, 347, 348, holding that where land is sold for taxes after the death of its owner, but for taxes accruing during his lifetime, and there are children of decedent who are adults, and children who are infants at the time of the sale, that the infants upon attaining majority may redeem their undivided interests therein, but not the whole, from such tax sale.

Cross reference. See further on this question, annotations and cross references under Rule 3 of Adams v. Beale (19 Iowa 61), ante. p. 692.

3. Tax Sale of Several Parcels of Land in Gross—Validity.—A tax sale of several parcels of land which were assessed separately, in gross, instead of separately, is irregular and will be set aside upon complaint of the land owner, pp. 379, 380.

Reaffirmed and qualified in Corbin v. De Wolf, 25 Iowa 127; Bulkley v. Callanan, 32 Iowa 463, 464, holding that where land is properly and legally assessed for taxation *in a body*, instead of parcels, it may be so sold.

Reaffirmed and qualified in Rima v. Cowan, 31 Iowa 127, holding that under the Code of 1860, a tax deed to land is *conclusive* as to the *manner* of the sale; and that when two such deeds recite that separate parcels of land, separately assessed, were sold separately, such recitals cannot be impeached by showing that the parcels were *in fact* sold in gross.

Reaffirmed and qualified in Martin v. Cole, 38 Iowa 145-147, 152, holding that a tax deed showing a sale for taxes of two or more tracts or parcels of land together, is void, and will defeat the title based thereon: but that a section of land belonging to an unknown owner may be sold for taxes as one parcel or tract, and a tax deed therefor is valid.

(Note.—See further, *McCready v. Sexton & Son*, 29 Iowa 356; *Ware v. Thompson*, 29 Iowa 67; *Eldridge v. Kuehl*, 27 Iowa 160; *Wallace v. Berger*, 25 Iowa 456; *Ackley v. Sexton*, 24 Iowa 320; *Harper, et al v. Sexton*, 22 Iowa 442; *Ferguson v. Heath*, 21 Iowa 438; *Byam v. Cook*, 21 Iowa 392; *Boardman v. Bourne*, 20 Iowa 134, important cases on this question, not citing the text.—Ed.)

4. Tax Sale of Land—Statutes Allowing Redemption from—Construction.—Redemption clauses in revenue statutes are to be liberally construed in favor of those whose estates will otherwise be divested by tax sales, p. 380.

Reaffirmed in *Corning Town Co. v. Davis*, 44 Iowa 628.

Reaffirmed and extended in *Ashenfelter, trustee v. Seiling, and Schandelmeier, et al*, 141 Iowa 515-518, 119 N. W. 985, holding further that unless the provisions of Secs. 1341 and 1441 of the Code of 1897, are strictly complied with, the right of a land owner to redeem is not cut off; that the provisions of such sections are mandatory and not directory.

Cross reference. See Rule 2 hereof and cross reference there found, in this connection.

WAPLES v. MARSH, 19 IOWA 381

1. District Court—Jurisdiction—Decedent's Estate—Action by Creditors.—The district court has general jurisdiction of all matters, except such as are denied or are taken away by express language of a statute, or by necessary implication therefrom.

So, the Code of 1860, does not give exclusive jurisdiction to the county court of all matters connected with the settlement of estates of decedents, and an action in equity in the district court may be maintained by the creditors of a decedent to compel an administrator to sell real estate for the satisfaction of their claims, pp. 383, 386, 387.

Reaffirmed and extended in *Clark v. Cress*, 20 Iowa 55, holding further that after an action on an administrator's bond for money due an heir is commenced in the district court, the administrator cannot make a settlement in the county court, and thereby oust the district court of its jurisdiction.

Reaffirmed and extended in *Starry v. Starry*, 21 Iowa 255, 256, holding further that courts of equity have concurrent jurisdiction with courts of law in the assignment of dower; and such jurisdiction of an equity court therefor is not divested by the special proceedings provided therefor (by the Code of 1860) in the county court: That the limitation provided by Sec. 2428 of the Code of 1860, applies to and bars the commencement of proceedings in the county court for assignment of dower; but does not apply to or bar an action in equity in the district court instituted for such purpose by a widow in peaceable possession of the realty since the death of her husband.

CHAMBERLAIN *v.* CITY OF BURLINGTON, 19 IOWA 395.

1. Municipal Corporations—Power of City to Issue Bonds in Aid of the Construction of Railroad—Injunction.—A charter of a city empowering it to borrow money for "public purposes" does not authorize it to issue bonds in aid of the construction of a railroad; and bonds so issued are *void*, and unenforceable in whatever hands they may come.

The levying and collecting of a tax to pay such bonds may be enjoined by a tax payer of the city, pp. 402-404.

Reaffirmed, explained and extended as to first paragraph in McPherson v. Foster Bros., 43 Iowa 60, 70, 22 Am. Rep. 215; *Swanson v. City of Ottumwa*, 131 Iowa 547, 9 A. & E. Ann. Cas. 1117, 106 N. W. 12, 5 L. R. A. 860, holding that county or other municipal bonds issued without authority are void even in the hands of a *bona fide* holder.

Reaffirmed and explained as to last paragraph in Zorger v. Township of Rapids, 36 Iowa 180; *Rood v. Board of Supervisors of Mitchell County*, 39 Iowa 446, holding that if a tax is illegal, and not merely irregular, its enforcement will be restrained by injunction.

Special cross reference. For other cases citing, sustaining, etc., the text, and many others on the question, see annotations under *State ex rel. B. & M. River R. R. Co. v. Wapello County* (13 Iowa 388), ante. p. 165.

Cross reference. See further in connection with first paragraph, annotations under *Clark v. City of Des Moines* (19 Iowa 199), ante. p. 715.

See further in connection with second paragraph, annotations under *Macklot v. City of Davenport* (17 Iowa 379), ante. p. 541.

TWOGOOD *v.* STEPHENS, 19 IOWA 405

1. Judgment Lien on Land—Equitable Interest of Judgment Debtor Covered by—Prior Homestead Right and Vendor's Lien.—A judgment is a lien on the equitable interest of the judgment debtor in land which may be sold under execution thereunder: But a judgment lien is inferior to a prior vendor's lien on land, and is subordinate to a homestead of the judgment debtor therein which is acquired before the judgment is rendered, p. 409.

Reaffirmed and extended in Howland v. Knox, 59 Iowa 48, 49, 12 N. W. 778, holding further that a judgment creditor may, in equity, attack a fraudulent conveyance of land by his judgment debtor, or he may sell such land under his judgment by execution, become the purchaser, and proceed in equity to quiet title as against the judgment debtor and his fraudulent grantee: But that a judgment debtor has no such interest in real estate which he has fraudulently conveyed to defeat his creditors, as will give a judgment creditor a lien thereon without such proceedings.

Cited with approval in Zion Church of the Evangelical Ass'n v. Parker, sheriff, 114 Iowa 8, 86 N. W. 62, the case turning on other questions.

Cross references. See further in this connection, annotations and cross references under Rule 1 of Vannice v. Bergen (16 Iowa 555), ante. p. 472; Bridgman & Co. v. McKissick, et al (15 Iowa 260), ante. p. 339.

HUGUS v. STRICKLER, 19 IOWA 413

1. Appeal from Justice's to District Court—United States Revenue Stamp Required—Failure to Affix—Dismissal.—Under the Act of Congress of June 30, 1864, a revenue stamp must be affixed to the notice, bond, transcript, or some other part of the written record upon an appeal from a justice's to the district court; and if such stamp is not so affixed, the district court will have no jurisdiction, and the appeal will be dismissed. The party appealing has no right to affix such stamp after motion to dismiss has been made, pp. 415, 416, 418, 419.

Reaffirmed in Botkins v. Spurgeon, 20 Iowa 598 (abstract).

Reaffirmed and extended in O'Hare v. Leonard, 19 Iowa 516, 517, holding further that the district court has no power to reinstate a case appealed from a justice's court and dismissed for want of the stamp being affixed as set out in the text, and then allow the party appealing to affix the stamp.

Reaffirmed and varied in Barney v. Ivins, 22 Iowa 165; City of Muscatine v. Sterneman, 30 Iowa 528, 529, 6 Am. Rep. 685, holding that an instrument requiring a stamp under the law of the text, is inadmissible in evidence unless it is affixed thereto.

Cited in Olmstead v. Iowa Mut. Ins. Co., 24 Iowa 504, the case involving whether or not an instrument required by law of the text to have a stamp affixed was *void* for failure to affix it thereto, the court declining to decide thereon, and resting opinion upon other grounds.

Cited in State v. Shields, 112 Iowa 29, 83 N. W. 807; State v. Glucose Sugar Refining Co., 117 Iowa 530, 91 N. W. 796; 83 N. W. 808, unreported, cases under United States Revenue Stamp Act of 1898.

Overruled in Mitchell v. Home Ins. Co., 32 Iowa 425; Ricord v. Jones, 33 Iowa 27, 28, holding that an instrument is not invalid for want of a stamp required to be affixed by the laws of the text, unless such stamp was omitted with a fraudulent intent to evade the provisions of the law; and that an instrument without a stamp, if not omitted therefrom with such intent, is valid and admissible in evidence; and that, in this last case, the burden is on the party objecting to the admission of such instrument in evidence, or attacking its validity, to prove or, in the latter instance, plead and prove such fraudulent design.

Cross reference. See further on this question, annotations under Deskin v. Graham (19 Iowa 553), *Infra.* p. 764.

VAN WAGNER v. VAN NOSTRAND, 19 IOWA 422

1. Deeds—Covenants in—General Warranty, Effect and What Included in and Implied by.—The general covenant of warranty in a deed to land includes and implies—under both the Codes of 1851, and 1860—all the usual covenants in a deed conveying the fee simple title to land; and the grantee in such a deed has, therefore, all the rights which he would have had if the conveyance had contained covenants of seizin, freedom from incumbrances, right to convey, and the like covenants, p. 426.

Reaffirmed in Richards v. Iowa Homestead Co., 44 Iowa 304.

2. Deed Without Reservations or Exceptions—What Included in—Building Erected by Tenant—Knowledge by Grantee—Parol Evidence Incompetent.—A conveyance of land without reservations or exceptions therein, includes the earth, and, also, everything attached to it, whether by nature, as trees, herbage, etc., or artificially, by man, as fences, buildings, etc.: Such a deed includes a building on the land conveyed erected by a tenant under contract with the grantor and with power thereunder to remove it at the expiration of the lease; and the removal of the building by the tenant is a breach of the covenants of the deed, and the grantee or his assignee may sue the grantor for damages by reason of such breach.

This is true, although the grantee had knowledge of the rights of the tenant at the time of the execution and delivery of the conveyance, as exceptions and reservations cannot be ingrafted upon a conveyance by parol, in the absence of fraud, accident or mistake, pp. 426, 427.

Reaffirmed in part in McGowen v. Myers, 60 Iowa 259, 260, 14 N. W. 789, holding that a grantee may recover upon a covenant against incumbrances in a deed containing no exceptions or reservations, although he had full knowledge thereof at the time he accepted the deed and covenant; and that an easement of a third person, or of third persons in a stairway which is a part of the building on the premises so conveyed, is an incumbrance.

Reaffirmed and explained in Newburn v. Lucas, 126 Iowa 88, 101 N. W. 731, holding that in an action of covenant, the deed governs, and the defendant (grantor) cannot defeat the covenant by parol evidence of the plaintiff's (grantee's) knowledge of an incumbrance: Holding, also, that immature and growing crops on land at the time it is conveyed by a deed containing no reservations or exceptions pass to the grantee thereunder.

Reaffirmed in part and explained in Barlow v. McKinley, 24 Iowa 70; Flynn v. Whitebreast Coal & Mining Co., 72 Iowa 745, 32 N. W.

476, holding that a grantee may recover upon a covenant against incumbrances in a deed containing no exceptions or reservations although he had full knowledge thereof at the time he accepted the deed and covenants; and that a railroad right of way over land is an incumbrance.

Distinguished in Johnson v. Tantlinger, 31 Iowa 502, 503, holding that in an action by the grantee of land against the grantor for conversion by the latter of crops growing on the land at the time of the conveyance, the defendant (grantor) may plead and prove, at least in mitigation of plaintiff's (grantee's) claim, that the specific crops were the produce of his labor, whereby they were brought from an immature to a mature condition, and that this labor was done with the plaintiff's knowledge and consent—the court declining to decide whether growing crops will pass as realty under a deed to land.

Distinguished and narrowed in Spaulding v. Thompson, 52 Iowa 485, 93 N. W. 499, a case wherein the deed contained an exception of the rights of a tenant of the grantor, the court holding that the rule is inapplicable in such case.

Distinguished and narrowed in Harrison v. Des Moines & Ft. Dodge Ry. Co., 91 Iowa 116, 117, 120, 58 N. W. 1081, holding that a public highway over land is not an incumbrance thereon.

Unreported citation, 130 N. W. 899, 901, 902.

Cross reference. See Rule 4 hereof, in this connection.

3. Deed—Breach of Covenant—Action for—Measure of Damages.—In an action by a grantee in a deed containing no exceptions or reservations, for breach of covenant of general warranty, by the removal by a tenant of the grantor of a building which was on the land conveyed at the time of the execution of the deed, the measure of damages is the value of the building removed: And this is the rule in such an action by an assignee of the grantee.

The existence of a valid lease at the date of the execution of such deed, constitutes a breach of the covenants thereof, entitling the grantee or his assignee to recover at least nominal damages therefor in such an action, pp. 424, 425, 428.

Reaffirmed and extended in Wragg & Son v. Mead, 120 Iowa 322, 94 N. W. 857, holding further that in an action upon a covenant against incumbrances where the breach alleged is an outstanding lease of the premises conveyed, the measure of damages is the rental value of the land for the unexpired term.

Reaffirmed and extended as to first paragraph in Newburn v. Lucas, 126 Iowa 88, 89, 101 N. W. 732, holding further that where a deed to land with the usual covenants, contains no exceptions or reservations, immature and growing crops on the land at the time of the execution of the instrument pass to the grantee thereunder; and that where such crops are afterwards converted by a third person under a contract with the grantor prior to the execution of the deed, the

grantee may recover of the grantor, as for breach of covenants, the value of the crops at the time of the execution of the conveyance.

Reaffirmed and varied as to second paragraph in Martin v. Roberts, 127 Iowa 220, 102 N. W. 1127, holding that where a contract for the sale of land stipulates that the vendor is to execute a deed thereto with the usual covenants of warranty, upon the purchaser paying a balance of the purchase price at a certain date, and the vendor, before the date that such balance of purchase price is due, executes a lease of the land to a third party, and puts him in possession thereof, such acts constitute a renunciation or rescission of the contract of sale, and the purchaser may sue the vendor for the amount of the purchase price previously paid, without tendering the balance thereof.

4. Deed to Land with Covenant of General Warranty—Unaccrued Rent under Prior Lease Passes under, when.—A deed to land with a covenant of general warranty, but containing no exceptions or reservations, passes unaccrued rent under a prior lease thereof to the grantee, p. 428.

Reaffirmed and extended in Winn v. Murehead, 52 Iowa 65, 66, holding further that in the absence of fraud, accident or mistake, parol evidence is inadmissible to prove that unaccrued rent was reserved to the grantor in a case as set out in the text.

Cross reference. See further, in this connection, Rule 2 hereof.

DELAVER V. PRATT, 19 IOWA 429

I. Homestead—Judgment Lien on—Proof Aliunde.—A judgment rendered for a debt created before homestead is occupied as such by the debtor, or for a mechanic's or materialman's lien thereon, is a lien thereon, and it is subject to the satisfaction thereof; and as between a judgment creditor and the judgment debtor or his heirs, the former may show that his judgment is a lien on the land and that it is subject thereto, by other proof than the record, pp. 432, 433.

Reaffirmed and extended in Markham v. Buckingham, 21 Iowa 496, 89 Am. Dec. 590, holding further that in a contest between the judgment debtor and a purchaser at an execution sale thereunder, the latter may show by the pleadings and the record in the action that the judgment attached as a lien upon the land purchased by him, although the judgment itself does not show such fact.

Reaffirmed and extended in Phelps v. Finn, 45 Iowa 449, 450, holding further that the rule is applicable to a purchaser at an execution sale of land in an action to redeem therefrom.

Reaffirmed and varied in State Savings Bank of Mo. Valley v. Shinn, sheriff, 130 Iowa 367, 368, 106 N. W. 922, 114 Am. St. Rep. 424, holding that a judgment is a lien on land as between the parties to the action and as to subsequent purchasers or incumbrancers with *actual notice*, although it be not indexed or be improperly so done.

Cross references. See further on this question, annotations and cross references under *Hale v. Heaslip* (16 Iowa 451), ante. p. 456.

WILLER, ADM'R v. HAWES, 19 IOWA 443 .

1. Appeal—Judgment upon Trial by Court Against Evidence—When no Ground for Reversal.—When upon an appeal in an action at law tried by the court, it is sought to reverse the judgment because it was against the evidence, and the record leaves a doubt as to such fact, the judgment will be affirmed, p. 444.

Reaffirmed and extended in *Starker & Co. v. Luse & Mahana*, 33 Iowa 596 (abstract), holding further that in order to justify a reversal of a judgment because the verdict of the jury was against the evidence, it must be clearly and manifestly unsustained by the evidence: And this rule applies equally to the finding or decision of the lower court upon the trial of a law action without a jury.

Cross reference. See further on this question, annotations and cross references under *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764.

(Note.—There are very many cases sustaining, but not citing the text.—Ed.)

HAMSMITH v. ESPY, BARKER AND ROBINSON, 19 IOWA 444

1. Judicial and Execution Sales—Title Acquired by Purchaser at—Caveat Emptor.—The purchaser at a judicial or execution sale acquires only the interest or title of the judgment debtor in or to the property sold: And the doctrine of *caveat emptor* applies to such sales, p. 446.

Reaffirmed in *Jones v. Blumenstein*, 77 Iowa 366, 42 N. W. 323; *Curtis v. Barber*, 131 Iowa 402, 108 N. W. 756, 117 Am. St. Rep. 425.

(Note.—See further, *Holtzinger v. Edwards*, 51 Iowa 383, 1 N. W. 600; *Matless v. Sundin*, 94 Iowa 111, 62 N. W. 662; *Weaver v. Stacy*, 93 Iowa 683, 62 N. W. 22, some important cases on this question, not citing the text.—Ed.)

Cross reference. See Rule 2 hereof.

2. Judicial and Execution Sales—Setting Aside by Purchaser.—In the absence of fraud the law will not, ordinarily, relieve a purchaser at a judicial or execution sale who acquired only a *defective* title thereat; but such a purchaser may sometimes be so relieved, if he acquired *no title* thereat, and the relief is applied for seasonably, p. 446.

Cited in *Burmeister v. Dewey*, 27 Iowa 471, the court holding that although homestead which is subject to the satisfaction of a judgment is sold before other property of the debtor subject thereto is exhausted, still, it will not be ground for setting aside the sale and deed made thereunder in 1859, in an action therefor commenced in

1868; a case, however, in which the court decides that the other property was properly exhausted before the homestead was sold.

Distinguished in Farmer & Son v. Sasseen, 63 Iowa 112, 18 N. W. 715, holding that when a judicial or execution sale of real estate is set aside because the purchaser thereat obtained *no title*, the judgment not being a lien on the realty (allowed by Sec. 3090 of the Code of 1873), the satisfaction of the judgment entered of record by reason of the sale, must, also, be set aside or cancelled by the court.

(Note.—See further, sustaining but not citing the text, Chambers v. Cochran and Brock, 18 Iowa 159.—Ed.)

STATE v. DECKLOTT, 19 IOWA 447

1. Criminal Law—Instructions or Admonition to Jury As to Duty—When and What Proper.—In homicide and other criminal cases of gravity and magnitude, it is entirely proper for the court to instruct or admonish them as to their duty, and to enjoin upon them a full, careful and conscientious consideration of the case, and a manly discharge of their duty as jurors.

So, upon the trial of an indictment for murder it is not improper or reversible error for the court in his instructions to say that "you should endeavor to move forward in the discharge of this duty without hesitation, fear or favor, let the result and its consequences be what they may. The good of society requires that crime should be surely and promptly punished. No considerations of sympathy or excessive kindness should for a moment deter you from finding the defendant guilty, if you are satisfied from the testimony, beyond a reasonable doubt, that he is so guilty: On the other hand you are to be uninfluenced by any excitement or prejudice in the community, which has less reliable knowledge of the facts and less legal and moral responsibility than you have, acting upon oath. The vast importance to the defendant of the result of your deliberations should alone prompt you to a careful and full investigation of the whole case, actuated by but one motive, that of, doing entire justice under the evidence, and the law as given you by the court," p. 450.

Reaffirmed and extended in State v. Wilson, 124 Iowa 267, 99 N. W. 1061, holding further that upon the trial of an indictment for keeping a house of ill fame, it is proper for the court to instruct the jury as to their duty to the state and to the defendant.—The instruction being similar to that set out in the text.

Cited in State v. King, 37 Iowa 469, the court holding that evidence improperly admitted, erroneous instructions given, and other rulings of a like character, are not cause for reversal of a judgment in a criminal prosecution, unless the accused was prejudiced thereby.

Distinguished and narrowed in State v. Hunter, 118 Iowa 694-696, 92 N. W. 875, holding that upon the trial of an indictment for murder, an instruction admonishing the jury as to their duty, etc., is

reversible error when it contains, along with the rest of the admonition, the following language, to-wit:—"On the one hand, you should remember that a failure to perform your duty, by which a crime, if one is shown, might go unpunished, and a criminal escape the penalty of his crime, cannot be corrected by a new trial, for the defendant cannot twice be put in jeopardy under our law."

(Note.—See further, *State v. Vance*, 17 Iowa 138, an important case in this connection, not citing the text.—Ed.)

2. Murder—First and Second Degree—Intention to Kill.—A specific intention to kill is not necessary under the Common Law to constitute murder; and under our statute—Code of 1860—such intention is not necessary to constitute murder in the second degree, although essential to murder in the first degree, p. 451.

Reaffirmed in *State v. Morphy*, 33 Iowa 275, 276, 11 Am. Rep. 122; *State v. Mewhirter*, 46 Iowa 102; *State v. Peffers*, 80 Iowa 585, 46 N. W. 664; *State v. Seery*, 129 Iowa 266, 105 N. W. 514.

Reaffirmed, explained and extended in *State v. Baldes*, 133 Iowa 163, 164, 110 N. W. 442, holding that an unlawful killing with malice, express or implied, is murder in the second degree, even though unaccompanied by deliberation, premeditation, or specific intent to kill: That if the killing be shown not only to have been done in malice, but with deliberation, premeditation, and the specific intent to kill, then, under our statute, it is murder in the first degree.

(Note.—See further, *State v. Baldwin*, 79 Iowa 717, 45 N. W. 297; *State v. Keasling*, 74 Iowa 528, 38 N. W. 397; *State v. Leeper*, 70 Iowa 748, 30 N. W. 501; *State v. Moore*, 25 Iowa 128; *State v. Gillick*, 7 Iowa 287, important cases, sustaining and explaining, but not citing the text.—Ed.)

3. Homicide—Manslaughter—What Constitutes.—Where one in sudden passion, or heat of blood, upon a reasonable provocation not amounting to self defense, and without malice, kills another, the offense is manslaughter and not murder, p. 455.

Reaffirmed in *State v. Kennedy*, 20 Iowa 574.

Reaffirmed and explained in *State v. Hockett*, 70 Iowa 453, 30 N. W. 748, holding that the following instruction as to manslaughter is correct, to-wit: "If you find from the evidence, beyond a reasonable doubt, that the defendant * * * did take the life of the said * * * by means of the weapon described in the indictment, * * * and that the killing, if any, was done in the heat of blood or passion, upon a sudden quarrel, and upon reasonable provocation, and without malice, express or implied, and you further so find that it was not justifiable or excusable * * * he is guilty of manslaughter."

Reaffirmed and qualified in *State v. Hunter*, 118 Iowa 696, 697, 92 N. W. 876, holding, as does the present case in argument, that the mere presence of passion or heat of blood in accused at the time of the

killing will not, unless superinduced by reasonable provocation, reduce the crime to manslaughter.

(Note.—See further, *State v. Spangler*, 40 Iowa 365; *State v. Abarr*, 39 Iowa 185; *State v. Shelledy*, 8 Iowa 477, important cases on this question not citing the text.—Ed.)

4. Homicide—Self Defense.—If at the time of killing another a person is in danger or apparent danger of death or serious bodily harm, then and there about to be inflicted on him by his adversary, he has the right to kill him, and it will be self defense, p. 456.

Reaffirmed and explained in *State v. Morphy*, 33 Iowa 276, 11 Am. Rep. 122, holding that a man cannot kill another, even in a combat, unless there is a real or apparent necessity therefor, in order to defend himself.

Reaffirmed and narrowed in *State v. Kennedy*, 20 Iowa 574, holding that a person is not justified in killing another, in order to protect himself from an ordinary assault which is not accompanied with imminent bodily danger to him.

Partially overruled in *State v. Benham*, 23 Iowa 162, 163, 92 Am. Dec. 417; *State v. Burke*, 30 Iowa 333, 334, holding that the danger to defendant must be actual, present, and urgent, or the homicide is not in self defense: That killing is justifiable by the defendant only when it was the only reasonable resort to save his own life, or his person from dreadful harm, or severe calamity, felonious in its character.

Cross reference. See further on this question, annotations under Rule 2 of *State v. Thompson* (9 Iowa 188), Vol. I, p. 560.

5. Homicide—Use of Deadly Weapon by Accused—Presumption.—Where a man makes use of a deadly weapon (in this case a pistol) to kill another, and the killing is not justifiable, an intention to inflict great bodily harm on or to take the life of the deceased will be inferred therefrom, p. 456.

Cited in *State v. Zeibart*, 40 Iowa 174, holding that the use of a deadly weapon to commit a homicide, is evidence of malice aforethought.

GREEN & DENSMORE *v.* SCRANAGE, 19 IOWA 461, 87 AM. DEC. 447

1. Husband and Wife—Mortgage by Wife of her Separate Property to Secure her Husband's Debt.—Where a creditor of a husband extends the time of payment of his debt, upon the wife of the debtor executing a mortgage on her separate property to secure it, such mortgage is valid, and will be enforced in equity.

Under the Code of 1860, a wife may mortgage her separate estate to secure the debt of her husband, pp. 464, 465.

Reaffirmed and varied in *Low Bros. & Co. v. Anderson*, 41 Iowa 478, holding that a married woman may mortgage her separate property to secure the debt of another.

Cross reference. See further on this question, annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

2. Mortgage by Wife to Secure Husband's Debt—Duress or Undue Influence—Threatening to Prosecute Husband.—If a wife is induced to execute a mortgage to secure her husband's debt by reason of threats made by her consort's creditor to illegally prosecute him, the instrument is not binding upon her, p. 466.

Reaffirmed, explained and extended in Giddings v. Iowa Savings Bank of Ruthven, 104 Iowa 679, 680, 74 N. W. 22, holding that where the fears or affection of a wife are worked upon through threats made against her husband, and she is induced thereby, against her will, to convey her property to secure his debt, there is duress as to her, even though the debt was valid, and the threat was of lawful prosecution for a crime that had in fact been committed by the husband.

Reaffirmed and extended in First Nat'l Bank of Nevada v. Bryan, et al, 62 Iowa 44, 45, 17 N. W. 166, holding further that where a wife is induced to sign a mortgage on her homestead to secure her husband's debt, upon the representation of the attorney of her husband's creditor that "it would save her husband's arrest," it is void *ab initio*.

MIDDLETOWN SAVINGS BANK v. CITY OF DUBUQUE, 19 IOWA 467

1. Municipal Corporations—Deed by Mayor Pro tem—Judicial Notice—Admissibility of Such Deed in Evidence.—Where the Act incorporating a city authorizes the appointment of a mayor *pro tem*, a deed of such a city signed by a mayor *pro tem*, is competent evidence without proof of the official capacity of such person, where the seal of the city is affixed thereto, and all the statutory requirements as to acknowledgement, etc., are complied with. The court, in such case, will take judicial notice of the fact that the Act of incorporation authorizes the appointment of a mayor *pro tem*., p. 474.

Reaffirmed and varied in State v. Loffer, 38 Iowa 426, holding that the district court will take judicial notice of the fact that a certain town is the county seat of a certain county, and may instruct the jury as to such fact, without proof thereof.

LAMPSON & POWERS v. ARNOLD, 19 IOWA 479

1. Insolvent Debtor—Sale or Mortgage to Secure a Creditor—When Valid—General Assignment, When Void.—An insolvent debtor, or one contemplating insolvency, may in good faith and in the absence of fraud, sell or mortgage a part or all of his property to secure a creditor, or creditors, although such sale or mortgage may practically defeat all other creditors than those secured, in the collection of their debts. Section 1826 of the Code of 1860, only applies to, and renders void a general assignment by an insolvent debtor, or one contemplating insolvency, when not made for the benefit of all creditors in proportion to the amount of their respective claims.

It is, therefore, legal for a debtor in good faith and in the absence of fraud, to pay part of his creditors in full, secure another part by a mortgage, or deed of trust, upon a part of his property, make a partial assignment of other property to secure still others, and then afterwards make a general assignment, pp. 485-487.

Reaffirmed in Lyon v. McIlvaine, 24 Iowa 13; Davis & Co. v. Gibbon, 24 Iowa 263; Farwell & Co. v. Howard & Co., 26 Iowa 384; Kohn Bros. v. Clement, Morton & Co., 58 Iowa 593, 12 N. W. 552; Cadwell's Bank v. Crittenden, 66 Iowa 241, 23 N. W. 648; Gage & Co. v. Parry, Assignee, 69 Iowa 609, 29 N. W. 824; Aulman v. Aulman, 71 Iowa 126, 127, 32 N. W. 241, 60 Am. Rep. 783; Bolles v. Creighton, 73 Iowa 205, 34 N. W. 818; Loomis & Son v. Stewart, 75 Iowa 390, 39 N. W. 662; Butler Bros. v. Diddy, 83 Iowa 538, 49 N. W. 996; Buck Runer Co. v. Chase & Worden, 85 Iowa 298, 52 N. W. 197; Clement, Bauer & Co. v. Johnson & Maring, 85 Iowa 569, 52 N. W. 502; Roberts, Butler & Co. v. Press, and Copeland, et al, 97 Iowa 482, 483, 66 N. W. 759; Groetzinger & Co. v. Wyman, et al, 105 Iowa 582, 75 N. W. 514, these cases being decided under the Codes of 1860 and 1873.

Cited in Grumme, trustee v. Firminich Mfg. Co., 110 Iowa 507, 81 N. W. 791, the case turning upon other questions.

Distinguished and narrowed in Van Patten & Marks v. Burr, 52 Iowa 521-523, 3 N. W. 528; Bradley & Co. v. Bailey, 95 Iowa 749-752, 64 N. W. 761, holding that where a debtor executes several mortgages, or other instruments with the intention of disposing of all of his property, the instruments will be considered as one transaction, and will be treated as a general assignment.

Cross references. See further on this question, annotations and cross reference under Rule 4 of Buell v. Buckingham & Co. (16 Iowa 284), ante. p. 437. See, also, in this connection, annotations under Rule 1 of Cole v. Dealham (13 Iowa 551), ante. p. 185; and Burrows v. Lehndorff (8 Iowa 96), Vol. I, p. 496.

LOGAN v. HALL, ADM'R, 19 IOWA 491

1. **Judgment on Agreed Facts—What Judgment to be Rendered.**—Where a cause is submitted to the court upon an agreed statement of facts, he should render such judgment thereon, whether legal or equitable as is justified and required by the facts, p. 495.

Unreported citation, 61 N. W. 996.

2. **Husband and Wife—Wife's Separate Money and Personal Property.**—Money, or personal property, belonging to a wife at the time of her marriage does not—under the Code of 1860—become the property of her husband, but remains hers: Although, of course, the wife may make a gift of such money, or property, so as to bar her from thereafter claiming it, either against him, or against his estate, or heirs, p. 495.

Reaffirmed and explained in King v. Gottschalk, 21 Iowa 514, holding that a wife may *give* and *deliver* to her husband notes or other choses in action; and that in such case the husband may sue thereon in his own name.

Reaffirmed and extended in Mitchell & Sons v. Sawyer and Wife, 21 Iowa 583, holding further that where a wife has separate property, she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of her husband.

Reaffirmed and extended in Robertson v. Robertson, 25 Iowa 352-354, holding further that—under the Code of 1860—a wife may sell and convey her separate property to her husband without the intervention of a trustee, and such conveyance is valid, in the absence of fraud: Hence, holding that an agreement of separation between husband and wife, which is based upon a sufficient consideration and not tainted with fraud, whereby the wife relinquishes her dower and releases the husband from a claim for future maintenance, is valid.

Cross reference. See specially, explanatory note following syllabus to this last case, ante. p. 722.

Cited with approval in Richmond v. Tibbles and Husband, 26 Iowa 477, the court holding that, under the Code of 1860, a wife is liable for breach of covenants contained in a deed to her own land.

Cited with approval in McKee v. Reynolds, 26 Iowa 582, the court holding that, as a general rule, a contract between a husband and wife made during coverture, whereby one of them releases dower in the real estate of the other, is unenforceable at law, although enforceable under equitable circumstances, in equity; but that deeds for the separation of husband and wife are valid and effectual, both at law and in equity, provided their object be an actual and immediate separation; and that if a husband, in pursuance of an agreement to separate, makes a grant to his wife of his right of dower in her property, and she pays him the consideration therefor, it is binding at law; but not if she only executes a note therefor which she never pays, and such a note is unenforceable at law.

Cross reference. See cross reference above in connection with this last case.

Cited in Sunderland v. Sunderland, 19 Iowa 330, a case turning upon other, but analogous questions.

Cross references. See Rule 3 hereof. See further in this connection, annotations under Rule 2 of Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

3. Husband and Wife—Husband Borrowing Wife's Money—Action for by Wife—Interest.—Where a husband borrows his wife's separate money, and promises to repay it, equity will enforce the contract against him, or, in case of his death, against his estate, especially where the promise by the husband to repay the wife is reduced to

writing, and the rights of creditors are not prejudiced or defeated. Where, in such case, the wife, upon the death of her husband, sues his administrator in equity for the debt, it will not draw interest except from the death of the husband, unless there was an agreement, express or implied, or special circumstances allowing it to draw interest sooner, pp. 498, 500, 501.

Reaffirmed and varied in Crouse v. Morse, 49 Iowa 385; Payne v. Wilson, 76 Iowa 380, 41 N. W. 46, holding that where a husband is indebted to his wife and to others, he may, in good faith and in the absence of actual fraud, and although insolvent, pay or secure the debt of his wife, to the exclusion of his other creditors; and that a sale or mortgage by the husband, in such case, to his wife in payment of or as security for her debt, is valid.

Reaffirmed and qualified in Heacock v. Heacock, 108 Iowa 546, 547, (cited in dissenting opinion, 549, 551) 79 N. W. 356, 75 Am. St. Rep. 273, holding that a note given by a husband to his wife is—under the Code of 1873—unenforceable by her, unless she pleads and proves in her action thereon, that it was given as a consideration for or in relation to her separate money or property.

Reaffirmed and qualified in In re Estate of Deaner, 126 Iowa 703, 102 N. W. 825, 106 Am. St. Rep. 374, holding that where a wife lends her money to her husband, and takes a note from him therefor she may—under Sec. 3155 of the Code of 1897—maintain an action against him on the note after its maturity, from which time the statute of limitation begins to run.—And see Rice v. Crozier, 139 Iowa 631, 117 N. W. 985 (reaffirming and qualifying the text), holding that under the Code of 1873, a wife may sue her husband for a debt due her, and that the statute of limitation commences to run from the time of its maturity.

Distinguished in Courtright v. Courtright, 53 Iowa 58-60, 4 N. W. 825, holding that where a husband uses his wife's money to pay expenses and obligations for which they are jointly liable under the statute, and this is done with her consent and without promise of repayment, she cannot recover therefor against him or his estate.

(Note.—See further, Wooster v. Bateman, 126 Iowa 554, 102 N. W. 521; McElhaney v. McElhaney, 125 Iowa 278, 101 N. W. 77; Bonbright v. Bonbright, 123 Iowa 305, 98 N. W. 784; Hoaglin v. Henderson & Co., 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756; Roberts v. Brothers, 119 Iowa 309, 93 N. W. 289; Mereness v. First National Bank, 112 Iowa 11, 83 N. W. 711, 84 Am. St. Rep. 318, 51 L. R. A. 410; Allerton v. Monona Co., 111 Iowa 560, 82 N. W. 922; Stewart v. McFarland, 84 Iowa 55, 50 N. W. 221; Gilbert v. Glenn, 75 Iowa 513, 39 N. W. 818, 1 L. R. A. 479; City Bank v. Wright, 68 Iowa 133, 26 N. W. 35, important cases on, and intimately connected with, this question not citing the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under Rule 2 of Jones v. Jones (19 Iowa 236), ante. p. 720.

AMERICAN INSURANCE CO. v. SCHMIDT, 19 IOWA 502

1. **Mutual Insurance Company—Action by, on Premium Note—Allegations of Petition and Proof Required.**—In an action by a mutual insurance company on a premium note which provides that it shall be paid “in such portions, and at such time or times as the directors of the company may, agreeably to their charter and by-laws, require,” the plaintiff must allege in its petition and prove, that the note is due for its policy’s due proportion of the losses and expenses incurred, and has been so declared and ordered to be paid by the policy holder, by the plaintiff’s directors, pp. 504, 505.

Reaffirmed in Warner v. Beern, 36 Iowa 386, 387; Chandelier v. Keith, 42 Iowa 103.

Unreported citation, 60 N. W. 238.

NOBLE v. MORREY, ADM’R, 19 IOWA 509

1. **Decedent’s Estate—Filing Claim Against within Six Months After Notice of Appointment of Administrator—Third Class Claim.**—The filing of a claim against the estate of a decedent within six months after notice by the administrator of his appointment, fixes the claim as one of the third class, under Sec. 2404 of the Code of 1860, although proof of or establishment of the claim be made or done after the expiration of such period: The time of the making of proof of or the establishment of such claim is immaterial.

The filing of the claim within such time advises the administrator of its nature and class, and he must regulate disbursement of assets accordingly, pp. 510, 511.

Reaffirmed and explained in Fritz v. Fritz, 93 Iowa 29-31, 61 N. W. 170, holding that the filing of a claim against the estate of a decedent in the office of the clerk of the district court having jurisdiction is the commencement of an action thereon, and suspends the running of the statute of limitation.

Reaffirmed and extended in Goodrich v. Conrad, 24 Iowa 257, holding further that where a claim against an estate of a decedent is filed within six months after the administrator gives notice of his appointment, it may be proved and established more than eighteen months after it is filed.

Distinguished as to second paragraph in Ashton, et al v. Miles, 49 Iowa 566, 567, holding that an administrator is not bound to take notice of a claim filed within six months after he gives notice of his appointment, unless he receives actual notice of such filing.—But see Phelps, Dodge & Palmer Co. v. Greenbaum, Adm’x, 87 Iowa 350,

351, 54 N. W. 77, *reaffirming* the text, and *overruling* Ashton, et al v. Miles, on this question.

(Note.—See further, sustaining, but not citing the text, Smith v. McFadden, 56 Iowa 482, 9 N. W. 350.—Ed.)

2. Decedent's Estate—When Fourth Class Claims Against to be Filed, Proved and Allowed—Exception to Rule—When Claim Barred.—A claim of the fourth class against a decedent's estate must—under Sec. 2405 of the Code of 1860—be filed, proved and allowed within a year and a half after the giving of notice by the administrator of his appointment, or it is barred: Unless there are peculiar circumstances entitling the claimant, creditor, to equitable relief from such bar, p. 511.

Reaffirmed in Wile v. Wright, Adm'r, 32 Iowa 458, 459, a case involving peculiar circumstances entitling the creditor to equitable relief from the bar of the statute.

Reaffirmed in Willcox v. Jackson, 51 Iowa 298, 299, 1 N. W. 539, under Sec. 2421 of the Code of 1873, requiring the creditor of decedent to file and prove his claim, and have it allowed, within twelve months after the giving of notice of his appointment by the administrator, except for the peculiar circumstances set out in the text.

Cross references. See further on this question, annotations under Brewster v. Kendrick, Adm'r (17 Iowa 479), ante. p. 558; Braught v. Griffith, and McCleary (16 Iowa 26), ante. p. 397; Hart v. Jewett (11 Iowa 276), Vol. I, p. 815.

DIXON v. DIXON, 19 IOWA 512

1. Pleadings—Amendments—When and for What Allowed.—The court may, under Sec. 2927 of the Code of 1860, at any time, in furtherance of justice and on such terms as may be proper, allow a party to amend his pleading by adding or striking the name of a party, or correcting a mistake of any kind, or by making additional allegations material to the cause of action or defense, or conforming to the proof, provided the amendment in this last instance does not materially change the issue.

So, where an action is brought by a partner in his individual name on a cause of action existing in favor of the firm, the plaintiff has the right to file an amendment making the firm a party; and it is reversible error for the court to refuse to permit the amendment to be filed, or to thereafter strike it from the files upon motion of defendant, p. 514.

Reaffirmed in Hodges & Co. v. Kimball & Farnsworth, 49 Iowa 581, 582, 31 Am. Rep. 158, under Sec. 2689 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and extended as to first paragraph in Sachra v. Town of Manilla, 120 Iowa 564, 565, 95 N. W. 199, holding further that

where an amended petition does not set out a new cause of action, it relates to the date of the filing of the original petition, and, for the purposes of the statute of limitation, is regarded as part thereof.

Cross reference. See further on this question, annotations under *SeEVERS, Adm'r v. Hamilton* (11 Iowa 66), Vol. I, p. 773.

(Note.—There are numerous cases sustaining the principle of, but not citing the text.—Ed.)

O'HARE *v.* LEONARD, 19 IOWA 515.

1. **District Court—Record not Signed by Judge—Effect.**—The orders and judgments of the district court are not—under Sec. 2665 of the Code of 1860—rendered invalid or inoperative by the failure of the judge thereof to sign the record of the term, p. 516.

Reaffirmed in *Traer Bros. v. Whitman*, 56 Iowa 445, 9 N. W. 340, holding that a judgment of the district court is valid although the record thereof is not signed by the judge.

(Note.—See further, sustaining, but not citing the text, *Childs v. McChesney*, 20 Iowa 431.—Ed.)

2. **Appeal from Justice's to District Court—United States Revenue Stamp Required—Failure to Affix—Dismissal, etc.**—Under the Act of Congress of June 30, 1864, a revenue stamp must be affixed to the notice, bond, transcript, or some other part of the written record upon an appeal from a justice's to the district court; and if such stamp is not so affixed, the district court will have no jurisdiction, and the appeal will be dismissed. The district court has no power to reinstate a case appealed from a justice's court and dismissed for want of a stamp being affixed, and then allow the party appealing to affix the stamp, pp. 516, 517.

Special cross reference. For cases citing, and overruling the text, and others on the question see annotations under *Hugus v. Strickler* (19 Iowa 413), ante. p. 743.

ALGER *v.* FARLEY & CHRISMAN, 19 IOWA 518

1. **Mortgages—Chattel Mortgages—Senior Mortgagee with Power of Sale—Sale by—Redemption by Mortgagor or Junior Mortgagee.**—Where a senior mortgagee with power of sale, takes possession of and sells mortgaged personal property, the purchaser paying about one-sixth its value, and buying for the benefit of a co-mortgagee of the senior making the sale, the mortgagor, or a junior mortgagee of the property may redeem from the sale, p. 520.

Reaffirmed and extended in *Doane & Co. v. Garretson*, 24 Iowa 353, holding further that a mortgagee of a chattel mortgage who takes possession of the property and sells it, or who sells it under foreclosure proceedings, may be compelled to account for any overplus of proceeds after payment of the debt, either to the mortgagor (debtor)

or his creditors; and that in such case any creditor of the mortgagor may subject the overplus by garnishment.

Cross reference. See further in this connection, annotations and cross references under Rule 4 of *Fromme v. Jones* (13 Iowa 474), ante. p. 176.

HALL'S ADM'X *v.* MCHENRY, 19 IOWA 521, 87 AM. DEC. 451

1. Promissory Note—Addition to or Alteration of which Discharges Maker or Surety.—When a note is fully executed and delivered, and an additional maker is thereafter added thereto by or at the instance of the payee, without the knowledge of the original makers, the latter are discharged by such acts. This Rule applies where an additional surety is added to a note after its execution and delivery, by or at the instance of the payee, and without the knowledge of an original surety, the latter, in such case, being thereby discharged.

Where, after the execution and delivery of a note signed by two sureties, the payee cuts off the name of one of them without the knowledge of the other, the latter is thereby discharged from liability thereon, pp. 523-525.

Reaffirmed and explained as to first paragraph in Dickerman *v.* Niner, 43 Iowa 509; *Hamilton v. Hooper*, 46 Iowa 516, 517, 26 Am. Rep. 161, holding that the adding of the name of another maker to a bill or note after its execution and delivery, is a material alteration discharging the original or prior parties not having knowledge of or consenting thereto, irrespective of the question of injury or benefit to them: And that one so adding his name to such a paper is liable as the sole maker thereof, as if he had made a new and original one.

Reaffirmed and extended as to second paragraph in Laub *v.* Paine, 46 Iowa 552, 553, 26 Am. Rep. 163, holding further that where, after the execution and delivery of a note, the payee, without the knowledge or consent of the surety thereon, erases the word "surety" after the latter's name, such erasure is a material alteration, and discharges the surety from liability, even against a holder thereof for value and before maturity.

(Note.—In this last case, the question of whether or not the erasure was so skillfully executed that a man of ordinary prudence in taking the note would not have observed it, was not raised or decided.—Ed.)

Reaffirmed, varied and qualified in Shepard *v.* Whetstone, 51 Iowa 458, 459, 1 N. W. 754, 33 Am. Rep. 143, holding that where, after execution and delivery, a note is altered by or with the consent of the payee, and the alteration is thereafter erased, and the note restored to its original form, and then transferred to one for value, before maturity and without notice, it is valid and enforceable by the latter against all parties thereto.

(Note.—In this last case the alteration consisted in filling in the blank space intended for the place where it was to be payable with the

words "ten per cent. interest from date," and the erasure or alteration was not shown by the note to have been made *after execution and delivery*.—Ed.)

Reaffirmed and narrowed as to first paragraph in Sullivan v. Sudisill, et al, 63 Iowa 159, 160, 18 N. W. 856, holding that where, after the execution and delivery of a note, the payee, without the knowledge or consent of the original maker and the surety thereon, and without a fraudulent purpose, procures an additional surety thereto, such payee may recover of the original maker or principal the amount of the consideration therefor, with interest at the legal rate per annum, in an action brought therefor: That where a note has been innocently altered, the payee may recover in an action brought against the maker, principal, upon the original consideration.

Reaffirmed and narrowed in Murray v. Graham, 29 Iowa 526, 527, 529, holding that where, after its execution and delivery, a note is altered by one of its makers, who claims to have authority from the others therefor, so as to correct what is believed to be a mistake therein, with the assent of the holder who is acting in good faith, but without the knowledge or consent of the other makers of the note, such holder may restore the note to its original form, and hold all the makers liable thereon: Holding further that when a note is innocently altered by the payee or holder thereof, he may recover the consideration therefor, in an action brought therefor against the principal who received it.

Cited with approval in McCramer v. Thompson, 21 Iowa 246, the case turning upon a question under Rule 2 hereof, which see for its holding.

Distinguished and narrowed as to first paragraph in Howard v. Clark, 36 Iowa 115, holding that although the addition of a name as surety to a note by or with the consent of the payee or holder, after its execution and delivery, and without the knowledge or consent of the maker discharges the latter, still, this is a defense available only to the maker discharged, and cannot be taken advantage of by the payee or holder.—And this rule applies to a holder who takes with knowledge of the facts.

Distinguished and narrowed in Micklewait v. Noel, et al, 69 Iowa 345, 28 N. W. 631, holding that where in an action by the payee of a promissory note, one of the makers seeks to be discharged because it was signed by others as makers without his knowledge or consent, he must further plead and prove that such signing was done after delivery to, and with the knowledge of the plaintiff (payee).

(Note.—See further, sustaining, explaining and qualifying, but not citing the text, Eckert & Williams v. Pickel, 59 Iowa 545, 13 N. W. 708; Berryman v. Manker, 56 Iowa 150, 9 N. W. 103; Morrison Bros. v. Huggins, 53 Iowa 76, 4 N. W. 854; Clough v. Seay, 49 Iowa 111; Krause v. Meyer, 32 Iowa 566.—Ed.)

Cross reference. See Rule 2 hereof, in this connection.

2. **Promissory Note—Surety Signing as Sole one—Addition of Others Before Delivery—Effect on First Surety.**—Where a surety signs a note with an express understanding that he is to be the only surety thereon, and others are added thereto before its delivery, it is doubted whether this, of itself, affects the liability of the first surety; as he placed it in the power of the maker to add the others: But the first surety may be—although this is not *decided*—discharged by the addition of the others, if the note shows on its face that it is signed by the principal, and the surety *as his sole surety*, or where the payee accepts the note with a *full knowledge* of the understanding, pp. 524, 525.

Cited in Rainbolt v. Eddy, 34 Iowa 441, 442, 11 Am. Rep. 152. holding that where, after execution and delivery, the payee without the maker's knowledge or consent, inserts "ten per cent. inst." in a blank in such note, and makes the alteration in such a manner as to afford no suspicion thereof, or the means of detecting it, such note, as altered, is valid as against the maker, in the hands of an innocent purchaser, for value and before maturity.

Cited in McCramer v. Thompson, 21 Iowa 246, the court holding that where, before delivery of a note signed by several sureties, the name of one is erased, without the knowledge or consent of the others, and the note is then delivered to the payee who has knowledge of the erasure, or such fact may be seen by him and he accepts it without inquiry from the other sureties thereon, the latter are discharged from liability.

LAVERTY v. HALL'S ADM'X, 19 IOWA 526

1. **Contract for Sale of Land—Specific Performance—Sufficiency of Petition in Action of—Laches of Plaintiff.**—Where in an action by the assignee of a contract for the sale of land, for specific performance thereof, the petition alleges that plaintiff's assignor made valuable improvements on the land, that time was not of the essence of the contract, and that it has never been forfeited or rescinded, the court cannot decide, as a matter of law on demurrer, that the plaintiff is deprived of his right to relief because of long delay in failing to pay for the land, or in bringing the suit: This question depends, in such case, upon the facts and circumstances as they appear upon the trial, pp. 528, 529.

Reaffirmed in Brown v. Ward, 110 Iowa 125, 126, 81 N. W. 248.

Distinguished in Prince v. Griffin, 27 Iowa 520, a case wherein the plaintiff was barred by laches, from the right to a specific performance of a contract for a sale of land, time being of the essence in the contract, and there having been a forfeiture thereof.

Cross reference. See further in this connection, annotations under Young v. Daniels (2 Iowa 126), Vol. I, p. 221.

2. Contract for Sale of Land—Action for Specific Performance by Purchaser—When Tender of Purchase Price Unnecessary.—As a general rule, where a purchaser sues for specific performance of a contract of sale of land, he must, at least, tender the purchase money into court; but where the vendor is dead, or unable to convey a good title, he may allege in such action that he is ready to pay the purchase price upon a good deed being made, pp. 529, 530.

Reaffirmed and explained in *Auxier v. Taylor*, 102 Iowa 676, 72 N. W. 292, holding that in an action in equity for specific performance of a contract for the sale of land and to compel a conveyance, no tender of the purchase price by plaintiff (purchaser) to defendant (vendor) is necessary before the commencement of the suit, where the defendant has already conveyed the land to another.

Reaffirmed, explained and extended in *Brown v. Ward*, 110 Iowa 128, 81 N. W. 249, holding that where plaintiff, a purchaser of land, sues in equity for an accounting and ascertainment of the amount due the defendant (his vendor) and for specific performance of the contract for the sale of the land involved, and plaintiff (purchaser), further avers a willingness to pay any balance found due to the defendant (vendor), a tender into court of the amount claimed by plaintiff to be due defendant, is not required.

Reaffirmed and extended in *Jones v. Hartsock*, 42 Iowa 153, holding further that in an action in equity, the court will not deny relief to a plaintiff otherwise entitled thereto, because he has not tendered the amount due the defendant, into court, but will so mould the decree as to costs, and the conditions under which relief will be granted, as to fully guard and protect all parties.

Reaffirmed and extended in *McWhirter v. Crawford*, 104 Iowa 553, 554, 72 N. W. 506, holding further that under the Code of 1873, a tender by a debtor of an amount insufficient to cover the debt due, is not good, although the creditor may fail to object thereto for that reason: Hence, holding that a tender of a less sum than is due to the vendor of land by the vendee of a contract for a sale or conveyance thereof, is insufficient to entitle the latter to demand specific performance and a deed.—Unless the vendor is unable to perform his contract, or is insisting upon a cancellation or a forfeiture, in which latter cases a tender by the vendee is not required.

Reaffirmed and varied in *Anson v. Anson*, 20 Iowa 60, 89 Am. Dec. 514, holding that in an action by a junior mortgagee of a mortgage on land to foreclose his mortgage and to redeem from an execution sale thereof under a senior mortgage, which sale was made under decree of foreclosure in an action by the senior to which the junior was not a party, the junior mortgagee is not required to tender into court the amount due on the senior mortgage, where he alleges in his petition that the purchaser at the senior's execution sale has since been in possession of the land, and has used it and committed waste thereon.

and asks an accounting of the rents and profits, and ascertainment of the amount due for the waste, that these sums be credited on the senior mortgage, and that he (the junior) proffers to pay the balance thereof, if any.

Cited in Grimmell, Ex'x v. Warner, 21 Iowa 15, holding that where the vendor of real estate seeks, in equity, a specific performance and foreclosure of a contract containing mutual and dependent covenants, he is not required to tender a deed to the purchaser before filing his bill.

Cross reference. See Rule 1 hereof. See further in this connection, annotations under Rules 3 and 4 of Hayward v. Munger (14 Iowa 516), ante. p. 277.

PETCHELL v. HOPKINS, 19 IOWA 531

1. Limitation of Actions—Action Barred by Law or Another State, Barred here—When Action Accruing but not Barred in Foreign State, Barred here.—When a cause of action accrues and is barred in and by the laws of another state, it is—under Sec. 2746 of the Code of 1860—barred here: But if a cause of action accrues in another state, and, before, it is fully barred there, or in some other state of which the person against whom it lies was a resident, such person becomes a resident of this state, the statute of limitation of this state commences to run thereon from the time of his becoming a resident hereof; and such previous residence is—under Sec. 2745 of the Code of 1860—immaterial, pp. 534, 535.

Reaffirmed in Gillett v. Hill, 32 Iowa 222, 223, holding that where defendant in an action in this state relies on the bar of a cause of action by the laws of another state of which he was a resident, he must plead the facts and the foreign law constituting the bar.

Special cross reference. For further cases citing, explaining and qualifying the text, see annotations under Rule 1 of Sloan v. Waugh (18 Iowa 224), ante. p. 616.

PENNY v. COOK, 19 IOWA 538

1. Action at Law—Defenses in—Legal or Equitable Allowed.—Under Sec. 2880 of the Code of 1860, the defendant in an action at law [In this case an action of ejectment] may plead as many defenses, either legal or equitable, as he has; and where an equitable defense is so interposed it will be treated as if the same facts were made the basis of a petition in chancery, p. 541.

Reaffirmed in Shawhan v. Long, 26 Iowa 491, 96 Am. Dec. 164.

Cross references. See further on this question, annotations under Rules 1-3 of Byers v. Rodabaugh (17 Iowa 53), ante. p. 491; Rules 1-5 of Van Orman v. Spafford, Clarke & Co. (16 Iowa 186), ante. p. 425.

2. Deed of Trust to Land—Sale Under After Debt Paid—Validity.—Where a sale of land is made under a deed of trust after the debt it was given to secure has been fully paid, it will be set aside or annulled, unless, perhaps, where rights of innocent third persons have intervened, pp. 541, 542.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a direct attack of a sale by fiduciary.

DICKEY v. LYON, 19 IOWA 544

1. Lands—Possession of or by Tenant of Another than Vendor—Constructive Notice to Purchaser.—Possession of land by another than a vendor thereof, is notice to the purchaser of the title or equity of the former, or person in possession, thereto or therein; and this rule applies where such possession is held by tenant, the possession of the tenant being that of his landlord: Such a purchaser takes subject to the title or equity of the person in possession, pp. 549, 550.

Reaffirmed in Nelson v. Wade, 21 Iowa 54; Bowman v. Anderson, 82 Iowa 212, 47 N. W. 1088, 31 Am. St. Rep. 473; Hannan v. Seiden-doph, and Maloney, et al, 113 Iowa 662, 86 N. W. 46; O'Neill v. Wilcox, and Rohert, 115 Iowa 17, 87 N. W. 742; Townsend v. Blanchard, and Royster, 117 Iowa 43, 90 N. W. 521, holding that possession of land by a tenant is sufficient to put a subsequent purchaser or mortgagee thereof upon inquiry, and constitutes constructive notice, as to the rights and equities of the landlord.

Reaffirmed and explained in Simmons v. Church, 31 Iowa 287, holding that actual possession of land by the grantee in an unrecorded deed is constructive notice of his title, as if his deed were recorded.

Reaffirmed and explained in Phillips v. Blair, 38 Iowa 656, holding that actual possession by a purchaser of real estate under a parol contract of purchase thereof, operates as constructive notice of his title or equity therein to subsequent purchasers and other persons dealing therewith adversely to him.

Reaffirmed and extended in Hubbard v. Long, and Bush, 20 Iowa 150, 151, holding further that actual possession of land by the grantee under a deed misdescribing it, is notice of his equitable title thereto.

Reaffirmed and extended in Thompson v. Miner, 30 Iowa 390, holding further that where a person purchases a building with knowledge of its plan and construction, and of the common use of a passage way and stairway by the vendor and a third person or third persons, he is charged with notice of the easement of the latter.

(Note.—See further, Rogers v. Hussey, 36 Iowa 669; Baldwin v. Thompson, 15 Iowa 504, important cases on this question, not citing the text.—Ed.)

Cross references. See further on this question, annotations and notes under Rule 1 of *Wilson v. Holcombe* (13 Iowa 110), ante. p. 126; Rule 1 of *English v. Waples* (13 Iowa 57), ante. p. 118; Rules 1 and 2 of *Suiter v. Turner* (10 Iowa 517), Vol. I, p. 739.

DESKIN *v.* GRAHAM, 19 IOWA 553

1. United States Revenue Stamp—Affixing to Instrument Requiring them, by Deputy Collector, when—Effect.—Under the United States Revenue law, a deputy collector, in case of the sickness of or temporary disability of the collector, may affix a stamp to any instrument requiring it, and from which it is omitted without an intent to defraud the Government; and when such power is exercised by the deputy, it will be presumed, in the absence of proof to the contrary, that one of the contingencies authorizing him to act, existed, and the instrument will be given effect.

When a stamp is so affixed to an appeal bond in a proceeding appealed from a justice's to the district court before the dismissal of the appeal, the case will not be dismissed, p. 554.

Reaffirmed in *Doud v. Wright*, 22 Iowa 337, 338.

Partially overruled in *Brown v. Crandall*, 23 Iowa 114, holding that unless the act of the deputy in the particular case is authenticated with the official seal of the collector, or it is shown by sufficient evidence *aliunde* that the collector was sick or otherwise unable to act at the time, and that the deputy was authorized for the time being to exercise the power in question, the same should be disregarded and treated as a nullity.

Special cross reference. For further cases citing the text, and other very important ones on the question, see annotations under *Hugus v. Strickler* (19 Iowa 413), ante. p. 743.

RICHARDS *v.* NUCKOLLS, 19 IOWA 555

1. New Trial After Term Judgment Rendered—Accident and Surprise—Newly Discovered Evidence—Requisites of Petition.—Where, after the term at which a judgment is rendered, but within a year after its rendition, the unsuccessful party seeks to set it aside and obtain a new trial for accident and surprise, and for newly discovered evidence, as provided in and allowed by Secs. 3112 and 3116 of the Code of 1860, he must allege in his petition and prove facts showing due diligence on his part before the trial to make defense or discover the evidence; and must further allege that he was prejudiced by the judgment, and set out a good defense to the adverse party's claim.

In the absence of such allegations and proof a new trial will not be granted, p. 556.

Reaffirmed and explained in Mather v. Butler County, 33 Iowa 253; Lay v. Wissman, 36 Iowa 307; Stuckslager v. McKee, 40 Iowa 213, holding that a new trial will not be granted on the ground of newly discovered evidence, unless the party asking it shall show to the court that he has been diligent in his efforts to obtain the evidence prior to the trial.

Reaffirmed and extended in Stineman v. Beath, 36 Iowa 78, 79, holding further that a new trial will not be granted for newly discovered, cumulative evidence; but that newly discovered evidence is not cumulative if it has, in any degree, an independent and distinct bearing upon the issue in the action wherein the new trial is sought.

Reaffirmed and extended in Bingham v. Foster, 37 Iowa 341; Carman v. Roennan, 45 Iowa 136, holding further that a new trial will not be granted on account of newly discovered evidence, where such evidence is cumulative of that introduced on the trial.

Reaffirmed and qualified in Barthell v. Roderick, 34 Iowa 519, holding that a mistake in a judgment in an action at law, not the result of the negligence of the party complaining or of his attorney, may be corrected by an action in equity: And that a mistake in a calculation of an attorney, whereby a judgment in an action on a promissory note is for too small a sum, may be so corrected.

Cited in Robb v. McDonald, 29 Iowa 332, 4 Am. Rep. 211, on the general question of applications for new trial and how tried, the case turning upon other questions.

(Note.—See further, Feister v. Kent, 92 Iowa 10, 60 N. W. 496; Sully v. Kuehl, 30 Iowa 279; Lisher v. Pratt, 9 Iowa 59, important cases on this question, not citing the text.

N. B. There are very many cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rules 1 and 2 of Alger v. Merritt (16 Iowa 121), ante. p. 415.

COLDEN & Co. v. COLE, 19 IOWA 565

(Abstract.)

1. Appeal—Error to Prejudice of Appellant to be Shown Affirmatively.—In order to authorize a reversal upon an appeal to the Supreme Court, error below which prejudiced the substantial rights of the appellant must be affirmatively shown from the record, p. 565.

Reaffirmed in Fulmer v. Fulmer, 22 Iowa 233; Chase v. Scott, 33 Iowa 312; Blackburn v. Powers, 40 Iowa 683.

Cross references. See further on this question, annotations under Rule 1 of Smith v. Milburn (17 Iowa 30), ante. p. 485; Fletcher v. Burroughs (10 Iowa 557), Vol. I, p. 748.

JORDAN v. HENDERSON, 19 IOWA 565

(Abstract.)

1. **Evidence—Husband and Wife—Competency to Testify in Action by or Against Consort.**—In an action between a husband and another, the wife is competent for or against the husband, if he waives the statutory prohibition; and the adverse party thereto cannot object to the wife's competency by reason of the marital relation: And the same rule applies as to the competency of the husband in an action wherein the wife is a party, p. 566.

Special cross reference. For cases citing and explaining the text, and others on the question, see annotations under Rule 7 of Russ v. Steamboat War Eagle (14 Iowa 363), ante. p. 247.

(Note.—The above rule was not, as a matter of fact, decided in this case, the court dismissing the appeal; but it is treated as *adjudication* by citing cases, and is therefore so given here.—Ed.)

NORTON v. SWEARENGEN, 19 IOWA 566

(Abstract.)

1. **Appeal—Error not Excepted to Below.**—Rulings of the trial court will not be reviewed upon appeal, where the record fails to show that they were excepted to below.

This rule applies to error in the trial court's giving or refusing to give instructions where no exceptions are taken thereto, p. 566.

Reaffirmed as to first paragraph in Roberts v. Cass, 27 Iowa 226.

Reaffirmed as to first paragraph in Linn County v. Day, 18 Iowa 581 (abstract), holding that where, upon appeal from an order sustaining a demurrer to a petition, the record fails to show that such ruling was excepted to below, the judgment will be affirmed.

Reaffirmed and extended as to second paragraph in Snyder v. Eldridge, 31 Iowa 130, 131, holding further that an exception to an instruction given or refused by the trial court, must be taken at that time, or such ruling will not be ground for reversal.

SYLVESTER v. FLEMING, 19 IOWA 567

(Abstract.)

1. **Evidence—Husband and Wife—Competency to Testify in Action by or Against Consort.**—In an action between a husband and another, the wife is competent for or against the husband, if he waives the statutory prohibition; and the adverse party thereto cannot object to the wife's competency by reason of the marital relation: And the same rule applies as to the competency of the husband in an action wherein the wife is a party, p. 567.

Special cross reference. For cases citing and explaining the text, and others on the question, see annotations under Rule 7 of Russ v. Steamboat War Eagle (14 Iowa 363), ante. p. 247.

LANGWORTHY v. CAMPBELL, 19 IOWA 568

(Abstract.)

1. Deed of Trust to Land—Sale Under—Fraud of Creditor—What Insufficient to Set Aside Sale.—The fact that the creditor secured by a deed of trust to land held a conversation looking toward a settlement with the agent of the grantor (debtor), and thus prevented the agent from attending the trust sale, is not sufficient evidence of fraud on the part of the creditor to justify the setting aside the sale therefor; especially where the conversation was caused or commenced by the agent, and it is not proven that the property sold for a grossly inadequate price, that there was any irregularity in the sale, or that the agent would have been able to benefit the grantor (debtor) by being present at the sale, pp. 569, 570.

Cited in Penny v. Cook, 19 Iowa 544, the court holding that a sale of land under a deed of trust, with a power of sale, is jealously watched by the court, and when the power has been fraudulently or oppressively and unfairly or irregularly exercised, the owner will be allowed to come in and impugn the sale and redeem the property, especially where the application is not stale, and the property has not passed into the hands of *bona fide* purchasers.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a direct attack of a sale by a fiduciary.

MILLER v. BONE, 19 IOWA 571

(Abstract.)

1. Appeal from District to Supreme Court—United States Revenue Stamp not Required—Required under Act of Congress of June 30, 1864, upon Appeals from Inferior Courts to District Court, p. 571.

Special cross reference. For cases citing, etc., the text, and others on the question, see annotations under Hugus v. Strickler (19 Iowa 413), ante. p. 743.

Cross reference. See, also, in this connection, annotations under Deskin v. Graham (19 Iowa 553), ante. p. 764.

Annotations to Decisions Reported in Volume 20 Iowa.

MENDELL *v.* CHICAGO & NORTHWESTERN RY. CO.,

AND

GODFREY *v.* SAME, 20 IOWA 9

1 Railroads—Liability for Killing or Injuring Stock—Double Damages—Notice Required—Form and Sufficiency of.—Where a notice to a railroad company in order to fix double liability in damages for its killing or injuring stock, as provided by Sec. 6 of Chap. 169, Acts of Ninth General Assembly, is sworn to by the stock owner, and is otherwise definite, and contains the statements of the required affidavit, the verification thereof dispenses with the necessity for a separate affidavit accompanying the notice. No particular form of such notice and affidavit is required by such statute, a substantial compliance therewith being sufficient, pp. 11, 12.

Reaffirmed and explained in Manwell *v.* B. C. R. & N. Ry. Co., 80 Iowa 665, 666, 45 N. W. 569, holding that the notice and affidavit together, in order to fix double liability of a railroad company for injuring or destroying property, should, so far as is practicable, inform the company of such material facts as will enable it to investigate the claim made, and decide whether it will pay the amount demanded within the thirty days limited by statute, without litigation: That if such papers contain the *amount* or *value* of the property injured or destroyed, the owner cannot, upon failure or refusal of the company to so pay, recover more than double the amount stated.

Reaffirmed and extended in Brammer *v.* Wabash Ry. Co., 112 Iowa 378, 379, 83 N. W. 1049, holding further that if the notice and affidavit to fix double liability for injuring, killing, or destroying property be not misleading as to the claim made, and be sufficient to put the railroad company upon inquiry, which, if diligently pursued, will enable the company to discover the facts concerning the claim within the thirty days allowed by statute, it is sufficient: Holding further that in an action against a railroad company to recover double damages for injury to or the killing of stock [or destruction of property], the question of the sufficiency of the notice and affidavit, is one of law for the court.—This case being under the Code of 1897.

Reaffirmed and extended in Black *v.* Minn. & St. L. R. R. Co., 122 Iowa 40, 96 N. W. 987, holding further that the affidavit and notice to a railroad company to fix its double liability for injury to or destruction of property, are to be taken together; and that a slight

inaccuracy in either of them in naming the company, is immaterial, they being otherwise specific.

Cited with approval in *McNaught v. C. & N. W. R. R. Co.*, 30 Iowa 339, the case turning upon, and its proposition given under Rule 2 hereof.

2. Railroad Company—Notice and Affidavit to fix Double Liability for Injuring or Destroying Property—How Served.—The notice and affidavit to fix double liability of a railroad company for injuring or killing stock or destroying property, under Sec. 6 of Chap. 169, Acts of Ninth General Assembly, may be served by leaving the original, as well as by reading the original and leaving a copy thereof. p. 12.

Reaffirmed and explained in *McNaught v. C. & N. W. R. R. Co.*, 30 Iowa 338, 339, holding that a railroad company is entitled to notice in writing, to be accompanied by the *original* affidavit of the owner of the stock or property injured, killed, or destroyed, before it is liable in double damages; and is allowed thirty days after such notice is given in which to pay the claim.

Reaffirmed and explained in *Brentner v. Ch. M. & St. P. Ry. Co.*, 68 Iowa 532, 23 N. W. 247, holding that the notice and affidavit may be served on an officer or agent of the railroad company, by simply delivering them to the person served therewith.

VANCE v. KIRKMAN, 20 IOWA 13

1. Writ of Error—Allegations in Affidavit for to be Responded to by Justice—Trial.—The return of the justice upon a writ of error to correct proceedings in his court, must respond to the allegations of the affidavit on which the writ is based; and it is on such return that the writ must be tried, p. 14.

Reaffirmed in *Lane & Wilson v. Goldsmith*, 23 Iowa 241.

Reaffirmed and extended in *Herald Printing Co. v. Walsh*, 127 Iowa 503, 103 N. W. 474, holding further that a question not raised in a justice's court cannot be reviewed upon writ of error.

(Note.—See further, *Edwards v. Cosgros*, 71 Iowa 296, 32 N. W. 350; *Rhodes v. De Bow*, 5 Iowa 260; *Stone v. Murphy*, 2 Iowa 35, some important cases on this question, not citing the text.—Ed.)

BURNS v. KEAS, ADM'X, 20 IOWA 16

1. Actions—Appearance—Waiver of Notice.—An appearance by defendant waives service of, or defects in service of, original notice, p. 18.

Special cross reference. For cases citing, sustaining and explaining the Rule, and others on the question, see annotations under Rule 1 of *Hale v. Van Saun & Hunt* (18 Iowa 19), ante. p. 576.

MYERS v. COPELAND, CLERK, 20 IOWA 22

1. Tax Sale of Married Woman's Land—Redemption by Under Code of 1860—Law of 1862, not Retroactive.—Under Sec. 779 of the Code of 1860, a wife could redeem her land from a sale for taxes within one year after the disability of coverture was removed; and the Act of 1862, allowing such a woman to redeem from such a sale within three years after date thereof, does not apply to a tax sale of a married woman's land, made before the act took effect, p. 25.

Special cross reference. For cases citing the text, and others intimately connected herewith, see annotations under Rules 2-4 of Adams v. Beale (19 Iowa 61), ante. p. 692.

SAVERY v. HAYS, 20 IOWA 25, 89 AM. DEC. 511

1. Replevin for Promissory Note which has been Paid.—The maker of a promissory note may maintain replevin therefor, after it has been fully paid or satisfied; and in such action the plaintiff (maker) need not set out the value of the note, pp. 27-29.

Reaffirmed and extended in Shipley v. Reasoner, 80 Iowa 552, 45 N. W. 1079; Smith v. Eals, 81 Iowa 238, 46 N. W. 1111, 25 Am. St. Rep. 486; Kennedy v. Roberts, 105 Iowa 525, 75 N. W. 364, holding further that any facts or circumstances which will entitle the maker of a promissory note to obtain a cancellation thereof in equity, entitles him to maintain an action at law in the nature of replevin to recover possession thereof.

Reaffirmed and extended in Smith v. Eals, 81 Iowa 238, 46 N. W. 1111, 25 Am. St. Rep. 486, holding further that one whose name has been forged to a note or bill of exchange, may maintain replevin therefor.

Reaffirmed and varied in Sigler v. Hidy, 56 Iowa 506, 507, 9 N. W. 375, holding that in an action on a promissory note, the defendant may set up as a counterclaim, facts entitling him to possession of the note, or any facts which would obtain a cancellation thereof in equity, and ask and obtain relief as in an action of replevin.

Cited in Davis v. Mohn, 145 Iowa 419, 124 N. W. 207, not in point, but upon analogy.

WILSON v. MCLERNAN, 20 IOWA 30

1. Swamp Lands—Pre-emption of—Requisite Settlement or Improvement.—In order to sustain an application to pre-empt swamp or overflowed lands, the applicant must show by proof that he has in good faith made a claim by actual settlement, or by actual, substantial, permanent improvement upon the land sought to be pre-empted. The word "actual" as used in the statute in connection with the improvement, means more than an improvement in name. The law was made for the benefit of actual settlers—those making actual improvements—

who enter upon these lands with the *bona fide* purpose of making themselves homes, or reclaiming them for the purpose of actual cultivation or improvement, p. 33.

Special cross reference. For cases citing the text, and others on the subject, see annotations under *Givens v. Decatur County* (9 Iowa 278), Vol. I, p. 576.

SHEPHARD *v.* BRENTON, 20 IOWA 41

1. Instructions Based on Evidence—Refusal of—When no Ground for Reversal—Insufficient Record on Appeal.—The refusal of instructions based upon evidence will not be ground for reversal, when the evidence adduced upon the trial is not made a part of the record upon appeal, pp. 42, 43.

Reaffirmed and extended in *Bower & Co. v. Stewart*, 30 Iowa 581, holding further that the refusal of the trial court to give a proper and unobjectionable instruction, is no ground for reversal, when the evidence on which it was based and all the given instructions are not made part of the record upon appeal.

Reaffirmed and extended in *Dootle, Livingston & Co. v. Phoenix Ins. Co.*, 62 Iowa 363, 17 N. W. 584, holding further that instructions based upon evidence will not be reviewed upon appeal, unless all the evidence adduced on the trial is before the Supreme Court.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of *Farr v. Fuller* (8 Iowa 347), Vol. I, p. 517.

2. Trial—Instructions Given or Charge to Jury—Exceptions to—Certainty Required—Review upon Appeal.—General exceptions to the instructions or to the charge of the court given to the jury, when some of them or some part thereof, are or is correct, will not authorize a review of specific errors therein upon appeal, p. 43.

Reaffirmed in *Spray v. Scott*, 20 Iowa 473; *Verholf v. Van Houtenlengen*, 21 Iowa 430, 431; *Redman & Fear v. Malvin & Cloud*, 23 Iowa 297, 298; *Cook v. Sioux City & Pac. R. R. Co.*, 37 Iowa 428.

Cited erroneously in *Bartle v. City of Des Moines*, 38 Iowa 416, the case turning upon other questions.

Cross reference. See further on this question, annotations under Rule 5 of *Davenport Gas Light & Coke Co. v. City of Davenport* (13 Iowa 229), ante. p. 140.

3. Judgment on Verdict—Omission of Clerk to Enter at Term Rendered—Nunc Pro tunc Entry of at Subsequent Term—Procedure.—Where the clerk omits to enter judgment on a verdict at the term at which it is returned, the district court may have the judgment entered *nunc pro tunc* at a subsequent term of the court, upon motion

of the party entitled thereto, both parties being present and heard upon the motion, pp. 44, 45.

Reaffirmed, explained and qualified in Goodrich v. Conrad, Adm'r., 28 Iowa 301, holding—as does the present case in argument—that *nunc pro tunc* orders must be limited to supplying such entries as have been omitted through oversight or negligence of the clerk; and such an order cannot be made to alter or expunge a record.

Reaffirmed and qualified in Newberry v. Getchell & Martin Lumber Co., 106 Iowa 153, 76 N. W. 518, holding that a *nunc pro tunc* order may be made to avoid the effects of a delay by the court, or of a delay or omission of its clerk, but rarely, if ever, to remedy a delay or an omission of a party or his attorney.

(Note.—See further, State v. McComb, 18 Iowa 43; Julian Gas Light Co. v. Hurley, 11 Iowa 520, some important cases on this question, not citing the text.—Ed.)

RHEIM v. ROBBINS, 20 IOWA 45

1. **Aliens—Right to Inherit Land in this State.**—Aliens who are non-residents of the United States cannot acquire and hold land by inheritance under the laws of this state—Code of 1860, p. 46.

Reaffirmed in Brown v. Pearson, 41 Iowa 483; King v. Ware, 53 Iowa 100, 4 N. W. 861.

Cited in Furenes v. Michelson, 86 Iowa 510, 53 N. W. 417, holding that under Chap. 85 of the Session Acts of 1888, a naturalized citizen of the United States and a resident of this state, cannot inherit the lands of a great uncle who is a naturalized citizen, where the former must inherit through his father who is a non-resident alien.

Cited in Meyer v. Meyer, 23 Iowa 369, 92 Am. Dec. 432, not in point.

Cited in 146 Iowa 395, 125 N. W. 334, not yet published.

Distinguished and narrowed in Ruppel v. McLachlin, 122 Iowa 348, 98 N. W. 155; Ahrens v. Ahrens, 144 Iowa 488, 1912, A., A. & E. Ann. Cas. 1098, 123 N. W. 165, holding that a treaty of the United States with a foreign country allowing citizens or subjects of the latter to take, hold and inherit property in the United States, is paramount to a statute of this state prohibiting aliens to inherit; and that citizens or subjects of such a country inherit, in this State: The last case holding, however, that such a treaty does not affect the statute of this state requiring non-resident aliens to sell real estate within a "reasonable time."

Distinguished and doubted in Purcell v. Smidt, 21 Iowa 542, 548, 549, 559, by a divided court.

(Note.—See further, specially, in this connection, Doehrel v. Hilmer, 102 Iowa 169, 71 N. W. 204; Opel v. Shoup, 100 Iowa 407, 39 N. W. 560, 37 L. R. A. 583; Bennett v. Hibbert, 88 Iowa 154, 55 N. W. 93; Greenheld v. Stanfroth, 21 Iowa 595; Lorieux v. Keller, 5 Iowa 196; Stemple v. Herminghouser, 3 G. Greene, 408.—Ed.)

Cross references. See further, annotations under *Stemple v. Herminghouser* (3 G. Greene 408), Vol. I, p. 105. See, also, in this connection, *Schultze v. Schultze*, 36 Am. St. Rep. 432, 19 L. R. A. 90.

2. Statutes—Construction So as to Give Effect to Whole, to be Taken.—When a statute is susceptible of two constructions, one of which will give effect to the whole, and the other will render a part inoperative, the former will prevail, p. 50.

Reaffirmed and extended in *Paterson v. Spearman, Clark and Seeley*, 37 Iowa 42, holding further that if a construction of a statute can be legitimately found which will give force to all of its words, the court will not adopt one involving the necessity of rejecting a part as unmeaning.

Reaffirmed and extended in *Rhode v. Bank*, 52 Iowa 376, 3 N. W. 408, holding further that two or more statutes on the same subject are to be construed together.

(Note.—See further, sustaining, but not citing, the text, *Leversee v. Reynolds*, 13 Iowa 310—and there are many others to the same effect, not citing the text.—Ed.)

CLARK v. CRESS, 20 IOWA 50

1. Pleadings—Answer—Reply, when Necessary—Reply Filed when not Required—Demurrer to.—An answer setting up new matter in confession and avoidance of plaintiff's cause of action, but not constituting a counterclaim, set-off or cross-demand, is—under Sec. 2917 of the Code of 1860—to be taken as denied without a reply being filed: And where a reply is filed when not required, a demurrer thereto must be disregarded or overruled, p. 54.

Special cross reference. For cases citing, explaining and extending the text, and others on the question, see annotations under Rule 2 of *Davenport Savings Fund Ass'n v. North American F. Ins. Co.* (16 Iowa 74), ante. p. 409.

2. Administrator's Settlement—When Conclusive—Action on Bond.—Until final settlement, mistakes in settlements with an administrator may—under Sec. 2457 of the Code of 1860—be corrected, and, under some circumstances after that time.

Accounts of an administrator settled in the absence of and without notice to a person adversely interested may—under Sec. 2456 of the Code of 1860—be opened, upon his application, within three months thereafter.

If an administrator entirely fails to discharge his duty, or fails for years to make a report, or appropriates assets of the estate to his own use, or fails to pay over money or property to a person, entitled thereto, the person aggrieved may sue on the bond in the district court: And in this latter case, the administrator cannot, after suit is commenced on the bond in the district court, go into the county court

and make an *ex parte* settlement, and thus oust the district court of jurisdiction of the action on the bond, pp. 54, 55.

Reaffirmed in Jenkins v. Shields, 36 Iowa 531, holding that an action may be maintained in the district court by the party aggrieved against an administrator and the sureties on his bond, for non-feasance and malfeasance; and that if, in such case, the administrator, in fact and without fraud or mistake, made a final settlement and was discharged, this is a matter to be pleaded as a defense.

Reaffirmed in In re Estate of Sawyer, 124 Iowa 487, 488, 100 N. W. 485, holding that an allowance by the court of compensation and attorneys' fees to an administrator upon his *ex parte* application and not on final settlement, is not final or conclusive on the parties interested: And the order making such allowance is not to be treated as an adjudication, and need not be appealed from or set aside in order to avoid its effect.

Reaffirmed and extended in Doris, Ex'r v. Miller, 105 Iowa 573, 574, 75 N. W. 484, holding further that mistakes in settlements may be corrected at any time before final settlement; and that the provisions of Sec. 2475 [Code of 1873] limiting the time within which application may be made to open up accounts settled in the absence of parties in interest, have no application to mistake or fraud in the settlement of an administrator's intermediate account.

Distinguished in Diehl v. Miller, 56 Iowa 314, 9 N. W. 241, an action on the bond of an administrator in which the plaintiff was held concluded by the final settlement and discharge of the administrator with and by the probate court, the plaintiff having appeared for awhile therein and opposed and contested, and then having withdrawn his contest or opposition, and commenced action on the bond.

ANSON v. ANSON, 20 IOWA 55, 89 AM. DEC. 514

1. Mortgages—Action by Senior Mortgagee of Land to Foreclose—Junior Mortgagee not a Party—Right to Redeem.—A junior mortgagee of land who is not made a party to an action by a senior to foreclose, may, both at Common Law and under the Code of 1860, bring his action to foreclose his junior mortgage, and to redeem from the senior mortgagor, his assignee, or the purchaser at the senior's foreclosure sale. In the above case, Sec. 3664 of the Code of 1860, limiting the time in which redemption is to be made from a sale of land under a foreclosure by a senior mortgagee, has no application, pp. 58-60.

Reaffirmed in American Button Hole, etc., Co. v. Burlington Mut. Loan Ass'n, 61 Iowa 465, 16 N. W. 527; Bunce v. West, 62 Iowa 81, 17 N. W. 179.

Reaffirmed and explained in Spurgin v. Adamson, 62 Iowa 657, 18 N. W. 293, holding—as does the present case in argument—that a purchaser under a foreclosure of a mortgage, as to a junior incum-

brancer entitled to redeem for the reason that he was not made a party to the foreclosure proceeding, is regarded as the assignee of the mortgage, and holds no other rights than would be held by the mortgagee, were redemption made while the mortgage was held by him, or were he the purchaser at a foreclosure sale.

Reaffirmed and extended in Gower v. Winchester, 33 Iowa 305, holding further that a subsequent mortgagee, or a purchaser of mortgaged land who is not made a party to an action to foreclose a prior mortgage thereon, is not bound by the foreclosure or the sale thereunder.

Reaffirmed and extended in Harsh, Gd'n v. Griffin, 72 Iowa 609, 610, 34 N. W. 441, holding further that heirs of a decedent mortgagor who are not made parties to an action of the mortgagee to foreclose his mortgage on land, are not cut off from their right to redeem from a decree of foreclosure and sale thereunder therein.

Cross references. See other Rules hereof, in this connection. See further on this question, annotations and cross references under Rule 1 of Street v. Beal and Hyatt (16 Iowa 68), ante. p. 408.

2. Mortgages on Land—Redemption by Junior Mortgagee from Purchaser at Foreclosure Sale—Amount to be Paid—Rents, Profits and Waste.—In an action for foreclosure and redemption by a junior mortgagee of land against the mortgagor, and the purchaser of the land at a foreclosure sale under a decree in an action by a senior mortgagee in which the junior was not made a party, the purchaser is entitled to be paid the amount of the senior mortgage, with interest and taxes paid, and to be charged with rents and profits of the land, and for waste committed thereon, p. 60.

Reaffirmed in American Button Hole, etc., Co. v. Burlington Mut. Loan Ass'n, 61 Iowa 466, 467, 16 N. W. 528; Bunce v. West, 62 Iowa 81, 17 N. W. 179.

Reaffirmed and extended in Spurgin v. Adamson, 62 Iowa 667, 668, 18 N. W. 293, holding further that a senior mortgagee who is in possession of the mortgaged land, either before foreclosure or under a foreclosure sale and deed made thereon, must, upon redemption by a junior incumbrancer, account for rents and profits, and is entitled to credit for taxes paid, and, in a proper case, for improvements made by him upon the premises.—And this rule applies to a purchaser at a foreclosure sale under a decree in an action by a senior mortgagee in which a junior is not made a party.

Cited in McNerny v. Reed, 23 Iowa 414, not in point, but upon analogy.

Cross references. See other rules hereof. See further Ten Eyck v. Casad and Rowley (15 Iowa 524), ante. p. 378.

3. Mortgages—Action by Junior Mortgagee to Redeem—Tender by Plaintiff—When not Required.—In an action to redeem by a

junior mortgagee of land against a senior mortgagee or his assignee, or a purchaser at the senior's decretal sale, the plaintiff need not tender the amount of the senior's debt, interest and costs, when he prays for rents and profits, asks for an accounting, and pleads that he is ready and willing to pay a balance found, p. 60.

Reaffirmed and explained in Jones v. Hartsock, 42 Iowa 153, holding that in an action to enjoin a sale under a deed of trust for a loan tainted with usurious interest, the plaintiff is not compelled to tender six per cent. interest per annum on the original loan as a condition precedent to his suit.

Cited in Harshey v. Blackmar, 20 Iowa 188, 89 Am. Dec. 520, not in point, but upon analogy.

Cross reference. See further on this question, annotations under Rules 3 and 4 of Hayward v. Munger' (14 Iowa 516), ante. p. 277.

4. Mortgages on Land—Purchaser at Senior Mortgagee's Foreclosure Sale Purchasing Land at Tax Sale—Effect on Rights of Junior Mortgagee.—A purchaser of land at a foreclosure sale under a decree in an action by a senior mortgagee in which a junior mortgagee was not a party, cannot, after obtaining possession, cut off the right of the junior to redeem, by purchasing the land at a tax sale, p. 61.

Reaffirmed and varied in Stears v. Hollenbeck, 38 Iowa 551, holding that one who acquires title to and possession of mortgaged land from the mortgagor, must pay the taxes due thereon at the time he gets and during the period of his possession, and cannot defeat the rights of the mortgagee by a purchase of the land for any such taxes.

Cited in 148 Iowa 162, 125 N. W. 340, not yet published.

AUFRICHT v. NORTHRUP, 20 IOWA 61

1. Vendor and Purchaser—Sale of Mortgaged Realty—What Insufficient to Charge Purchaser with Payment of Mortgage Debt.—Where mortgaged land is sold and conveyed with covenants of general warranty, subject to the mortgage debt, this does not without a further showing of the assumption of the mortgage debt, or a promise or agreement to pay it, by or on the part of the purchaser and as part of the consideration for the sale and conveyance, operate to charge the latter with the payment of such debt, pp. 62, 63.

Reaffirmed in Bristol Savings Bank v. Stiger, 86 Iowa 347-351, 53 N. W. 266.

Reaffirmed and explained in Lewis v. Day, 53 Iowa 579, 5 N. W. 756; Rice v. Hulbert, 67 Iowa 727, 25 N. W. 899; Sieffert & Weise Lumber Co. v. Hartwell, 94 Iowa 582, 63 N. W. 335, 58 Am. St. Rep. 413, holding that a purchaser of mortgaged property who does not assume or agree to pay the mortgage debt, is not personally bound therefor.

Cross reference. See further on this question, annotations and note under Johnson v. Monell (13 Iowa 300), ante. p. 153.

STATE *v.* SCOTT, 20 IOWA 63

1. Bail Bond—Forfeiture of—Release of Surety Before Judgment—When Allowed—Discretion of Trial Court—Abuse—Reversal.—If, after forfeiture of a bail bond and before final judgment against the bail, the accused be surrendered or arrested, the court may—under Sec. 4994 of the Code of 1860—in its discretion, remit the whole or any part of the bond: But this is a matter within the sound judicial discretion of the trial court, and his ruling thereon will not be ground for reversal, unless a strong case of abuse thereof be shown upon appeal: And the provisions of such section have no application where the accused is neither surrendered or arrested before the final judgment, pp. 66, 67.

Reaffirmed in State *v.* Hirronemus, 50 Iowa 548, under Sec. 4600 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and explained in State *v.* Merrihew, 47 Iowa 115, 117, 29 Am. Rep. 464, holding that where before forfeiture of his bond to appear in the district court of one county, the accused is arrested and held in custody in another county and on another charge, and the bail fails to make the facts appear to the district court of the first county at the time forfeiture is entered, such facts constitute no defense in an action to enforce the forfeiture.

SHOMO *v.* BISSELL, ADM'R, 20 IOWA 68

1. Decedent's Estate—Filing an Allowance of Claim after Eighteen Months—Equitable Circumstances.—Where a person having a claim against the estate of a decedent, files it several years after notice is given by the administrator of his appointment, and several years after final report and settlement by the administrator, he should be held to very strict proof of peculiar circumstances entitling him to equitable relief, under Sec. 2405 of the Code of 1860; and where, in such case, the creditor, claimant, knew of the death of his debtor, and of the circumstances upon which he relies to obtain equitable relief in time to have filed his claim within a year and a half after notice was given by the administrator of his appointment as required by such section, the relief will be denied, pp. 69, 70.

Special cross reference. For cases citing and explaining the text, and many others on the question, see annotations, note and cross references under *Ferrall v. Irvine*, Adm'r (12 Iowa 52), ante. p. 8.

PORTER *v.* CHICAGO & NORTHWESTERN RY CO., 20 IOWA 73

1. Common Carriers—Carriage of Freight—Common Law Liability for—Burden of Proof.—A common carrier is responsible for the safe carriage and delivery of goods committed to its care and accepted by it for transportation, except when prevented by the Act of God, or the public enemy; and in an action against a common carrier

for loss of goods received for transportation, the burden of proof is on the defendant to show circumstances relieving it from liability as above, pp. 77, 78.

Special cross reference. For cases citing, sustaining, qualifying, etc., the text, and others on the question, see annotations under Rule 1 of Angle v. M. & M. R. R. Co. (18 Iowa 555), ante. p. 680.

2. Common Carrier—Against Action as Warehouseman—When Recovery Cannot be Had as Carrier.—When plaintiff sues a common carrier as warehouseman for loss of or injury to goods, and the defendant simply denies the averments of the petition in its answer, the plaintiff cannot recover against it as a common carrier, p. 78.

Distinguished in Warner v. B. & M. Riv. R. R. Co., 22 Iowa 168, 92 Am. Dec. 389, a case commenced in a justice's court wherein the carrier was declared against generally for the loss of goods, and the plaintiff set out the facts, and the record on appeal did not show whether the defendant was sued as carrier or as warehouseman, or how the case was regarded or treated upon the trials below, the court holding that in such case, if the defendant does not require the plaintiff to make his petition more specific, or to elect, the latter may recover against the defendant if he proves it liable in either capacity.

GIVENS v. CAMPBELL, 20 IOWA 79

1. Injunction to Restrain Proceedings Under Void Judgment.—Injunction lies to restrain proceedings under an execution issued on a void judgment. Such a judgment is one rendered in an action wherein the defendant had *no notice*, p. 81.

Reaffirmed and explained in Connell v. Stelson, 33 Iowa 149, holding that injunction lies to restrain the collection of or proceedings under a judgment which is void for want of jurisdiction of the court rendering it.

Reaffirmed and explained in Iowa Union Telephone Co. v. Boylan, 86 Iowa 93, 94, 52 N. W. 1123, holding that where a judgment is rendered against a defendant who has had *no notice* of the action, it is void; and chancery will set it aside and enjoin process or proceedings thereunder upon complaint of the party aggrieved: And in an action therefor the plaintiff is not required to plead or prove that he is not indebted to the plaintiff in the first action.

Reaffirmed and explained in Leonard v. Capital Ins. Co., 101 Iowa 485, 70 N. W. 630, holding that a court of chancery has jurisdiction to set aside, cancel, and enjoin the enforcement of a void judgment; and that an appeal is not the only remedy of the party aggrieved in such case.

Reaffirmed and qualified in Hawkeye Ins. Co. v. Huston, 115 Iowa 624, 89 N. W. 30, holding that under Sec. 4364 of the Code of 1897, an action to set aside a void judgment and to enjoin proceedings

on an execution thereunder, must be brought in the court rendering it.

Reaffirmed and qualified in Uehlein v. Burke, 119 Iowa 744-746, 94 N. W. 244, holding that where a person seeks in an equitable action to set aside a void judgment *in rem*, he must allege and prove some special equity entitling him to the relief.

(Note.—See further, sustaining and explaining, but not citing, the text, Overholtzer v. Hazen, 101 Iowa 340, 70 N. W. 207; Henkle v. Holmes, 97 Iowa 695, 66 N. W. 910; Phelan v. Johnson, 80 Iowa 727, 46 N. W. 68; State Ins. Co. v. Waterhouse, 78 Iowa 674, 43 N. W. 611; Dady v. Brown, 76 Iowa 528, 41 N. W. 209; Baker v. Ryan, 67 Iowa 710, 25 N. W. 890; Gerrish v. Hunt, 66 Iowa 683, 24 N. W. 274; State Ins. Co. v. Granger, 62 Iowa 273, 17 N. W. 504; Grattan v. Matteson, 51 Iowa 622, 2 N. W. 432; Bennett v. Hanchett, 49 Iowa 71; Anderson v. Hall, 48 Iowa 346; Lockwood v. Kitteringham, 42 Iowa 257.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Bonsall v. Isett (14 Iowa 309), ante. p. 242.

STATE v. CARNEY; SAME v. STUTZ; SAME v. WADE; SAME v. HUNT,
20 IOWA 82

• I. **Grand Jury—Selection of—Substantial Compliance with Statute.**—A substantial compliance with the statute—Code of 1860—in reference to the selection of, summoning and impaneling the grand jury is all which is required; and when this is done, indictments are valid: Such statute is directory, p. 84.

Reaffirmed and explained in State v. Beckey, 79 Iowa 370, 371, 44 N. W. 680; State v. Pierce, 90 Iowa 510, 58 N. W. 893, holding that a challenge to a grand jury on the ground of technical irregularities in its selection, not affecting the substantial rights of accused, must be overruled: That the statute in relation to the selection of the grand jury is directory, and substantial compliance therewith is all that is required.

Reaffirmed and extended in State v. Brandt, 41 Iowa 600, 602, 604, 632, 633, (cited in dissenting opinions, 618, 619, 643, 644); State v. De Bord, 88 Iowa 105, 55 N. W. 80; State v. Pell, 140 Iowa 661, 119 N. W. 157; State v. Clark, 141 Iowa 299, 119 N. W. 720; State v. Carter, 144 Iowa 376, 121 N. W. 802, holding further that an indictment will not be set aside because of irregularities in the selection of the grand jury, where they do not affect or prejudice the substantial rights of the accused: A substantial compliance with the statute is all that is required.

Distinguished and narrowed in State v. Russell, 90 Iowa 570-573, 58 N. W. 916, 28 L. R. A. 195, holding that the statute of 1886, requiring among other things that not more than one person shall be drawn as a grand juror from any civil township, is mandatory; and that an indictment returned by a grand jury two of which are from

the same civil township, must be set aside upon motion made by accused before pleading thereto (where the accused was not held to await the action of the grand jury, and had no opportunity to object to or challenge it before the indictment was returned).

Cross references. See Rule 2 hereof. See further on this question, annotations under Rule 1 of State v. Knight (19 Iowa 94), ante. p. 697; Rule 1 of State v. Ansaleme (15 Iowa 44), ante. p. 301.

2. Appeal in Criminal Case—Harmless Error.—Upon an appeal to the Supreme Court in a criminal case, technical errors or defects which did not affect the substantial rights of the accused (Appellant) will—under Sec. 4925 of the Code of 1860—be disregarded, p. 94.

Reaffirmed in State v. Guisenhouse, 20 Iowa 230; State v. Reid, 20 Iowa 417, 418; State v. King, 37 Iowa 468, 469.

Reaffirmed in State v. De Bord, 88 Iowa 105, 55 N. W. 80, under the Code of 1873.

(Note.—There are very many cases sustaining, but not citing, the text.—Ed.)

Cross reference. See Rule 1 hereof.

3. Intoxicating Liquors—State Law Constitutional—Violation of State Law—United States Revenue License.—A United States revenue license does not authorize a person to violate the state law in reference to keeping a nuisance for the sale of intoxicating liquors, etc.; and such license is no defense to an indictment under the state law.

The statute for the suppression of intemperance—Code of 1860—is constitutional, p. 85.

Reaffirmed in State v. Baughman, 20 Iowa 500, 501; State v. Munzenmaier, 24 Iowa 90.

Reaffirmed and extended in Stommel v. Timbrel, sheriff, 84 Iowa 343, 51 N. W. 161, holding further that the payment of a special Federal Intoxicating Liquor Tax does not exempt one from punishment for violation of the intoxicating liquor statutes of this state.

(Note.—See further, sustaining, but not citing, the text, State v. McCleary, 17 Iowa 44.—Ed.)

STATE v. COLLINS, 20 IOWA 85

1. Indictment—Trial—Instructions Offered by Counsel—Charge of Court—Practice.—It is the better practice for the court upon the trial of an indictment, to lay aside the instructions as offered by counsel, and to draft instructions of his own covering the entire law of the case as applicable to its issue and evidence, p. 91.

Reaffirmed in State v. Busse, 127 Iowa 327, 328, 100 N. W. 540

Cited in State v. O'Hagan, 38 Iowa 507, the court holding that upon the trial of a criminal prosecution, it is the duty of the court to

instruct the jury on the entire law of the case, and his failure to so do is reversible error.

Unreported citation, 128 N. W. 966.

2. Criminal Law—Evidence—Wife of Accused as Witness for Him—Weight of her Testimony—Erroneous Instruction as to.—Where, upon the trial of an indictment the wife of accused testifies in his behalf, and her testimony is corroborated by other witnesses and circumstances, an instruction that "the wife may be a witness for her husband in criminal cases, but if her testimony is against established facts, by other competent testimony, the jury may give it but little weight, or may wholly disregard it," is erroneous and reversible error, p. 92.

Cited in State v. Moore, 25 Iowa 138, 95 Am. Dec. 776, the court holding that an instruction that an accomplice cannot be corroborated by his wife, should not be given.

(Note.—See further, State v. Bernard, 45 Iowa 234; State v. Nash, 10 Iowa 89; State v. Rankin, 8 Iowa 355; State v. Guyer, 6 Iowa 263, some very important cases on this question, not citing the text.—Ed.)

3. Criminal Law—Alibi—Failure to Establish—Effect.—A failure of an accused person to establish his *alibi* defense upon the trial of an indictment is not "a circumstance of great weight against him," and does not imply "an admission of the truth and relevancy of the facts alleged;" and an instruction in such an instance, embodying these propositions is improper.

If the *alibi* defense is fabricated or "trumped up," the failure of the accused to establish it may be a circumstance of weight against him, but even then it will not be taken as conclusive of his guilt, p. 93.

Cited with approval in State v. Cruise, 19 Iowa 318, the case turning on other questions.

4. Criminal Law—Circumstantial Evidence—Degree of Proof Required to Convict—Erroneous Instruction as to.—Where upon the trial of an indictment the state relies upon circumstantial evidence *alone*, to convict the accused, and the guilt of accused is not clearly and undeniably established, it is error for the court to instruct the jury that "all evidence is, more or less, circumstantial, the difference being in the degree, and it is sufficient for the purpose when it excludes disbelief, that is, *actual* and not *technical* disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror, while he believes as a man. It is enough that his conscience is clear," pp. 96, 97.

Reaffirmed in State v. Tyler, 122 Iowa 132, 97 N. W. 986.

Reaffirmed, doubted and qualified in State v. Pratt, 20 Iowa 270. holding that the giving of such an instruction as set out in the text, is not reversible error where the verdict below was fully warranted by

the evidence, and it appears from the record upon appeal that the accused had a fair and impartial trial.

And see 149 Iowa 532, not yet published.

5. New Trial in Criminal Cases—Discretion of Trial Court—Review of Ruling on Appeal.—The Supreme Court will more liberally review the trial court's ruling in refusing to grant defendant a new trial in a criminal case than in civil actions; and where, in such a case, it appears upon appeal that the verdict was clearly against the weight of evidence and resulted in injustice, the judgment will be reversed, p. 97.

Reaffirmed in State v. Wise, 83 Iowa 599, 50 N. W. 60.

Cited in Murphy v. C. R. I. & P. R. R. Co., 38 Iowa 545, turning upon other questions.

Cross reference. See further on this question, annotations and cross references under Rule 2 of State v. Johnson (19 Iowa 230), ante. p. 719.

STATE v. WILLIAMS, 20 IOWA 98

1. Indictment—Exceptions in Statute—When Need not be Negated—Bigamy.—If an exception or proviso be part of the enacting clause, or clause creating an offense, of a statute, an indictment therefor must negative the exception or proviso; but if an exception or proviso be contained in a subsequent part of such a statute, either in the same or a subsequent section, and is separate and distinct, it is a matter of defense, and is not required to be negated in the indictment.

So, an indictment for bigamy under Sec. 4348 of the Code of 1860, need not negative the exceptions contained in Sec. 4349 thereof, pp. 99, 100.

Reaffirmed and explained as to first paragraph in State v. Kendig, 133 Iowa 168, 110 N. W. 465, holding that when an exception is embodied in the body of a clause, it must be alleged in the indictment; but that when, in a statute, there is a clause for the benefit of the state, and afterwards follows a proviso or exception in favor of the defendant, the latter is a matter of defense and need not be alleged in the indictment.

Reaffirmed, explained and extended as to first paragraph in State v. Stapp, 29 Iowa 554, holding that an indictment is not required to negative exceptions in the purview of a statute, where they are independent of and are not part of the clause creating or defining an offense.

Reaffirmed, explained and qualified as to first paragraph in State v. Aiken, 109 Iowa 644, 80 N. W. 1074, holding that where an exception contained in a statute is part of the description of the offense or crime and of the enacting clause embodied in the section defining the

crime or offense, or where the exception is so incorporated with the prohibitory clause that one cannot be read without the other, that the indictment must negative the exception: Hence holding that an indictment for abortion or producing a miscarriage, under Sec. 4759 of the Code of 1897, must state that it was not necessary to save the woman's life.

Cross references. See further on this question, annotations under Rule 2 of State v. Collins (11 Iowa 141); Rule 2 of State v. Beneke (9 Iowa 203), Vol. I, pp. 789 and 564, respectively.

2. Evidence—Marriage—How Proved.—The fact of a marriage may be proved by any person who was present at the ceremony and such evidence is sufficient to establish the fact; record evidence thereof is not required. This rule is applicable upon the trial of an indictment for bigamy, p. 100.

Reaffirmed in State v. Hughes, 58 Iowa 169, 11 N. W. 707.

Reaffirmed in Kilburn v. Mullen, 22 Iowa 503, in an action by a husband for damages for criminal conversation or the alienation of his wife's affections.

Reaffirmed and extended in State v. Wilson, 22 Iowa 365, 366, holding further that upon the trial of an indictment for adultery that the testimony of either the husband or wife as to the fact of the marriage, together with proof of continued cohabitation by them as such, raises a presumption of the fact of a legal marriage, which must be rebutted or disproved by accused; and that an instruction to this effect in such a case, is proper.—And to the same effect is, State v. Nadal, 69 Iowa 482, 483, 29 N. W. 453 (reaffirming the text), a criminal prosecution for bigamy.

Reaffirmed and extended in State v. Hazen, 39 Iowa 649, 650, holding further that upon the trial of an indictment for adultery against a married man, the fact of his marriage may be proved by his wife.

Reaffirmed and extended in Casley v. Mitchell, 121 Iowa 97, 98, 96 N. W. 726, holding further that whenever the fact of a marriage is involved, record evidence thereof is not required, but it may be proved by any kind of competent evidence, either direct or circumstantial: Holding further that proof that a man and woman, immediately after their reputed marriage commenced to cohabit as such, continued to so do for several years, during which period children were born to them, sufficiently establishes their marriage.

Reaffirmed and extended in Smith v. Fuller, 138 Iowa 95, 115 N. W. 912, 16 L. R. A. (New Series) 98, holding further that the fact of a marriage may be established by direct testimony of eye witnesses, by testimony of one of the contracting parties, by admissions and confessions of the parties while living together, by testimony as to cohabitation, and repute during the time the parties are living together and by other recognized legal testimony.

(Note.—See further, *Hager v. Brandt*, 111 Iowa 746 (Abstract), 82 N. W. 1016; *Gilman v. Sheets*, 78 Iowa 499, 43 N. W. 299, important cases in this connection, not citing the text.—Ed.)

Cross references. See further in this connection, *Hayes v. People*, 82 Am. Dec. 364; *Badger v. Badger*, 42 Am. Rep. 263.

3. Indictment—Allegations and Proof—Variance.—An immaterial variance between the allegations of an indictment and the proof to sustain it, where the variance does not mislead or prejudice the accused, is not fatal.

So, where an indictment for bigamy avers that the second marriage by accused was with "Jane Jaco," and the proof shows it to have been with "Jane Frances Jaco," the proof is sufficient to sustain the indictment, it not appearing that the accused was thereby misled or prejudiced, p. 100.

Reaffirmed, explained and extended in *State v. Burns*, 119 Iowa 666, 94 N. W. 239, holding that under Sec. 5286 of the Code of 1897, an error in an indictment as to the name of the person injured, is immaterial when the offense is otherwise charged and described with sufficient certainty to identify the act which is the subject thereof.

Reaffirmed and extended in *State v. Dankwardt*, 107 Iowa 708-710, 77 N. W. 495, holding further that where the means used to accomplish a crime named in the statute are fully set forth in the indictment, and then it follows the language of the statute, it is sufficient: Holding further that "senior" or "junior" after a name is no part thereof, and that the failure to add it is not fatal.

Cited in *State v. Van Auken*, 98 Iowa 679, 68 N. W. 456, not in point, but upon an analogous question.

Cross references. See further on this question, annotations under Rule 1 of *State v. Thompson* (19 Iowa 299), ante. p. 729; Rule 1 of *State v. Emeigh* (18 Iowa 122), ante. p. 594.

See, also, in this connection, annotations under Rule 4 of *State v. McComb* (18 Iowa 43), ante. p. 581.

KNOWLES v. RABLIN AND CORWITH, 20 IOWA 101

1. Mortgages on Land—Action to Foreclose by Senior Mortgagee—Junior not a Party may Redeem.—A junior mortgagee of land who is not made a party to an action by a senior to foreclose his mortgage thereon, may redeem from a sale under a decree of foreclosure in the senior's action, p. 103.

Reaffirmed and extended in *Harsh, Gd'n v. Griffin*, 72 Iowa 609, 610, 34 N. W. 441, holding further that heirs of a decedent mortgagor who are not made parties to an action of the mortgagee on land, are not cut off from their right to redeem from a decree of foreclosure and sale thereunder therein.

Cross reference. See Rule 2 hereof. See further, on this question, annotations and cross reference under Rule 1 of *Anson v. Anson* (20 Iowa 55), ante. p. 774.

2. Mortgages on Land—Redemption by Junior Mortgagee, etc.—Amount to be Paid.—Where a junior mortgagee of land, or his assignee, or a purchaser at his foreclosure sale, seeks to redeem from a sale made under a decree in an action of foreclosure by a senior mortgagee thereof, to which the junior was not a party, he must pay the whole amount of the senior's mortgage debt, p. 104.

Reaffirmed and extended in *Spurgin v. Adamson*, 62 Iowa 665-668, 18 N. W. 295, holding further that a purchaser under a foreclosure of a mortgage, as to a junior incumbrancer entitled to redeem for the reason that he was not made a party to the foreclosure proceeding, is regarded as the assignee of the mortgage, and holds no other rights than would be held by the mortgagee were redemption made while the mortgage was held by him, or were he the purchaser at a foreclosure sale.

Cross references. See further on this question, annotations under *Anson v. Anson* (20 Iowa 55), ante. p. 774; *Street v. Beal* (16 Iowa 68), ante. p. 408.

SOBEY v. BRISBEE, 20 IOWA 105

1. Contracts—Lease of Land—Statute of Frauds.—A verbal contract for a lease of land for the period of one year, the term to commence at a certain date in the future, is not within the Statute of Frauds. Subsec. 4 of Sec. 4007 of the Code of 1860, requiring contracts in relation to land, except leases for a term of one year, to be in writing, applies to the *term* or *duration* of the contract, and not to the time of performance in reference to the date it is made, pp. 107, 108.

Reaffirmed in *Jones v. Marcy*, 49 Iowa 190, under the Statute of Frauds of 1873, corresponding to the law of the text.

Reaffirmed in *Omaha Land Co. v. Hanson*, 117 Iowa 101, 102, 90 N. W. 708, holding that a verbal agreement whereby a claimant of land agrees to surrender possession of the land, if a suit is decided in favor of the other party thereto, is not a lease, but a transfer of an interest in the land, and is within the Statute of Frauds.

2. Statute of Frauds—Contracts Not to be Performed Within a Year—What Contracts not Included in.—Subsec. 5 of Sec. 4007 of the Code of 1860, requiring contracts not to be performed within a year to be in writing, does not apply to contracts for the creation of, or transfer of an interest in land, p. 106.

Reaffirmed in *Stem v. Nysonger*, 69 Iowa 514, 29 N. W. 434, under Sec. 3664 of the Code of 1873, corresponding to the section of the text.

STATE v. NEELY, 20 IOWA 108

1. **Murder—Indictment for—Sufficiency of Allegations—Malice Aforethought.**—Where an indictment for murder in the second degree charges that the offense was committed “with an intent in so doing then and there and thereby feloniously, intentionally, willfully, maliciously and deliberately to kill and murder” the deceased, etc., it sufficiently alleges that the crime was committed “with malice aforethought,” pp. 109, 110.

Reaffirmed and explained in State v. Thurman, 66 Iowa 693, 694, 24 N. W. 511, holding that although an indictment for murder in the second degree must charge that the accused committed the crime “with malice aforethought,” still, it is not necessary that such words be used therein, if words of similar import are employed: Hence, holding that an indictment for murder in the second degree in performing an abortion, which charges that the accused “did willfully, maliciously and feloniously administer or cause to be taken by E. V., then and there being pregnant with child, a quantity of some noxious drug or substance * * * with the specific intent then and there to produce a miscarriage and abortion of said E. V. * * * from the effects of and by reason of said drugs so administered the said E. V. died,” sufficiently charges that the crime was committed “with malice aforethought.”

Distinguished and narrowed in State v. Newberry, 26 Iowa 467, 468, holding that an indictment for an assault with intent to commit a specific crime need not set out the elements of the crime the accused intended to thereby commit; but such indictment need only to charge *what particular crime* accused committed the assault with intention to commit: And that an indictment for an assault with intent to commit murder need not allege that it was done “with malice aforethought.”

2. **Homicide—Self Defense—Instruction on.**—Upon the trial of an indictment for murder an instruction, that in order to sustain the plea of self defense the defendant must show that deceased assaulted him, and that the assault “was imminently perilous, and the danger to the defendant *actual* and urgent,” is not erroneous, when the rest of the instructions given, when taken with it, explain the word *actual* therein to mean, *danger actual to the defendant's comprehension*, evident or actual *to the defendant*, and not that such danger had to *in fact exist* at the time of the killing, pp. 114, 115.

Reaffirmed and explained in State v. Benham, 23 Iowa 162, 163, 92 Am. Dec. 417; State v. Burke, 30 Iowa 334, holding that a person may take the life of another to save himself from imminent and enormous bodily injury felonious in its character, or when it seems reasonably necessary to save his own life: And that an instruction on self defense is reversible error when it limits the right to defense of *life only*.

Reaffirmed and explained in State v. Burke, 30 Iowa 334, holding that the law gives a person the same right to use such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from *great bodily harm*, as it does to prevent his life from being taken; and he may excusably use this necessary force, even to taking the life of his assailant, to save himself from any felonious assault.

Reaffirmed and explained in State v. Collins, 32 Iowa 39, holding—as does the present case in argument—that in order to justify the killing on the ground of self defense, it is not necessary that the danger should in fact exist; but that there must be actual and real danger to the defendant's comprehension as a reasonable man at the time he killed deceased; that the inquiry is not whether the harm apprehended was actually intended by the assailant, but was it actual and real to the accused as a reasonable man, as compared with danger remote and contingent, at the time he did the killing.

Reaffirmed and explained in State v. Abarr, 39 Iowa 189, holding that when one who is attacked without his fault, as an ordinarily prudent and cautious man, has reason to apprehend loss of life or great bodily harm, he may kill his assailant in self defense, though it may turn out afterwards that the appearances were false.

Reaffirmed and explained in State v. Mahan, 68 Iowa 306, 20 N. W. 450, holding that a person is only justified in killing an assailant on the grounds of self defense when it is, or reasonably appears to be, the only means of saving his life, or of preventing some great injury to his person: That if the danger which seems to threaten such person can be avoided or prevented by any other reasonable means within his power, he is not justified in taking his assailant's life.

Reaffirmed and qualified in State v. Kennedy, 20 Iowa 574, holding that one has no right to kill another in resisting an ordinary assault, accompanied by no imminent bodily danger to him.

Cited in State v. King, 37 Iowa 468, 469, holding—as does the present case inferentially—that evidence improperly admitted, and erroneous instructions given in a criminal prosecution when no prejudice is wrought a defendant, and other rulings of like character, do not demand a reversal of a judgment of conviction.

Cross reference. See further on this question, annotations and cross reference under Rule 4 of State v. Decklots (19 Iowa 447), ante. p. 748.

3. Homicide—Bringing on Difficulty—Self Defense.—A person who brings on or provokes a difficulty for the purpose of having an affray cannot, without some proof by him of a change of conduct or action, or that he in good faith retired or endeavored to retire therefrom, justify the killing of his adversary therein, on the ground of self defense, or on the ground that the deceased fired the first shot: And

upon the trial of an indictment for murder and in such a case, an instruction embodying the foregoing principle is proper, pp. 115, 116.

Reaffirmed in State v. Murdy, 81 Iowa 614, 47 N. W. 871; State v. Hammer, 116 Iowa 286, 89 N. W. 1084.

Reaffirmed and explained in State v. Stanley, 33 Iowa 532, holding that where, upon the trial of an indictment for murder, the evidence tends to show that the accused sought the deceased with a view to provoke a difficulty or to bring on a quarrel, the accused must prove his change of conduct or action after he sought the difficulty or quarrel, or that he in good faith retired or tried to retire therefrom, or he is not entitled to rely upon self defense: And in such a case, an instruction that "the defendant cannot have the benefit of the plea of self defense if he sought the deceased with a view to provoke a difficulty or to bring on a quarrel" is proper, without qualification, in the absence of such proof by the accused.

Reaffirmed and extended in State v. Whitnah, 129 Iowa 214, 105 N. W. 433, holding further that upon the trial of an indictment for murder in killing a person in a mutual combat, an instruction to the jury, warranted by the evidence, that "if when they met upon the street accused and deceased mutually arranged or agreed to go to some place out of town to fight out their quarrel, if any, and in pursuance of such arrangement or understanding, and with the purpose of engaging in a fight with deceased accused did go to the appointed meeting, and did engage in a fight with deceased, then the acts of the accused done or committed in the course of a fight so brought about cannot be justified or excused on the ground of self defense," is proper.

(Note.—In this last case there was no evidence of a withdrawal from or an attempt to withdraw from the combat by accused.—Ed.)

Cited in State v. Bone, 114 Iowa 548, 87 N. W. 511, on the question of when the arming of oneself after a difficulty with an enemy is, and when it is not to be considered as evidence of malice.

Distinguished and narrowed in State v. Dillon, 74 Iowa 657, 658, 38 N. W. 528, holding that upon the trial of an indictment for murder where the evidence tends to show that the defendant sought or brought on the difficulty, he is nevertheless entitled to an acquittal if from all the evidence in the case, there is a reasonable doubt that he changed his conduct, or in good faith retired or attempted to retire therefrom, and afterwards acted in self defense: And that in such a case an instruction that "the burden of proving such change, if any, is on the defendant, and he must satisfy you [the jury] by evidence introduced for that purpose, or by all the evidence in the case, that he did so change, or the plea of self defense will not avail him," is reversible error.

MAY v. WILSON, 20 IOWA 117

1. Appeal from Justice's to District Court—How Perfected—Notice.—Under the Code of 1860, an appeal from a justice's to the district court is effectuated by a notice, an appeal bond, and a certified copy of the transcript, unless the appeal is allowed the day on which the judgment is rendered, when a written notice is not required, p. 118.

Distinguished in Durand v. N. W. Life & Sav. Co., 112 Iowa 299, 83 N. W. 973, holding that when an appeal from a justice's to the district court is otherwise regularly taken, the failure to give written notice thereof to the adverse party will not—under the Code of 1897—render a judgment thereon in the later court void, although such a judgment in such an instance will be irregular or erroneous, and will be set aside upon motion, or will be reversed upon appeal to the Supreme Court: But such a judgment will not be set aside as void in an action therefor in a court of equity.

HOLLOWAY v. PLATNER; 20 IOWA 121, 89 AM. DEC. 517

1. Unrecorded Deed, Mortgage or Equity to or in Land—Sale Under Subsequent Judgment—Purchase by Judgment Creditor without Notice, Rights of.—Where a judgment creditor buys land of the judgment debtor at a sheriff's sale under his judgment and without actual or constructive notice of a deed, mortgage, or equity to or in another, made or given before the rendition of his judgment, he takes the land as any other *bona fide* purchaser and free from such prior deed, mortgage, or equity, unless there are equitable circumstances which give the holder of the prior instrument or equity the superior right, pp. 123, 124.

Reaffirmed and extended in Jones v. Brandt, 59 Iowa 342, 10 N. W. 854, holding that a purchaser, without notice, at a sheriff's sale of land, is protected against latent equities therein.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 3 of Evans v. McGlasson (18 Iowa 150), ante. p. 601.

LAMB v. FIRST PRESBYTERIAN SOCIETY OF MARSHALLTOWN, 20 IOWA

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1. Trial—Special and General Verdict—Special Inconsistent with General—When Judgment to be Entered on Former.—In order—under Sec. 3080 of the Code of 1860—to justify a court in rendering a judgment upon a special finding of facts, against the general verdict, such finding of facts must be inconsistent with the general verdict, and when taken together with the facts admitted in the pleadings, must be sufficient to establish the right to recover, p. 130.

Reaffirmed and explained in Hardin v. Branner, 25 Iowa 368; Conners, Adm'r v. B. C. R. & N. Ry. Co., 71 Iowa 492, 32 N. W. 466, 60 Am. Rep. 814; Kerr, Adm'x v. Keokuk Water-works Co., 95 Iowa 513, 64 N. W. 597; Schulte v. Ch. M. & St. P. Ry. Co., 114 Iowa 93, 86 N. W. 64, holding that in order to entitle a party to a judgment upon a special verdict, against a general verdict in favor of the other party, the special findings must be inconsistent with the general one; and such special findings must of themselves, or when taken together with the facts admitted by the pleadings, be sufficient to establish or defeat—as the case may be—the right to recover.

Reaffirmed and explained in Kerr, Adm'x v. Keokuk Water-works Co., 95 Iowa 513, 64 N. W. 597, holding that if the general verdict is inconsistent with the instructions to the jury and the special findings, a motion to set aside the general verdict and for judgment on the special findings should be sustained.

Reaffirmed and extended in Hawley, Adm'r v. City of Atlantic, 92 Iowa 175, 60 N. W. 520; Fishbaugh v. Spunaugle, 118 Iowa 344, 92 N. W. 61, holding further that in order to warrant a judgment upon special findings against a general verdict, the former must be necessarily and absolutely inconsistent with the latter.

(Note.—See further, Case v. Ch. M. & St. P. Ry. Co., 100 Iowa 490, 69 N. W. 538; Coffman, Adm'r v. Ch. R. I. & Pac. Ry. Co., 90 Iowa 462, 57 N. W. 955; Krauskopf v. Krauskopf, 82 Iowa 535, 48 N. W. 922; Newman v. Ch. M. & St. P. Ry. Co., 80 Iowa 678, 45 N. W. 1054; Seekel v. Norman, 78 Iowa 254, 43 N. W. 190; O'Donnell v. Hastings, 68 Iowa 271, 26 N. W. 433; Hammer, Adm'r v. Ch. R. I. & Pac. Ry. Co., 61 Iowa 56, 15 N. W. 597; Crouch v. Deremore, 59 Iowa 43, 12 N. W. 759; Baird v. C. R. I. & P. R. R. Co., 55 Iowa 121, 7 N. W. 460; Bills v. Ottumwa, 35 Iowa 107; Mershon v. Nat'l Ins. Co., 34 Iowa 87; Phoenix v. Lamb, 29 Iowa 355; Bonham v. Iowa Central Ins. Co., 25 Iowa 328; Hatfield v. Lockwood, 18 Iowa 298; Davenport Sav. Fund Ass'n v. North American Fire Ins. Co., 16 Iowa 74, important cases sustaining, explaining, qualifying and intimately connected with, but not citing, the text.

N. B. The cases of the annotations under this present case, and the cases in this note, are under the various Codes of 1860, 1873 and 1897.—Ed.)

STREET v. HUGHES, 20 IOWA 131

1. **Municipal Corporations—Tax Sale of Land—Act of 1858 as to Effect of Tax Deed and Manner of Foreclosure, Construed.**—Chapter 105, Acts of 1858, Sec. 1144 of the Code 1860, was intended to give a uniform effect to deeds made to purchasers of real estate sold for municipal taxes, and a like method for the foreclosure of the equity of redemption, under whatever municipal charter such a sale might be made. Under such Act the provisions of Secs. 503, 506 of

the Code of 1851, apply, and a purchaser at such tax sale made after it took effect is entitled to a deed, and after six months from the day thereof, has the right to file his petition as in case of the foreclosure of a mortgage, pp. 132-134.

Reaffirmed in McNamara v. Estes, 22 Iowa 257, 258; State v. Shaw, 28 Iowa 80, 4 Am. Rep. 159; Vaughn v. Stone, 54 Iowa 385, 2 N. W. 980.

BOARDMAN v. BOURNE, 20 IOWA 134

1. Tax Deed to Several Parcels of Land Showing on Face That They were Sold in Gross for Lump Sum—Effect.—Where a tax deed to several parcels of land shows on its face that they were sold in a lump for a gross sum, it is void, pp. 136, 137.

Reaffirmed in Byam v. Cook, 21 Iowa 396; Ferguson v. Heath, 21 Iowa 439, 440; Harper v. Sexton, 22 Iowa 445; Ackley v. Sexton, 24 Iowa 321; Connor v. Griffin, 27 Iowa 249, 250; Ware v. Thompson, 29 Iowa 66; Hurlburt v. Dyer, 36 Iowa 475; Hintrager v. McElhinney, 112 Iowa 332, 82 N. W. 1010.

Reaffirmed and qualified in Ware v. Thompson, 29 Iowa 66-68, holding that although a tax deed which shows on its face that several distinct parcels of land were sold for taxes in a lump and for a gross sum, is void, still, the tax sale itself will not be void in such an instance, unless such parcels were *in fact* so sold.

Reaffirmed and qualified in Smith v. Easton, 37 Iowa 586, holding that a tax deed is—under the Code of 1860—*conclusive* evidence that the sale was conducted in the *manner* required by law, unless it shows on its face that the law has been violated.

Reaffirmed and narrowed in Martin v. Cole, 38 Iowa 145-147, 150-153, holding that a tax deed showing a sale for taxes of two or more tracts or parcels of land together is void, and will defeat the title based thereon: But that a section of land belonging to an unknown owner, may be sold for taxes as one parcel or tract, and a tax deed therefor is valid.

Cited in McCready v. Sexton & Son, 29 Iowa 414, 416, (dissenting opinion) 4 Am. Rep. 214, the majority court reaffirming and narrowing the text, and holding that where a tax deed recites that several parcels or tracts were sold in a lump and for a gross sum, when they were in fact sold separately, the county treasurer who made the sale may thereafter make a deed or deeds to the tax purchaser correcting the mistake, and that the latter deed or deeds will be valid, under the Code of 1860, and, conclusive that the tax sale was made in the *manner* required by law.—And to the same effect are Hurley v. Street, 29 Iowa 432, 433; Gray v. Coan, 30 Iowa 540, 541, reaffirming this McCready case, and reaffirming and narrowing the text.

Cited in Pursley v. Hayes, 22 Iowa 21, 92 Am. Dec. 350, as an instance of a collateral attack of a void sale of land under legal proceedings.

Distinguished in Rima v. Cowan, 31 Iowa 127, 128, holding that when a tax deed to several parcels of land recites that they were sold separately, it is—under the Code of 1860—conclusive of the question, the instrument is valid, and the tax sale or deed, cannot be attacked because the sale of the parcels were in fact sold in a lump and for a gross sum.

Cross reference. See further on this question, annotations and note under Rule 3 of Penn v. Clemans (19 Iowa 372), ante. p. 739.

KINYON v. PALMER, 20 IOWA 138

(Former Appeal, 18 Iowa 377.)

1. Appeal—General Objections to Instructions and Evidence When not Considered.—General objections and exceptions to instructions given or refused or to evidence admitted or rejected upon the trial below, will not be considered upon appeal to the Supreme Court when no grounds therefor are stated in the record and none are set out in the argument of counsel, p. 141.

Reaffirmed and qualified in Clark v. Connor, 28 Iowa 314, holding that where the party appealing to the Supreme Court has made a general objection to the admission of evidence which was overruled, and the record fails to show the ground of such objection, the trial court's ruling thereon will not be reviewed; but where the successful party makes a general objection to the admission of evidence below which is sustained by the trial court, then if the unsuccessful party shows upon appeal that there is no legal or possible grounds upon which the trial court's ruling thereon can be sustained, he is entitled to a reversal of the judgment therefor.

MAHANA v. BLUNT, 20 IOWA 142

1. Pleadings—Answer—Sufficiency of Denial in.—Where the defendant in his answer almost literally denies the allegations of the petition, it is sufficient to put plaintiff upon proof of his cause of action there averred, p. 143.

Reaffirmed in Doolittle v. Greene, 32 Iowa 124.

2. Statute of Frauds—Verbal Contract for Sale of Land—Possession Under to Take Case out of Statute.—In order to take a verbal contract for the sale of land out of the Statute of Frauds by reason of the purchaser having taken possession thereof thereunder, such possession must unequivocally refer to and result from the agreement. Where a tenant in possession of land buys it of his landlord under a verbal contract, his remaining in possession thereof thereafter is not sufficient to take the contract out of the Statute of Frauds, p. 144.

Reaffirmed and extended in Wilmer v. Farris, 40 Iowa 310, holding further that where one partner makes a verbal contract for the sale of his undivided interest in partnership real estate to another partner, and the latter thereafter *continues* in possession thereof, it does not take the contract out of the Statute of Frauds.

Reaffirmed and extended in Omaha Land Co. v. Hanson, 117 Iowa 101, 102, 90 N. W. 708, holding further that a verbal agreement whereby a claimant of land agrees to surrender possession of the land, if a suit is decided in favor of the other party thereto, is not a lease, but a transfer of an interest in the land, and is within the Statute of Frauds.

Reaffirmed and extended in Bemis v. Allen, 119 Iowa 163, 93 N. W. 51; Allen v. Bemis, 120 Iowa 177-179, 94 N. W. 561, 562, holding further that when a tenant in possession of land buys it of his landlord under a verbal contract, and thereafter claims that his possession thereof thereafter, took the contract out of the Statute of Frauds, he must clearly establish that with the making of the contract his possession as tenant ceased, and that the land was thereafter held by him as purchaser under and by virtue of the contract: The last case holding that the fact that such a tenant makes valuable improvements on the land after his verbal purchase, is not alone sufficient to establish such change of possession.

Reaffirmed and varied in Barton v. Smith, 66 Iowa 76, 23 N. W. 271, holding that where a purchaser in possession of land under a written contract of sale, orally agrees with his vendor to cancel the written contract, and thereafter the purchaser remains in possession of and pays rent for the land to his vendor, such oral contract is not within the Statute of Frauds.

Cited in Smith v. Phelps, 32 Iowa 539, holding—as does the present case in argument—that an oral contract for the sale of land is not within the Statute of Frauds when it is proved by the party against whom it is sought to be enforced.—Decision under Sec. 4010 of the Code of 1860.

Cited in Daily v. Minnick, 117 Iowa 578 (dissenting opinion), 91 N. W. 913, 60 L. R. A. 840, the majority court holding that where a party agrees to convey certain land to a child in consideration of his being named for him, and the parents in consideration thereof so name the child, such naming constitutes a payment of the purchase price or consideration for the land under the Code of 1897; and such contract will be specifically enforced in equity: And this is the rule where the land to be conveyed was uncertain at the time of the agreement, but was afterwards designated and agreed upon by the parents of the child and the party who agreed to convey.

BURKE v. JEFFRIES, 20 IOWA 145

1. **Municipal Corporations—Act of March 23, 1858—To What Cities and Towns Applicable.**—The Act of March 23, 1858, in relation to cities and towns, does not apply to those organized prior to the taking effect thereof, or to those organized under special charters, unless they adopt the provisions thereof, or unless as therein specially provided, pp. 147, 148.

Reaffirmed in Town of Decorah v. Bullis, 25 Iowa 15.

2. **Statutes—Repeal by Implication not Favored.**—The repeal of a statute by implication is not favored; and a court ought to hesitate much more in declaring or recognizing such repeal when the alleged repealing act disclaims such intention in advance, p. 147.

Reaffirmed and extended in State v. Shaw, 28 Iowa 78, 79, 4 Am. Rep. 159; City of Dubuque v. Harrison, 34 Iowa 167, 168, holding further that in order to work a repeal of an old by a new statute, they must be absolutely repugnant; that courts will, if possible, give effect to several statutes on the same subject.

Reaffirmed and extended in State v. Brandt, 41 Iowa 614, holding further that any reasonable or allowable construction will be adopted by the courts in order to avoid deciding that a statute is repealed by implication.

(Note.—There are many cases sustaining the text, and its extensions, not citing the text.—Ed.)

Cross reference. See further on this question, annotations under Rule 2 of Baker & Griffin v. Steamboat Milwaukee (14 Iowa 214), ante. p. 229.

HUBBARD v. LONG AND BUSH, 20 IOWA 149

1. **Vendor and Purchaser—Possession Adverse to Vendor—Notice to Purchaser by.**—Possession of land by another than a vendor thereof, is notice to the purchaser of the title or equity of the former, or person in possession, thereto or therein, pp. 150, 151.

Reaffirmed and extended in Phillips v. Blair, 38 Iowa 656, holding further that a purchaser, with notice of a right in another is in equity liable, to the same extent and in the same manner as the person from whom he made the purchase.

Cross references. See further on this question, annotations under Dickey v. Lyon (19 Iowa 544), ante. p. 763; Rule 2 of Baldwin v. Thompson (15 Iowa 504), ante. p. 374.

CHASE v. ABBOTT, 20 IOWA 154

1. **Mortgage—What Extinguishes Lien of.**—The lien of a mortgage is not extinguished until the debt it is given to secure is paid or satisfied; and a change of the note evidencing the debt, or the execution of a new one therefor, does not affect it, p. 158.

Reaffirmed and explained in Port v. Robbins, 35 Iowa 209, 210, holding that no change in the form of the evidence of the indebtedness secured or the manner or time of payment thereof, will operate to discharge a mortgage or lien thereunder: Only actual payment of the debt or an express release will have such an effect.

Reaffirmed and extended in Gribben v. Clement, 141 Iowa, 148, 119 N. W. 597, holding further that no change of form of the debt originally secured by mortgage will release the mortgage so long as the identity of the debt can be traced.

Reaffirmed and qualified in Freeburg v. Eksell, 123 Iowa 468, 99 N. W. 120, holding that an action to foreclose a mortgage is not barred by the statute of limitation until the debt it is given to secure is so barred: Holding further that the lien of a mortgage continues until its debt is paid, or discharged, or the mortgage is released, or the debt, by operation of law, can not longer be enforced.

Cross references. See further on this question, annotations under Rule 1 of State for use, etc. v. Lake (17 Iowa 215), ante. p. 518 Packard v. Kingman (11 Iowa 219), Vol. I, p. 806.

2. Homestead—Right of Wife to in Husband's Land—When Vests—Right of Wife to Redeem Homestead from Tax Sale.—The right of the wife to homestead in her husband's real estate used and occupied by him as homestead at the time of his marriage, vests in her at such time: This right of the wife in the homestead is of a higher character and more in the nature of a vested interest or title, than is a dower right in other real estate of her husband.

A wife may redeem homestead from a tax sale, under a saving clause in a statute in reference thereto in favor of married women, after the time allowed for redemption by the husband has expired, p. 158.

Cited as to first paragraph in Sayers v. Childers, 112 Iowa 680, 84 N. W. 939, the court holding that agricultural land situated within the limits of a town, but which has never been platted, is not within the provisions of Sec. 2978 of the Code of 1897, and that in such case the debtor is entitled to homestead therein of forty acres: And that of this right he cannot be deprived by an Act of the General Assembly or by act of the Auditor in platting it as provided by Sec. 568 of the Code of 1897, or by act of the city in extending its boundary.

Cited as to first paragraph in Clarke v. Sherman, 128 Iowa 356, 103 N. W. 983, the court holding that an insolvent debtor cannot use non-exempt property for the purchase of a homestead, nor can he use such property for the payment of a mortgage given for a part of the purchase price thereof.

Distinguished as to first paragraph in Johnston v. McPherran, 81 Iowa 233, 47 N. W. 61, holding that a wife has no homestead right or interest in lands fraudulently conveyed by her husband before his marriage to her.

(Note.—The second paragraph of the text is *argument*, and is only given as *law* because the later cases found at the special cross reference below, treats it as such.—Ed.)

Special cross reference. For cases citing the second paragraph of the text, and others on the question, see annotations under Rules 2-4 of *Adams v. Beale* (19 Iowa 61), ante. p. 692.

3. Mortgage on Land—Action to Foreclose—Parties—Wife of Mortgagor.—In an action to foreclose a mortgage on land, in the absence of a power of sale given by the instrument itself, all persons having an interest in the property must be made parties, or they will not be barred or concluded by anything done therein.

So, in an action to foreclose a mortgage executed by a husband on homestead before his marriage, his wife whom he subsequently married, who is not made a party thereto, is not concluded, as to her right or interest in the homestead, by the decree therein, or sale made thereunder, pp. 158, 159.

Reaffirmed and extended as to first paragraph in *Gower v. Winchester*, 33 Iowa 305; *Barrett v. Blackmarr*, 47 Iowa 569, 570, holding that any person who has an interest in, or lien upon mortgaged land acquired after the execution of the instrument, and who is not made a party to an action to foreclose it, may redeem from a sale under a decree therein, and after the statutory period for redemption has expired.

Reaffirmed and qualified in *Browneller v. Wells*, 109 Iowa 232, 233, 80 N. W. 352, holding that although a wife is not barred of her rights in homestead by an action, or any proceedings therein, to foreclose a mortgage thereon executed by her husband before his marriage to her, still, such mortgage is valid and superior to her rights, and may be later foreclosed in an action wherein she is a party, her right therein being simply a right to use such homestead until such last named foreclosure, or to redeem from the mortgage: Holding further that where the wife occupies such homestead *as growing out of and depending upon* the right of her husband against whom it was foreclosed and sold, and he, after the sale, acknowledges himself a tenant of the purchaser, the statute of limitation does not run in her favor.

Cited with approval as to second paragraph in *Sayers v. Childers*, 112 Iowa 679, 80 N. W. 352, not in point, but upon other matters connected with the homestead right, syllabus of which is given under Rule 2 hereof.

Cross reference. See further as to foreclosure of mortgage on homestead in action wherein wife is not a party, annotations under Rule 2 of *Larson v. Reynolds & Packard* (13 Iowa 579), ante. p. 190.

4. Deed Absolute on Face but in Fact a Mortgage.—Where a deed to land is absolute on its face, but a bond to reconvey is executed

by the vendee upon the payment of a certain sum at a certain time, and it appears that such sum is a debt of the vendee against the vendor and which the deed is to secure, the two instruments will be treated as a mortgage, pp. 154, 157.

Reaffirmed and explained in Thompson v. People's B. L. & Inv. Co., 114 Iowa 485, 486, 87 N. W. 439, holding that a deed with a defeasance is in effect only a mortgage, and that the grantor may recover any sum paid by mistake, more than the debt it is given to secure.

(Note.—There are very many cases sustaining, but not citing, the text.—Ed.)

HARSHEY v. BLACKMARR, 20 IOWA 161, 89 AM. DEC. 520

1. Attorney and Client—Unauthorized Act of Attorney—Judgment Upon Unauthorized Appearance by Attorney—Relief from.—An attorney cannot, without special authority, admit service of *jurisdictional process* upon his client, yet will be presumed in all collateral proceedings, and perhaps on appeal or in error, that a regular attorney at law who appeared for a defendant though not served, had authority to so act.

A judgment rendered upon an appearance entered by an attorney who has no authority therefor, will be set aside upon motion or by bill in equity, if the proceeding is commenced promptly after the discovery of the fact by the defendant and he is guilty of no *laches* or is not estopped to so do by his acts or admissions: But a judgment rendered against a non-resident who is not (as shown by the record) in any way served with notice and upon an answer procured to be filed by an attorney without any authority or color of authority so to do, and procured by the fraudulent representations of the plaintiff, is *void* as against all persons and in all proceedings, pp. 171-174, 181, 182.

Reaffirmed in Wheeler v. Cox, 56 Iowa 37, 8 N. W. 689, holding that a practicing attorney of a court wherein an action is brought by him, is presumed to have had authority to institute it; and that in an action to set aside a judgment therein rendered against the plaintiff upon a counterclaim, and to enjoin proceedings thereunder on account of want of authority of such attorney, this presumption will prevail, unless the evidence of a want of authority is clear and satisfactory.

Reaffirmed in Uehlein v. Burk, 119 Iowa 743, 94 N. W. 244, holding that in an action to set aside a judgment rendered by a court in this state and to enjoin a sale of realty thereunder, because the judgment was rendered upon an unauthorized appearance by attorney—defendant not having been served with notice—the burden is on the plaintiff seeking the relief to show that the attorney had no authority to act in the first action: That where a judgment is rendered upon an unauthorized appearance by an attorney, and the defendant it not served with notice, it is *void* for want of jurisdiction.

Reaffirmed and explained in Bryant v. Williams, 21 Iowa 331, holding that a defendant who has had judgment rendered against him upon the unauthorized appearance of an attorney and in an action wherein he is not served with notice, may maintain an action in equity to set it aside; but that if such action is not instituted promptly after knowledge of the rendition of the judgment has come to the defendant, and he delays for an unreasonable time, and third persons meanwhile acquire an interest in the judgment, the delay may operate as an estoppel in favor of the third persons.—But see Newcomb v. Dewey, 27 Iowa 390, reaffirming and explaining the text, holding that in an action to set aside a judgment and proceedings thereunder because it was rendered upon an acceptance of service of notice by an attorney without authority, the fact that real estate has been sold to a third person thereunder, or the fact that the judgment or other record of the court recites that the defendant was duly served with notice, or duly accepted service thereof, does not defeat the right of the plaintiff in the last action against whom the judgment was rendered, to have it and all proceedings under it, set aside.—And see Macomber v. Peck, 39 Iowa 355-357, (reaffirming the text) an action wherein a person against whom a decree for the sale of land was entered upon the unauthorized appearance of an attorney, and in which he (the defendant) was not served with notice, is held barred by delay and laches after knowledge of the decree from attacking it, as against a *bona fide* purchaser without notice from the decretal sale purchaser.

Reaffirmed and explained in Walsh v. Doran, 145 Iowa 113, 123 N. W. 1000, holding that in the absence of bad faith on the part of the attorney, the presumption that he is authorized to appear for the client whom he represents is strong, and can only be overcome by clear and satisfactory evidence.

Cited with approval in Rogers v. Gwinn, 21 Iowa 63, the court holding that in an action in this state on a foreign judgment, the defendant may plead and prove as a defense, that such judgment was procured by the fraud of the judgment creditor (plaintiff in the action in this state).

Cited with approval in Pollard v. Baldwin, 22 Iowa 332, holding that in an action on a foreign judgment, the defendant may defend by showing that he was not in fact served with notice or process in the foreign action, although the foreign judgment entry recites that he was duly served; but that in such case, the defendant must make clear and satisfactory proof of such want of service.

Cited with approval in Dunlap & Co. v. Cody, 31 Iowa 263, 7 Am. Rep. 129, the court holding that in an action in this state on a foreign judgment, the defendant may plead and prove as a defense that the jurisdiction of his person by the foreign court was obtained by the fraud of the plaintiff, his agent, or attorneys: Hence holding that where defendant is induced to go to the foreign state by the false rep-

representations of the plaintiff's attorneys that a particular contract of work was to be let, in his line of employment, and while there he was served with process in the plaintiff's action against him in such state, such facts constitute fraud and is a complete defense to an action in this state on the foreign judgment thereon rendered.

Cited in Whetstone v. Whetstone, 31 Iowa 281, the court holding that where a judgment in another action between the same parties concerning the same subject-matter and in another court, whether foreign or domestic, is set up in bar of a later action, the plaintiff may prove by way of reply, that such former judgment was obtained by fraud of the party relying thereon.

Cited in Melhop & Kingman v. Doane & Co., 31 Iowa 400, 7 Am. Rep. 147, the case involving the binding force of a foreign judgment, *in rem* and *in personam*, the case, however, not involving the law of the text.

Cited in Oxtoby v. Henley, 112 Iowa 701, 84 N. W. 943, the court holding that one who is made a party to an action without his consent, but who thereafter consents to or ratifies such act, is bound by the judgment therein.

Cited in Spencer v. Berns, 114 Iowa 128, 86 N. W. 210, holding that a void judgment may be set aside on motion; and that where the defendant has been served with *no notice*, as distinguished from *irregular or defective* notice or its service, and does not enter his appearance to the action, the judgment therein is *void*.

See 148 Iowa 376, not yet published.

Unreported citation, 126 N. W. 355.

Cross reference. See further on this question, annotations and cross reference under Rule 2 of Prince v. Griffin (16 Iowa 552), ante. p. 472.

BARTLETT v. DUBUQUE & SIOUX CITY R. R. CO., 20 IOWA 188

1. Railroads—Duty to Fence Crossings—Liability for Injuring or Killing Stock.—Chapter 169, Acts of 1862, does not make it the duty of a railroad company to supply cattle guards at private crossings, but only requires them to be built where a railroad crosses a public highway.

Where a railroad company fences land as provided by the above act, and keeps the fence in repair, it is liable for the killing or injuring stock on the fenced right of way, only in case of gross negligence; but if a railroad company neglects or refuses to fence land when it has a right so to do by the above law, or if it negligently or by failure to use ordinary care, allows such fence to become out of repair whereby cattle are killed or injured, it is liable for less than gross negligence by reason thereof. If cattle are injured or killed on a fenced right of way by a railroad train by reason of gates or bars being left open or down with-

out the fault of the company, it is only liable for their killing or injury occasioned by its gross negligence, pp. 192-194.

Reaffirmed and explained in Davis v. B. & M. Riv. R. R. Co., 26 Iowa 552, 554, 556, holding that if stock is killed or injured by a railroad company where there is a right to fence, and none has been erected, the liability is absolute: That if there be a fence, gross negligence must be shown on the part of the company: But if the killing takes place where there is no right to fence, the company is held to reasonable care and is liable for ordinary negligence: Holding further, however, that the statute of the text was not intended to apply to unfenced depot grounds, and that a railroad company is not liable for injury to or the killing of stock thereon, except where negligence is shown.

Reaffirmed and explained in Tyson v. K. & D. M. R. R. Co., 43 Iowa 209, holding that a railroad is not required nor has it a right to place gates at a private lane where it crosses its track, the lane having gates at each end; and that in such case the company is not liable for killing the lane owner's cattle which stray upon the track from the lane, when no negligence is proved.

Cited in Rutherford and Thompson, Adm'rs v. Iowa Central Ry. Co., 142 Iowa 754, 121 N. W. 707, the court holding that under Secs. 2054, 2057, and 2022 of the Code of 1897, cattle guards and wing fences are only to be erected at public crossings, unless the owner of a private crossing requests them: That if the owner of stock knows that they have escaped on the right of way of a railroad, he may go thereon to recover them; but in so doing he is a bare licensee, and the railroad company owes him no higher duty than if he were a trespasser.

Cited in Gray v. D. & M. R. R. Co., 37 Iowa 123, not in point.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 2 of Alger v. M. & M. R. R. Co. (10 Iowa 268), Vol. I, p. 680.

Cross reference. See further on this question, annotations under Rule 1 of Jones v. Galena & Ch. Un. R. R. Co. (16 Iowa 6), ante. p. 392.

WRIGHT v. ILLINOIS & MISSISSIPPI TELEGRAPH CO., 20 IOWA 195

I. New Trial—Affidavits of Jurors in Support of—When and when not Admissible.—Affidavits of jurors may be received in support of a motion for a new trial and to avoid their verdict, to show any matter occurring during the trial or in the jury room which does not essentially inhere in the verdict itself; as that a juror was improperly approached by a party, his attorney or agent; that witnesses or others conversed as to the facts or merits of the case in the presence of the jurors; that the verdict was determined by aggregate or average, or by lot, or by game of chance, artifice or other improper manner: But such an affidavit will not be received to show any matter which essen-

tially inheres in the verdict itself; as that the juror did not assent to it; that he did not understand the instructions of the court, the statements of the witnesses, or the pleadings; that he was unduly influenced by his fellow jurors, or was mistaken in his calculation, judgment, or any other matters resting alone in his breast, p. 210.

Reaffirmed in Hall & Co. v. Robison, 25 Iowa 93; Cowles, Adm'x v. Ch. R. I. & P. R. R. Co., 32 Iowa 518; Garretty v. Brazell, 34 Iowa 104; Bingham v. Foster, 37 Iowa 341; Dunlavey v. Watson, 38 Iowa 402; Darland v. Wade, 48 Iowa 548; Ward v. Thompson, 48 Iowa 594, 595; Fox v. Wunderlich, 64 Iowa 193, 20 N. W. 9; Wilkins v. Bent & Cotrell, 66 Iowa 532, 24 N. W. 30; Griffin & Adams v. Harri-man, 74 Iowa 439, 38 N. W. 140; Hallenbeck & Son v. Garst, 96 Iowa 512, 65 N. W. 418; Purcell, Adm'x v. Tibbles, 101 Iowa 27, 69 N. W. 1121; Baxter, Adm'r v. City of Cedar Rapids, 103 Iowa 608, 609, 72 N. W. 793; Clark v. Van Vleck, 135 Iowa 200, 112 N. W. 651, all these cases applying the rule under different states of fact.

Reaffirmed and explained in Kruidenier Bros. v. Shields, 70 Iowa 431, 30 N. W. 682, holding that where the jury obtained and considered in their retirement (without plaintiff's knowledge) a paper, not in evidence, and were influenced thereby in arriving at their verdict, that it was sufficient ground for a new trial; and that affidavits of jurors were admissible in support of the motion therefor, to prove such fact.

Reaffirmed and explained in State v. Beste, 91 Iowa 568, 569, 60 N. W. 113, holding that affidavits of jurors cannot be received in support of a motion for a new trial, to show arguments used by jurors with their fellow jurors, deductions drawn by them from the testimony, or the want of testimony, or other matters essentially inhering in the verdict itself.

Reaffirmed and explained in State v. Whalen, 98 Iowa 673, 68 N. W. 557, holding that affidavits of jurors are receivable in support of a motion for a new trial on the ground of misconduct of the jury, to show that while they were deliberating and before an agreement had been reached, portions of the Code in regard to the subject-matter involved, were read to the jury and explained by one or more of its members; but such affidavits are not sufficient ground for a new trial unless prejudice to the party applying therefor be shown to have resulted therefrom: And such affidavits are not receivable in such case to show *the weight* which the jurors gave to such reading and explanation.

Reaffirmed and explained in Porter v. Whitlock, 142 Iowa 72, 120 N. W. 651, holding that the grounds upon which the jurors assent to the verdict, where there has been no misconduct in bringing extraneous matters to the jurors' attention, cannot be shown to impeach it, nor is it competent in this way, to show that the jury misunderstood the law.

Reaffirmed and extended in McLeod v. Humeston & Shenandoah Ry. Co., 71 Iowa 139, 140, 32 N. W. 247, holding further that where through no fault of counsel on either side of a controversy, a paper containing material facts pertinent to the issue, and not introduced in evidence, is given to the jury and considered by them in their retirement, it is sufficient ground for a new trial; and the affidavits of jurors are admissible in support of a motion for a new trial, to prove such facts.

Reaffirmed and extended in State v. Cowan, 74 Iowa 57, 58, 36 N. W. 888, holding further that an affidavit of a juror is not receivable in support of a motion for a new trial, to show that he was *influenced* by remarks of the bailiff in the jury room; but such an affidavit is receivable in such case, to show that the bailiff made remarks in the jury room which were calculated to influence the jurors in arriving at a verdict; and counter-affidavits of other jurors are receivable to disprove such fact.

Reaffirmed and extended in Christ v. Webster City, 105 Iowa 121, 74 N. W. 743, holding further that affidavits of jurors are not receivable in support of a motion for a new trial, to show that they misunderstood instructions given to them by the court.

Reaffirmed and varied in State v. Gibbs, 39 Iowa 321, 322, holding that affidavits of grand jurors cannot be received in support of a motion to set aside an indictment, to show that the indictment was not concurred in by the requisite number of jurors.

Reaffirmed and qualified in Morris v. Howe, 36 Iowa 493, 494, holding that where the fact that a suppressed deposition was taken to the jury room by the jury without the knowledge or consent of one of the parties to the action, is made the ground of a motion for a new trial by such party, an affidavit of a juror is receivable *in support of the verdict* and in resisting the motion, that he, the affiant juror, was the only one of the jury who read any part of it, and that he only read certain parts, and that before so reading he had firmly made up his mind as to the verdict, and had expressed it openly by ballot, and that the jury had previously agreed as to which party was entitled to a verdict as it was later returned.

Distinguished in Swails v. Cissna, 61 Iowa 695, 696, 17 N. W. 41, holding that affidavits of jurors may be received, to show the basis upon which a verdict was found, when it is not sought thereby to impeach or avoid it: Hence holding that affidavits of jurors who returned a verdict for a gross sum, are receivable to show that they did not allow interest.

Distinguished in Jamison v. B. & W. Ry. Co., 69 Iowa 672, 29 N. W. 775, holding that the time for taking an appeal from an assessment of damages by a sheriff's jury for a right of way of a railroad, commences to run from the time the assessment was *in fact* made by such jury; and that upon a motion to dismiss an appeal therefrom be-

cause not taken in time, affidavits of jurors who composed the sheriff's jury, as to the exact date of the making of such assessment are admissible, although they contradict the return of the sheriff on such fact.

(Note.—There are many other cases sustaining, but not citing, the text.—Ed.)

Cross reference. See, also, Rule 2 hereof.

2. New Trial—Quotient Verdict Ground for—Affidavits of Jurors to Prove.—Where a verdict was determined by each juror marking down such sum as he saw fit, and the aggregate was then divided by twelve and the quotient taken as the verdict, pursuant to a previous agreement by the jury to accept it as such, such facts constitute a ground for a motion to set the verdict aside: Affidavits of jurors who returned such verdict are receivable in support of a motion for a new trial, to show such facts, pp. 212, 213.

Reaffirmed in Kendrickson v. Kingsbury, 21 Iowa 391, 392; Darland v. Wade, 48 Iowa 548.

Reaffirmed and extended in Darland v. Wade, 48 Iowa 548, holding further that where, upon a motion for a new trial on the ground set out in the text, there are affidavits of jurors filed to show the facts and affidavits of other jurors are filed to disprove them, the ruling of the trial court thereon will not be reversed, except where clearly wrong or unjust: Holding further that where a verdict is returned which is determined as in the text, the trial court has no authority to direct a *remittitur* or to enter a judgment thereon for any sum less than the amount of the verdict.

Reaffirmed and qualified in Beal v. Stone, 22 Iowa 448, holding that in order that the affidavits of jurors be received in support of a motion for a new trial as set out in the text, the facts of the text must be made a ground for a new trial.

Reaffirmed and qualified in Fuller v. Ch. & N. W. R. R. Co., 31 Iowa 213, 214, holding that where a verdict of a jury is severable, and the jury *regularly* determined part of its amount, but improperly and as in the text, determined the residue thereof, such fact will not be cause for reversal upon appeal, if the successful party will thereon remit the part of the verdict improperly determined.

Reaffirmed and qualified in Hamilton v. Des Moines Valley R. R. Co., 36 Iowa 35, holding that in order for the rule to be applicable, the jury must agree to be bound by the result of the calculation; and such an agreement and calculation made by the jury for the purpose of "ascertaining the amount of the verdict *in case it was adopted*," is not a ground for a new trial, or for reversal upon appeal.

Cross references. See Rule 1 hereof, in this connection. See further on this question, annotations, note and cross reference under Rule 3 of Barton v. Holmes (16 Iowa 252), ante. p. 432.

3. **Negligence—Contributory Negligence.**—Where the plaintiff by his own negligence or carelessness contributed to produce the casualty from which he suffered damage, he cannot recover therefor, p. 214.

Reaffirmed in Portman v. City of Decorah, 89 Iowa 337, 56 N. W. 512.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

MARTIN v. ORNDORFF, 20 IOWA 217

(Later Appeal, 22 Iowa 505.)

1. **Appeal—Verdict Against Evidence—Affirmance or Reversal for—When.**—Where, upon an appeal to the Supreme Court, there is any reasonable doubt as to the correctness of the verdict of the jury, and especially where the trial judge has overruled a motion for a new trial based upon the ground that the verdict was against the evidence, the verdict will be affirmed; but when, upon such appeal, such doubt is wanting, and the verdict was clearly against the evidence, the judgment will be reversed, p. 219.

Reaffirmed, explained and extended in Starker & Co. v. Luse & Mahana, 33 Iowa 596 (abstract), holding that in order to justify a reversal of a judgment because the verdict of the jury was against the evidence, it must be clearly and manifestly unsustained by the evidence: And this rule applies equally to the finding or decision of the lower court, upon the trial of a law action without a jury.

Reaffirmed and qualified in Conner v. Mountain, 28 Iowa 593 (abstract), holding that when the evidence is conflicting and the trial court refuses to interfere with the verdict, there must, in order to justify a reversal, be a very strong case of abuse of discretion, or prejudice to appellant's substantial rights.

(Note.—There are many other cases sustaining, but not citing the text.—Ed.)

RUSSELL v. HANLEY, 20 IOWA 219, 89 AM. DEC. 535

1. **Railroads—Liability for Killing or Injuring Stock—Fenced Right of Way.**—In order for a railroad company to be liable, under Chap. 169, Acts of 1862, only for gross negligence in killing or injuring stock, the track must not only be lawfully fenced but kept so; but if it is so kept, and the fence should be open or down without fault on the part of the company, then it would be liable only for gross negligence resulting in injury to cattle straying thereon: In such last case, the person leaving the fence open or down would be liable for injuries to cattle therefrom occasioned by trains of the railroad company, pp. 221, 222, 225.

Reaffirmed and explained in Bartlett v. Dubuque & Sioux City R. R. Co., 20 Iowa 193, 194, holding that it is the duty of a railroad company to use care and diligence to see that gates or bars in its fenced right of way are not left open or down; but if stock is injured or killed on a fenced right of way by a railroad train by reason of gates or bars being left open or down without the fault of the company, it is only liable in case of gross negligence.

Reaffirmed and explained in Henderson v. C. R. I. & P. R. R. Co., 39 Iowa 223, holding that where gates or bars are provided by a railroad company at a private crossing, it is required to use only reasonable care and diligence to keep them closed or up, and if, notwithstanding this, a gate is left open or bars down, and injury to stock results, the loss must be borne by the party whose negligence occasioned it.

Reaffirmed, explained and extended in Davis v. B. & M. Riv. R. R. Co., 26 Iowa 552, 554, 556, holding that under the law of the text, if stock is killed or injured by a railroad company where there is a right to fence, and none has been erected, the liability is absolute: That if there be a fence gross negligence must be shown on the part of the company: But if the killing takes place where there is no right to fence, the company is held to reasonable care, and is liable for ordinary negligence: Holding, however, that the statute of the text was not intended to apply to unfenced depot grounds, and that a railroad company is not liable for injury to or the killing of stock thereon, except where negligence is shown.

Reaffirmed and varied in Whitbeck v. D. & P. R. R. Co., 21 Iowa 103, 105; Evans v. B. & M. Riv. R. R. Co., 21 Iowa 376; Spence v. Ch. & N. W. Ry. Co., 25 Iowa 141, 142, holding that under the law of the text, if a railroad company fails to fence its road it is liable absolutely for stock injured or killed by reason of want of such fence, and, under certain circumstances, for double the value thereof, unless the injury or killing is occasioned by the willful act of the owner.

Reaffirmed and varied in C. & N. W. Ry. Co. v. Dunn, 59 Iowa 620, 13 N. W. 722, holding that where a gate at a railroad private crossing is wrongfully removed by the owner of the land for whose benefit the crossing was made, and the railroad company negligently fails to replace the gate for about a month, at the expiration of which period a third person's horse strays through the opening upon the track and is killed by the train, that the railroad company is liable to the owner of the horse, and the owner of the land in so removing the gate is liable to the railroad company for the value of the animal.

Reaffirmed and qualified in Manwell v. B. C. R. & N. Ry. Co., 80 Iowa 668, 45 N. W. 570, holding that a land owner may by his conduct release a railroad company from liability for its failure to build and maintain a fence, and that a tenant who acquires a right to occupy

and use the land jointly with the owner, with knowledge of such release by his landlord, acquires no greater right than the latter.

Reaffirmed and qualified in Fowbel v. Wabash R. R. Co., 125 Iowa 217, 218, 100 N. W. 1121, holding that a railroad company is not liable for injury to stock at a private crossing over it's and other roads, when the evidence fails to show that such crossing was not adequate for the purposes of the land owner, and not protected by fence so far as essential to his use and convenience and the safety of the public.

Cited in Herold v. Meyers, 20 Iowa 382, the court holding that where an ox which was running at large entered a close and ate too much corn from which it died, that the owner of the former could not recover therefor of the owner of the latter, although the close was not inclosed with a lawful fence.

Distinguished and narrowed in Liddle v. Koekuk, Mt. Pleasant & M. R. R. Co., 23 Iowa 379, 380, holding that the lessee of a railroad and in possession of and operating it, is not liable under the law of the text for injury to or the killing of stock on the unfenced right of way thereof; but that in such case, the lessor railroad company is so liable: That such a lessee may, in such case, be liable for his own negligence or that of his employees, but not under the statute being discussed.

Distinguished and narrowed in Tyson v. K. & D. M. R. Co., 43 Iowa 209, the court holding that a railroad is not required nor has it a right to place gates at a private lane where it crosses its track, the lane having gates at each end; and that in such case the company is not liable for killing the lane owner's cattle which stray upon the track from the lane, when no negligence is proved.

Cross reference. See further on this question, annotations and cross references under *Bartlett v. Dubuque & Sioux City R. R. Co.* (20 Iowa 188), ante. p. 799.

GILRUTH v. GILRUTH, 20 IOWA 225

I. Divorce—Action for—Service by Publication—Setting Aside Default—Code Construed.—Section 3160 of the Code of 1860, allowing default judgments obtained in an action wherein service is had by publication only, to be set aside within two years upon motion, etc., does not apply to actions for divorce, pp. 226, 227.

Reaffirmed in Whitcomb v. Whitcomb, 46 Iowa 444; *Rush v. Rush*, 46 Iowa 649, 26 Am. Rep. 179; *Tollefson v. Tollefson*, 137 Iowa 154, 114 N. W. 632—this last case under Sec. 3796 of the Code of 1897—all being actions to set aside a decree of divorce for fraud, etc.

STATE v. GUISENHAUSE, 20 IOWA 227

I. Indictment—Minutes of Grand Jury—Nunc Pro Tunc Order Filing—Minutes of Several Indictments Filed together, when

not Error.—It is not error for the trial court to enter a *nunc pro tunc* order filing minutes of the evidence before the grand jury in a criminal prosecution.

The fact that minutes of evidence before the grand jury on which several indictments for nuisance against different defendants were found are not returned to the clerk and filed separately, is not error, where the record does not disclose that the accused complaining was not thereby misled or prejudiced in his substantial rights, pp. 229, 230.

Reaffirmed and extended in State v. Briggs, 68 Iowa 422, 27 N. W. 360; State v. Craig, 78 Iowa 639, 43 N. W. 463; State v. Doss, 110 Iowa 616, 80 N. W. 1070, holding further that no indorsement of filing of minutes of the grand jury is necessary to be made by the clerk; that if such minutes are returned with the indictment and received by the clerk to be kept as part of the record, it is sufficient: But that it is the better practice to indorse them filed, as it is *evidence* of the filing.

Reaffirmed, extended and varied in Corliss v. Conable, 74 Iowa 61, 36 N. W. 892; Small v. Wakefield, 84 Iowa 535, 536, 51 N. W. 35; Town of Lovilia v. Cobb, 126 Iowa 560, 102 N. W. 497, holding that when papers (or other matter) required or desired to be filed in a cause, are left with the clerk, justice or other officer whose duty it is to file them, and for the purpose of their being kept by such officer as part of the record, such fact constitutes a filing, although the better practice is for the officer to indorse them filed.

Reaffirmed and varied as to first paragraph in State v. Patterson, 23 Iowa 579, holding that in an action on a forfeited bail bond, it is proper for the court to enter a *nunc pro tunc* order filing it as of the date it should have been filed, and to thereupon admit it in evidence.

Cross reference. See further on this question, annotations under Rule 1 of State v. Postlewait (14 Iowa 446), ante. p. 266.

2. **Intoxicating Liquors—Indictment for Nuisance—Exceptions to Statute a Defense.**—Upon the trial of an indictment for nuisance in keeping a building for the purpose of selling, and keeping with intent to sell, intoxicating liquors contrary to law, the state need not prove that the liquors were not kept by accused as allowed by law—Code of 1860: Any such a fact is a defense, to be proved by accused, p. 231.

Reaffirmed in State v. Becker, 20 Iowa 439.

Reaffirmed and extended in State v. Baughman, 20 Iowa 501; State v. Munzenmaier, 24 Iowa 90, holding further that upon the trial of such an indictment, proof of the sale or the keeping with intent to sell, is presumptive evidence of the guilt of accused, and, under Sec. 1564 of the Code of 1860, is sufficient to convict, unless rebutted by proof by accused that the liquors were lawfully sold or kept.

3. Appeal—Harmless Error—Instruction not Prejudicial.—The giving of an instruction is not ground for reversal, although it may have been improper, when it does not appear that it prejudiced the substantial rights of the party appealing and complaining, p. 231.

Reaffirmed in First Nat'l Bank of Fort Dodge v. Breese, Whitlock & Co., 39 Iowa 645.

Reaffirmed and extended in State v. King, 37 Iowa 469, holding further that evidence improperly admitted, and erroneous instructions given in a criminal prosecution, when no prejudice is wrought a defendant, and other rulings of like character do not demand the reversal of the judgment of conviction.

(Note.—There are very many cases sustaining, but not citing, the text.—Ed.)

WILSON v. TRAER & CO., 20 IOWA 231

1. Conveyances—Acknowledgment taken by Party Interested, Void—Constructive Notice—Validity of Conveyance.—Where an acknowledgment to a conveyance is taken and certified by a party thereto, or by one directly interested, who is an officer ordinarily authorized, it is *void*, does not authorize the recording of the conveyance, and if the instrument is recorded thereunder, it does not impart constructive notice.

As between the parties, however, the instrument is valid, p. 235.

Reaffirmed in Blackman v. Henderson, 116 Iowa 580, 581, 87 N. W. 656, 56 L. R. A. 902, holding that the rule is applicable whether the interest of the party to the acknowledgement is apparent from the face of the instrument or not.

Reaffirmed and explained as to first paragraph in Smith v. Clark, 100 Iowa 610, 69 N. W. 1013, holding that an acknowledgment to a mortgage taken by a stockholder of a corporation having a beneficial interest in the debt it is given to secure, is void, and the recording thereof does not impart constructive notice.

Reaffirmed and explained as to first paragraph in Bardsley v. German American Bank, 113 Iowa 217, 218, 84 N. W. 1041, holding that a cashier of a bank, who is working on a salary which is in no way dependent upon the profits of the business, and who is not a stockholder in the corporation, or a partner, as the case may be, and not otherwise directly or indirectly interested, may take an acknowledgment to a mortgage to such bank, and the recording thereof imparts constructive notice.

Reaffirmed and explained as to first paragraph in Farmers' & Merchants' Bank v. Stockdale, 121 Iowa 750, 751, 96 N. W. 733, holding that an acknowledgment to a mortgage, taken by a partner in a bank to whom the instrument was given, is void, and the recording thereof imparts no constructive notice.

Reaffirmed and varied in Empire Real Estate & Mort. Co. v. Beechley, 137 Iowa 9, 10, 114 N. W. 557, holding that Sec. 3536 of the Code of 1897, in reference to proof of notice by publication, must be strictly complied with, or a judgment in such an action will be void: That where the plaintiff in such an action, administers the oath required by such section, to the publisher of the newspaper making the publication or his foreman, a judgment entered therein thereon, is void, as well as all proceedings thereunder.

(Note.—See further, sustaining and explaining, but not citing, the text, City Bank of Boone v. Ratke, 87 Iowa 363, 54 N. W. 435; First Nat'l Bank of Burlington v. Owen, 52 Iowa 107, 2 N. W. 980.—Ed.)

TAGGART & TAGGART v. WOOD, 20 IOWA 236

1. Judgment—Enjoining Collection of or Proceedings Under—When Defense to be Shown.—Equity will not restrain the collection of or proceedings under a judgment which is valid and regular on its face, and set it aside, unless the plaintiff who seeks the injunction avers and proves a defense to the action wherein the judgment was rendered, or that it is unjust and oppressive, p. 238.

Reaffirmed in De Tar v. Boone County, 34 Iowa 491.

Reaffirmed and explained in Uehlein v. Burk, 119 Iowa 744-746, 94 N. W. 244, holding that where a person seeks in an equitable action to set aside a void judgment *in rem*, he must allege and prove some special equity entitling him to the relief.

Reaffirmed and extended in Parsons v. Nutting, 45 Iowa 405, 406, holding further that where a defendant seeks to enjoin the collection of a judgment improperly entered, he must tender or offer to pay the amount which he admits to be justly due.

Distinguished and criticised in Arnold v. Hawley, 67 Iowa 315, 25 N. W. 260, holding that where in an action to set aside a void judgment and to restrain proceedings thereunder, the plaintiff (defendant in first action) avers that the petition in the action wherein the void judgment was rendered alleged no cause of action against him and the first petition is made a part of the last petition and shows such fact, it is a sufficient denial of indebtedness in the action wherein the void judgment was rendered—the court doubting whether the rule of the text applies to *void* judgments.

ADAIR v. BOYLE, 20 IOWA 238

1. Leases—Action for Damages by Lessee for Refusal of Lessor to give Possession—Measure of Damages—Special Damages.—If a lessor refuses to permit his lessee to occupy the premises leased according to the lease, he is liable to an action for damages thereby done the lessee; and in such an action the lessee is entitled

to recover the difference between the rent reserved and the value of the premises for the term: If there be no such difference he can recover only nominal damages.

Besides the above, the lessee may recover any other damages resulting as the direct and necessary or natural consequence of the defendant's (lessor's) breach of contract, especially where the special damages are specially pleaded, pp. 242-245.

Reaffirmed in Hall v. Horton, 79 Iowa 358, 359, 44 N. W. 570.

Reaffirmed as to first paragraph in Alexander v. Bishop, 59 Iowa 578 (cited in dissenting opinion, 580), 13 N. W. 717, 718.

BERRYHILL v. JACOBS, 20 IOWA 246

(Former Appeal, 19 Iowa 346.)

1. **Default Judgment—Necessity of Motion to Set Aside Before Appeal—Dismissal of Appeal for Failure—Effect.**—Under Sec. 3545 of the Code of 1860, a motion to set aside a default judgment must be made, overruled and excepted to before the prosecution of an appeal to the Supreme Court, or the appeal will be dismissed: But where such an appeal is so dismissed, it will not bar the rights of the defendant (Appellant) to then proceed in the lower court as allowed by the code, p. 247.

Cited in Wile v. Wright, 32 Iowa 461; Coakley v. McCarty, 34 Iowa 108; Borgalthous v. Farmers' & Merchants' Ins. Co., 36 Iowa 252, the court holding that under the section of the text, errors which may be corrected by motion below, will not be reviewed upon appeal to the Supreme Court without a motion is first made therefor in the court below.

(Note.—There are many other cases sustaining, but not citing, the text, on the point on which it is cited.—Ed.)

KNOWLES v. CITY OF MUSCATINE, 20 IOWA 248

1. **Public Roads and Highways—Establishment Exceeding Legal Width—Void and Irregular Judgments.**—Where the county court establishes a public road or highway of a width in excess of that allowed by law, the judgment or order so establishing is irregular, and will be reversed upon appeal; but it is valid until reversed or set aside, and cannot be attacked collaterally.

Where a court has jurisdiction of the subject-matter of and parties to an action, all orders and judgments therein rendered are valid until set aside or reversed, and cannot be collaterally attacked, pp. 249, 250.

Reaffirmed as to first paragraph in Sullivan v. Robbins, 109 Iowa 237, 80 N. W. 340, holding that an order of the board of supervisors altering or changing a road so that it is less than the statutory width (Code of 1897) is irregular, but cannot be collaterally attacked.

Reaffirmed and explained as to second paragraph in Pursley v. Hayes, 22 Iowa 34, 92 Am. Dec. 350, holding that when a court has jurisdiction, it has a right to decide every question that arises in a case; and, whether its decisions be correct or not, its judgment, until reversed, is regarded as binding on every other court.

Cited with approval as to first paragraph in Mallory v. Montgomery County, 48 Iowa 690, the court holding that a contract by the board of supervisors for the construction of a bridge less than the statutory width is erroneous, not void, and that the contractor may recover thereon.

Cited in Sarver v. C. B. & Q. R. R. Co., 104 Iowa 62, 73 N. W. 499, not in point.

Distinguished in State v. Wagner, 45 Iowa 485, holding that under the Code of 1873, the county auditor has no authority to establish a highway of a less width than sixty-six feet, and his order or judgment establishing one of a less width is *void*, and is subject to collateral attack.

Cross references. See further in this connection, annotations under *Davenport Mut. Sav. Fund & Loan Ass'n v. Schmidt* (15 Iowa 213), ante. p. 326; *State v. Berry* (12 Iowa 58), ante. p. 10.

ELMORE v. HIGGINS, 20 IOWA 250

1. Contracts—Contemporaneous Indorsement on Note Secured by Mortgage—Effect—Construction.—An indorsement on the back of a note secured by mortgage, made contemporaneously with the execution of the note and mortgage, is to be construed as part of the transaction, and the mortgage, note and indorsement are to be construed together, and effect be given to every expression in the three, if it can be done fairly. In such case the court will consider all the facts and circumstances surrounding the transaction, in order to arrive at and give effect to the object and intention of the parties, p. 254.

Reaffirmed in State v. Stratton, 27 Iowa 423, 1 Am. Rep. 282; *Newberry v. Rutter*, 38 Iowa 181, 182; *Heaton v. Ainley*, 108 Iowa 113, 78 N. W. 798; *Allison v. Hollembeak*, 138 Iowa 481, 114 N. W. 1060.

2. Mortgage—Contemporaneous Indorsement on Note Secured by—When Limits Right of Mortgagee to Mortgage Alone.—When, at the time of the execution of a note and mortgage, there is, by agreement of the parties, indorsed on the note that "the within mentioned note is confined to a certain mortgage of even date given by &c.," such indorsement limits the right of the mortgagee or other holder of the note to the mortgage alone; and no personal judgment can be rendered against the makers in an action thereon, or to foreclose the mortgage, p. 254.

Reaffirmed, explained and extended in Allison v. Hollembeak, 138 Iowa 481, 114 N. W. 1060, holding that where, at the time of the execution of a negotiable note, it is indorsed thereon, by agreement of the parties, that "this note is secured by purchase money mortgage on * * * and payee herein agrees to look to mortgage security for payment of this note," such indorsement limits the payee, or other holder of the note, to the mortgage; and the rule applies in favor of the maker, and in favor of an indorser thereof.

Cited in Weil v. Churchman, 52 Iowa 256, 3 N. W. 40, the court holding that the relation of debtor and creditor must exist between the two parties to a mortgage before the mortgagee will be entitled to a personal judgment in an action to foreclose: Holding further that a mortgage on land simply acknowledging the receipt of money the instrument is given to secure, with a stipulation therein that it is to be void upon the payment of the sum by the mortgagor, his heirs, etc., at a given time, but not showing further that it is executed for a debt, does not authorize a personal judgment against the mortgagor (or his administrator or estate, in case of his death) in an action of foreclosure.

VAN HORN v. BELLAR, 20 IOWA 255

1. **Arbitration and Award—Judgment on Award by Justice, by Agreement—Jurisdiction of Justice's Court.**—A judgment may be entered in a justice's court upon an award, where the parties agree thereto, either in the submission of the controversy to arbitration or otherwise, and the amount of the award does not exceed the jurisdiction of that court, p. 257.

Reaffirmed and extended in Whitis v. Culver, 25 Iowa 31, 32, 95 Am. Dec. 761, holding further that when the submission to arbitration provides that judgment is to be entered upon the award in a justice's court, such court has the powers in relation thereto, given to other courts in such cases, that is to render judgment upon the award, reject it for any sufficient reason, or recommit it to the arbitrators for rehearing: But that no appeal lies to the district court from the justice's court in such case, and errors of law committed by the justice in such a case must be corrected by writ of error.

STATE v. NETTLEBUSH, 20 IOWA 257

1. **Homicide—Dying Declarations—Incomplete Narrative, when Competent.**—That the deceased did not give a complete narrative of all that occurred, or might very legitimately be supposed to have occurred at the time he was fatally wounded, is no objection to the competency or sufficiency of his statement as a dying declaration upon the trial of an indictment against one accused of his murder, provided it appears that the deceased fully completed his statement, p. 260.

Cited in State v. Fielding, 135 Iowa 258, 112 N. W. 540, the court holding that a dying declaration consisting of statements general in their nature, is competent, if it tends to prove a collective fact involving the guilt of the person indicted for the murder.

BESSINGER v. DICKERSON, 20 IOWA 260

1. Officers—Justice of the Peace—Liability of Sureties on Bond.—Where an official bond of a public officer is not retrospective in character, the sureties thereon are liable for the misappropriation by their principal of public moneys in his hands at the time of its execution and subsequently thereto, but not for prior misappropriations or delinquencies of such officer.

So, the sureties on the official bond of a justice of the peace are liable in damages for his conversion of notes placed in his hands for collection, where such conversion happens before the execution of a new bond by such officer, p. 261.

Reaffirmed and extended in Morgan v. Long, 29 Iowa 436, holding further that the sureties on the bond of a district court clerk are liable thereon for money received by him in satisfaction of a judgment and deposited in a bank that becomes insolvent: And holding further that in all cases, when a bond is given for the security of the public generally or of particular individuals, that action may be brought thereon by any person intended to be thereby secured.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 3 of Mahaska County v. Ingalls, Ex'r (16 Iowa 81), ante. p. 410.

STATE v. MCCOY, 20 IOWA 262

1. Criminal Law—Trial of Indictment—Witnesses Before Grand Jury—Evidence.—Upon the trial of an indictment the witnesses who were before the grand jury are not confined to their evidence as shown by the minutes returned with the indictment, but may testify to any other competent facts bearing upon the guilt or innocence of the accused, p. 263.

Special cross reference. For cases citing, sustaining, explaining, etc., the text, and others on the question, see annotations under Rule 2 of State v. Bowers (17 Iowa 46), ante. p. 490.

PRESTON v. WINTER, 20 IOWA 264

1. Change of Venue—Motion for in Vacation—Notice of.—A motion for a change of venue made in vacation, cannot be entertained without notice thereof is given to the adverse party, or unless he enters his appearance thereto, p. 265.

Reaffirmed in Loomis v. McKenzie, 31 Iowa 427.

STATE v. PRATT, 20 IOWA 267

1. **Appeal in Criminal Cases—No Assignment of Errors Required—Review on.**—No assignment of errors or joinder therein is necessary under our statute upon appeal to the Supreme Court in a criminal case: And upon such an appeal, although the defendant does not appear, or fails to file the transcript, the state may so do; and it is the duty of the court—under the Code of 1860—to examine the record, and render such judgment as the law demands, disregarding technical errors and defects not affecting the substantial rights of the parties, p. 268.

Reaffirmed and explained in State v. McGlasson, 86 Iowa 46, 52 N. W. 226, holding that where the defendant in a criminal case prosecutes an appeal to the Supreme Court and then fails to file a transcript or to take steps, and the state thereupon files the transcript, the court will—under Sec. 4538 of the Code of 1873—dispose of the case upon its merits, in the absence of a showing by the defendant that he will be prejudiced thereby, or that he desires a continuance and has good grounds therefor.

2. **Larceny—What Constitutes.**—Where a person picks up money which has dropped from the pocket of the owner, and with an unlawful intent converts it to his own use, without the knowledge of the owner, such facts are sufficient to sustain an indictment for the general offense of larceny, pp. 268, 269.

Reaffirmed and qualified in State v. Hayes, 98 Iowa 621, 622, 67 N. W. 674, 60 Am. St. Rep. 219, 37 L. R. A. 116, holding that in order to make one guilty of larceny by converting money or property found by him, the intent to steal must exist at the time it is found, and the finder must know, or have reasonable means of knowing or ascertaining the owner: Hence, holding that one who finds a pocket-book with papers in it identifying the owner, and converts the money therein to his own use, is guilty of larceny.

3. **Trial—Objection to Evidence—How Raised.**—Objection to the introduction of evidence must be raised at the time it is offered to be introduced, and not later by instructions directing the jury not to consider it, p. 269.

Reaffirmed and extended in Becker v. Becker, 45 Iowa 240, holding that it is reversible error for the court to give an instruction excluding evidence from the consideration of the jury which was admitted without objection.

Reaffirmed and extended in Wicks v. Town of De Witt, 54 Iowa 131, 6 N. W. 177, holding further that where the court erroneously refuses to strike out prejudicial and incompetent evidence, a general instruction not directly excluding the evidence from the consideration of the jury, but only impliedly so doing, does not cure the error.

Distinguished and narrowed in State v. Lavin, 80 Iowa 559, 560, 46 N. W. 554, holding that when evidence introduced in chief by one party is only shown to be incompetent by rebuttal testimony of the adverse party and if this latter evidence is true, it is the duty of the court to properly instruct the jury in reference thereto.

And see 147 Iowa 565, 126 N. W. 700.

4. Criminal Law—Evidence—Silence of One Accused of Crime.—The fact that at the time of his arrest a person accused of a crime was charged with its commission and remained silent, is competent evidence upon the trial of an indictment against him therefor: Such evidence is, however, frequently entitled to little weight; but its weight and sufficiency is to be determined by the jury in connection with all the facts and circumstances of the case, p. 269.

Cited with approval in Patterson v. Pratt, 19 Iowa 362, the case turning upon other questions.

Unreported citation, 128 N. W. 966.

5. Criminal Law—Circumstantial Evidence—Degree of Proof Required to Convict—Erroneous Instructions as to—When not Reversible Error.—Where, upon an appeal from a judgment of conviction, it appears that although the state relied upon circumstantial evidence alone to convict, the accused had a full and fair trial and that the verdict was fully warranted by the evidence, the following instruction, although somewhat misleading, is not reversible error, to-wit:—“All evidence is, more or less, circumstantial, the difference being in the degree, and it is sufficient for the purpose when it excludes disbelief, that is, *actual* and not *technical* disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror, while he believes as a man. It is enough that his conscience is clear.” p. 270.

Special cross reference. For cases citing and qualifying the text, and others on the question, see annotations under Rule 4 of State v. Collins (20 Iowa 85), ante. p. 780.

GARLAND v. WHOLEBAU, 20 IOWA 271

1. Action at Law—Appeal—Objections not Raised Below—Review.—Upon an appeal from a judgment in an action at law, questions not raised in the trial court will not be reviewed: And the parties upon the appeal are bound by the issue made and trial thereon below, and cannot claim anything contrary thereto in the Supreme Court.

So, where a party to an action at law does not object to the form of the action, or that it was not well brought, in the trial court, he cannot complain thereof upon appeal, p. 272.

Reaffirmed and explained in Sandusky Machine & Agricultural Works v. Hooks, 83 Iowa 308, 49 N. W. 62, holding that upon an appeal to the Supreme Court in an action at law, the defendant cannot change his defense or base it upon a different hypothesis than that

tried below: That upon such an appeal, the same case must be reviewed that was made and tried below.

Reaffirmed and explained in Ross v. Hawkeye Ins. Co., 93 Iowa 225, 61 N. W. 853, 34 L. R. A. 466, holding that in law actions, the Supreme Court will not review questions not raised below.

Reaffirmed and explained in Petty v. Mut. Fire Ins. Co. of Des Moines, 111 Iowa 361, 82 N. W. 767, holding that the question that an action was prematurely brought, cannot be raised for the first time in the Supreme Court.

Reaffirmed and extended in Webster v. Cedar Rapids & St. P. R. Co., 27 Iowa 318, holding further that errors which may be corrected by motion below, will not be reviewed or considered by the Supreme Court, unless a motion for their correction be made before the appeal is prosecuted.

Cross reference. See further on this question, note under Rule 1 of Lavery v. Woodward, Adm'r (16 Iowa 1), ante. p. 391.

ARNOLD v. ARNOLD, 20 IOWA 273

1. Trial—Pleadings—Amendment After Jury Sworn—Failure to Reswear Jury.—When, after a jury is sworn to try the issue in a civil action, an amended pleading [in this case an amended answer] is permitted to be filed, it being proper and in furtherance of justice, the jury need not be resworn; and especially is this true where no motion is made therefor, p. 275.

Reaffirmed and explained in Hinkle v. Davenport, 38 Iowa 360, holding that after the jury is sworn, the name of one of the parties, plaintiff, may be stricken out, and a substituted petition be filed praying for the relief on behalf of the remaining plaintiff, and the trial proceed thereon; but that in such case, if demanded by the defendant, the jury must be resworn.

2. Appeal—Assignment of Errors as to Instructions—Certainty Required in.—An assignment of errors as to instructions given or refused, must specifically point out the error or errors claimed, and designate the instruction or instructions, or part of the trial court's charge where found, or it will be disregarded on appeal, p. 276.

Special cross reference. For cases citing, sustaining, etc., the text, and others on the question, see annotations under Rule 4 of Peck v. Hendershott (14 Iowa 40), ante. p. 201.

STATE v. HASKELL, 20 IOWA 276

1. Public Officers or Agents—Unauthorized Acts or Representations of—Effect.—The unauthorized acts or representations of a public officer or agent whose powers are defined by express statute, do not bind his principal or the public, p. 281.

Reaffirmed in Seddon v. State, 100 Iowa 381, 69 N. W. 672.

Cross reference. See further on this question, annotations and cross references under Rule 1 of *Clark v. City of Des Moines* (19 Iowa 199), ante. p. 715.

BUELI, *v.* BALL, MARSHALL, 20 IOWA 282

1. Municipal Taxation—Agricultural Lands within Original Boundary of City, not Subject to—Remedy of Land Owner.—Lands situated within the original boundaries of a city and which are used for agricultural purposes, are not subject to city taxation; and this question can be raised in an action of replevin against an officer who levies upon personal property in seeking to collect such a tax, pp. 288, 289.

Reaffirmed and explained in *Deiman v. City of Ft. Madison*, 30 Iowa 548-550; *Durant v. Kauffman*, marshal, 34 Iowa 195, holding that lands within a city limits which are used exclusively for agricultural purposes, and receive no benefits from the city, are not subject to city taxation.

Reaffirmed, explained and extended in *Davis v. City of Dubuque*, 20 Iowa 459; *Deeds v. Sanborn*, 22 Iowa 217, holding that land lying within the boundary of a city but which is used for agricultural, mining or other such purposes, and which is not benefited and enhanced in value by municipal improvements and does not receive the advantages and protection of the city, is not subject to taxation therein: And injunction lies in favor of such land owner to restrain the collection of such taxes.

Reaffirmed and qualified in *O'Hare v. City of Dubuque*, 22 Iowa 145, 146, holding that where agricultural or mining land is situated in a city limits on a street thereof, and receives the advantages and benefits of the city, and is thereby enhanced in value, it is subject to city taxation.

Reaffirmed and qualified in *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 295, 66 N. W. 179, 35 L. R. A. 63, holding that in order for land within a city boundary to be exempt from taxation for municipal purposes, it must be used in good faith for agricultural purposes: Holding further that a taxation or assessment for pavements is not "taxation for city purposes" within the meaning of the exemption.

Cited in *Grant v. City of Davenport*, 36 Iowa 405, holding that the provision of Chap. 78, Acts of 1872, in reference to the power of cities to levy a special tax for the construction and maintaining water-works, that it shall not "be levied upon the taxable property of said city which lies wholly without the limits of the benefit or protection of such works," is constitutional.

Cited in *Hatch, Holbrook & Co. v. Pottawattamie County*, 43 Iowa 444, not in point.

Cross references. See further on this question, annotations under *Fulton v. City of Davenport* (17 Iowa 404), ante. p. 549; *Mack-*

lot v. City of Davenport (17 Iowa 379), ante. p. 541; Langworthy v. City of Dubuque (13 Iowa 86), ante. p. 121.

2. **Municipal Corporations—Paving and Repairing Streets, what Included in—Liability of Abutting Lots for.**—The word "pave" as used in a city charter authorizing streets to be "paved and repaired" at the expense of the abutting lots, if the owner refuses so to do, upon being so required by the city council for a reasonable time, includes excavation and filling necessary in preparing the surface of a street therefor, and everything else necessary to make a level and convenient surface for horses, carriages, and foot passengers, of any convenient, common or practical material; and it authorizes the city council to require a sidewalk to be so constructed, pp. 290-292.

Reaffirmed in Warren v. Henly, 31 Iowa 35-37, holding that authority to a city to cause its streets and alleys "to be paved, and pavements to be repaired," authorizes their improvement by macadamizing, and the construction of gutters and the putting in of curbstone.

Reaffirmed and qualified in Allen v. City of Davenport, 107 Iowa 100, 101, 77 N. W. 536, holding that a "reasonable amount" of excavating in order to prepare the surface of the street for the finished improvement may be charged as part of the costs of paving.

Cited in Warren v. Henly, 31 Iowa 44, on the constitutionality of a similar charter to that of the text, the court upholding the law.

Distinguished and narrowed in Bucroft v. City of Council Bluffs, 63 Iowa 649, 651, 19 N. W. 808, holding that a city has no authority to assess the cost of grading *preparatory to paving*, and then at some future and uncertain time make another assessment for paving: And that an ordinance requiring grading of a street, when nothing is declared as to *when* the paving is to be done, it being left to the future, is ineffective as against lot owners; and a city is liable on a contract for such grading to a contractor performing the labor thereunder.

Cross reference. See further in this connection, annotations under Rule 2 of B. & M. Riv. R. R. Co. v. Spearman, et al (12 Iowa 112), ante. p. 22.

3. **Statutes—Charters of Cities—Assent of Inhabitants.**—The power of the legislature to pass a charter conferring powers on a city or town does not depend upon the assent of the inhabitants thereof, p. 289.

Cited in Swan v. City of Indianola, 142 Iowa 739, 121 N. W. 551, the court holding that courts will not inquire into the motives of members of the legislature in enacting laws, and this rule also obtains as to members of a city council in enacting ordinances.

WINSLOW, HARRIS & CO. v. TURNER, 20 IOWA 294

1. **Actions in Equity—Appeal—Trial De Novo—When not so Tried—Reversal without Prejudice to New Appeal, when.**—Upon an appeal in a chancery action, or from a decree on an equitable

defense in an action at law, tried below by evidence in writing (according to the first method provided by Secs. 2999 and 3000 of the Code of 1860) where the record fails to show that it contains *all* the evidence adduced below, a trial *de novo* upon the facts will not be had.

But where objection to a trial *de novo* on an appeal in a chancery action (on the ground that the pleadings and evidence are not part of the record), is made on the hearing, after appellant's argument is filed and in the absence of his counsel, the Supreme Court should affirm without prejudice to the right of appellant to prosecute another appeal, p. 295.

Reaffirmed as to first paragraph in State v. Orwig, 27 Iowa 256.

Cited in Davis & Atlee v. Card, 33 Iowa 593 (abstract), being a case wherein a bill of exceptions in an action at law was certified as containing "the substance of the evidence," and the court holding it insufficient to warrant a review of any question involving a question of evidence.

Cross references. See further on this question, annotations under Rule 4 of Van Orman v. Spafford, Clarke & Co. (16 Iowa 186), ante. p. 425; Rule 2 of Cook v. Woodbury County (13 Iowa 21), ante. p. 111, and cross references found under these cases.

WINTON v. SHERMAN, 20 IOWA 295

1. Vendor and Purchaser—Action at Law for Purchase Price of Land Under Contract to Convey—Tender of Deed—Action in Equity.—In an action at law to recover the purchase price of land under a contract to convey when the consideration was paid, but where no conveyance has been made, it is a sufficient defense to aver and show that the deed has not been delivered or tendered.

But a delivery or tender of a deed is not required before bringing suit in equity for the purchase money of land and foreclosure of the lien therefor, or other equitable relief; as a court of equity may grant relief under such conditions as is proper, and as will protect all parties, pp. 296, 297.

Reaffirmed as to second paragraph in Wightman v. Spofford, 56 Iowa 149, 8 N. W. 682; *Stevenson v. Polk*, 71 Iowa 285, 32 N. W. 344.

Reaffirmed and explained as to second paragraph in Montgomery v. Gibbs, 40 Iowa 657, holding that in an action in equity to foreclose a lien on land for its purchase price under a contract to convey, the chancellor may order the execution of a deed, upon the purchase money being paid.

Reaffirmed and extended in Nelson v. Wilson, 75 Iowa 713, 38 N. W. 135, holding further that a person cannot sue *at law* upon a contract containing mutual and dependent conditions, without first offering to perform the obligations thereby imposed upon him; but that

the rule is to the contrary in equity, as there relief may be granted upon such conditions as will protect all rights.

Reaffirmed and varied as to first paragraph in Courtright v. Deeds, 37 Iowa 508, holding that in an action at law for the purchase price of certificates of stock in a corporation *to be paid for when they were delivered*, it is a sufficient defense to aver and prove that no tender thereof was made by plaintiff before he commenced his action.

Distinguished as to first paragraph in Rollins v. Thornburg, 22 Iowa 390, holding that where plaintiff (vendor) was to execute a deed and place it in the hands of a third person to be delivered to defendant (vendee) upon the payment of the purchase money note for the land, that the plaintiff (vendor), having complied with his contract, might sue at law without further tendering deed.

Cross references. See further on this question, annotations under *Berryhill v. Byington* (10 Iowa 223); *School Dist., etc. v. Rogers* (8 Iowa 316), Vol. I, pp. 673 and 514, respectively.

LOGAN & COOK v. TAYLOR, 20 IOWA 297

1. **Mechanic's or Materialman's Lien—Vendor's Lien Superior to—Assignee of Contract of Sale of Land Paying Purchase Price—Effect.**—A vendor's lien on land for his purchase money is superior to the lien of a mechanic or materialman for labor performed or materials furnished in the erection of a building on the land under a contract made with the purchaser subsequent to his purchase: And where such a purchaser of land under a contract for a conveyance upon payment of the purchase price at a certain time, transfers his contract to another, who in good faith and without notice of the mechanic's or materialman's lien, pays the purchase price to the vendor and receives a deed from him, the assignee or transferee is entitled to be subrogated to the rights of the vendor, to the extent of the purchase money paid, and to a superior lien on the land therefor to that of the other lien, p. 300.

Distinguished and narrowed in Janes v. Osborne, 108 Iowa 413, 414, 79 N. W. 144, holding that where the vendor of land agrees that the cost of a building erected by the purchaser on land sold by him, take precedence of his claim for the purchase price, the mechanic or materialman erecting or furnishing material to be used in the erection thereof, has the superior lien.

TRAEER v. LYTLE, 20 IOWA 301

1. **Practice—Action on Wrong Side of Docket, or by Motion Instead of Bill in Equity—How Question Raised.**—The question whether a proceeding should have been at law or equity, or by a bill in equity instead of by motion, cannot, under the Code of 1860, be raised by demurrer, but must be raised by motion, p. 302.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Rule 1 of Conyngham v. Smith (16 Iowa 471), ante. p. 458.

Cross reference. See further on this question, annotations under Rules 1-3 of Byers v. Rodabaugh (17 Iowa 53), ante. p. 491.

STATE v. MAY, 20 IOWA 305

1. Intoxicating Liquor, Property—Traffic in Prohibited—Larceny of.—Although intoxicating liquor as an article of traffic is prohibited by statute and is liable when kept as such to be seized and destroyed, still, until this is done, it is in its essential nature property, and may be the subject of larceny, pp. 308, 309.

Cited in Sommer v. Cate, 22 Iowa 590 (dissenting opinion), the majority court holding that in an action to recover the value of intoxicating liquor prohibited by statute and is liable when kept as such to be seized and has been illegally deprived of them, but that he owned or possessed them with lawful intent.—Applying this rule in an action against a common carrier for loss of intoxicating liquors in his hands for carriage and delivery.

Cited in Monty v. Arneson, 25 Iowa 387 (cited in dissenting opinion), the court holding that the owner of intoxicating liquors in his possession for unlawful sale may recover possession thereof of a sheriff or other person, wrongfully obtaining their possession.

Cited in Turner v. Hitchcock, 20 Iowa 322, on the right to abate premises as a nuisance where intoxicating liquor is unlawfully sold, or kept with intention to be unlawfully sold.

TURNER v. HITCHCOCK, 20 IOWA 310

1. Torts—Joint Tort Feasors may be Sued Jointly or Separately.—Joint tort feasors may be sued jointly or separately by the person injured thereby, pp. 316, 317.

Reaffirmed in McDonald v. Nugen, 118 Iowa 513, 92 N. W. 675, 96 Am. St. Rep. 407.

2. Torts—Joint Tort Feasors—Separate Actions and Judgments—One Satisfaction.—Although a person injured by a tort may sue each joint tort feasor, and obtain separate verdicts and judgments, still, he may have only one satisfaction, p. 317.

Reaffirmed in McDonald v. Nugen, 118 Iowa 513, 92 N. W. 675, 96 Am. St. Rep. 407.

Reaffirmed and explained in Putney v. O'Brien, 53 Iowa 121, 4 N. W. 894, holding that where a person injured by a joint tort, recovers separate judgments therefor against the joint tort feasors, he may elect which judgment he will enforce or receive satisfaction from; but that the enforcement or the satisfaction of one, discharges the other judgments for such tort.

Reaffirmed and explained in Cushing v. Hederman, 117 Iowa 639, 91 N. W. 941, 94 Am. St. Rep. 320, holding that recovery of judgment against one of two joint wrong doers, so long as such judgment remains unsatisfied, is not a defense to a separate action against the other.

Unreported citation, 72 N. W. 554.

Cross reference. See Rule 3 hereof in this connection.

3. Torts—Joint Tort Feasors—Release of or Satisfaction as to One.—Effect.—The release of one joint tort feasor, or the acceptance of satisfaction as to him, operates to release and discharge all the others, pp. 317, 318.

Reaffirmed in Metz v. Soule, Kretsinger & Co., 40 Iowa 238; Bell v. Perry & Townsend, 43 Iowa 372; Long v. Long, 57 Iowa 500, 10 N. W. 876; Atwood v. Brown, 72 Iowa 726, 32 N. W. 108; Miller v. Beck & Co., 108 Iowa 578, 79 N. W. 344, holding that an accord and satisfaction by one of several joint wrong-doers, is a satisfaction as to and discharges all.

Reaffirmed and explained in Snyder, Adm'x v. Mut. Telephone Co., 135 Iowa 226, 227, 112 N. W. 780, 14 L. R. A. (New Series) 321, holding that to constitute a settlement with some one joint tort feasor such as to release another who is sought to be held liable for the same tort, it must be shown that the settlement was of the entire claim against the one with whom the settlement is made; but when it appears that there has been such settlement, supported by a valuable consideration, the entire right of action against any other person who might have been proceeded against for the same injury, is extinguished.

Reaffirmed and qualified in Miller v. Beck & Co., and Edmundson, 108 Iowa 582, 79 N. W. 346; Ryan v. Becker, 136 Iowa 276, 277, 111 N. W. 428, 14 L. R. A. (New Series) 329, holding that a release may be given, although no part of the damage has been paid, and a technical release to one who is not a joint wrong-doer will not necessarily release another who may have had some connection with the wrong: But a satisfaction, however, by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action.

Reaffirmed and qualified in Ryan v. Becker, 136 Iowa 276, 277, 111 N. W. 428, 14 L. R. A. (New Series) 329, holding, however, that parol evidence is competent to show that a paper purporting to be a release, was to one not in fact liable; that the money, the consideration of the purported release, was not in fact received as compensation, and that there was no satisfaction or attempt at satisfaction of a judgment liability.

Cited in Bonney v. Bonney, 29 Iowa 451, an action by an administrator *de bonis non* against the first administrator and the sureties on his bond, claiming a portion of the amount reported by the latter in his hands on his final settlement, and a sum over and above this

amount because of errors and mistakes in the final settlement; the court holding that if two or more are jointly or jointly and severally bound on a promissory note or other liability, and the obligee releases to one of them, all are discharged; but although the word "release" be used, even under seal, yet if the parties, the instrument being considered as a whole and in connection with all the circumstances of the case and the relations of the parties, cannot be reasonably supposed to have intended a release, it will be construed only as an agreement not to charge the person or party to whom the apparent release is given, and not as a technical release.

Cross reference. See other rules hereof, in this connection.

4. Torts—Joint Tort Feasors—Contribution.—No contribution is allowed among joint tort feasors who *knowingly* commit a wrong, p. 318.

Reaffirmed and extended in Ferguson v. Firmenich Mfg. Co., 77 Iowa 580, 42 N. W. 450, 14 Am. St. Rep. 319, holding further that a joint tort feisor cannot sue another joint tort feisor for damages resulting to the former by reason of the wrong done: But that if one joint tort feisor has suffered damage by reason of independent wrongful acts of another joint tort feisor and to which he did not contribute, he may recover from the latter therefor.

5. Joint Torts—Damages not Apportionable.—In case of a joint tort, the damages are not apportionable between the wrong-doers, but the act of one is the act of all, p. 318.

Reaffirmed and extended in Reizenstein v. Clark, 104 Iowa 292, 73 N. W. 590, holding further that in an action for a joint assault, if one of the participants was actuated by malice, this condition of mind will be attributed to the other, and each held liable for all damages, both actual and exemplary, resulting therefrom.

MCAUNICH v. MISSISSIPPI & MISSOURI R. R. Co., 20 IOWA 338

1. Railroads—Section 7 of Chap. 169 of Acts of 1862, Constitutional.—Section 7 of Chap. 169, of the Acts of 1862, prescribing the liability of a railroad company for neglect of its agents, or by mismanagement of its engineers or other employes in the operation of its trains, is constitutional, pp. 341, 342.

Reaffirmed in Bucklew v. Cent. Iowa Ry. Co., 64 Iowa 611, 21 N. W. 107; *Pierce v. Cent. Iowa Ry. Co.*, 73 Iowa 142, 34 N. W. 784, holding, also, that Sec. 1307 of the Code of 1873—law of the text—is not contrary to either the state or United States constitutions.

Reaffirmed in Mumford v. Ch. R. I. & Pac. Ry. Co., 128 Iowa 692, 693, 104 N. W. 1138, upholding constitutionality of Sec. 2071 of the Code of 1897, which is the law of the text.

Cited with approval in Akesson v. C. B. & Q. Ry. Co., 106 Iowa 56, 75 N. W. 676, the case deciding on Rule 2 hereof.

2. Railroads—Negligence—Injury to or Death of Employee—Action for—Fellow Servant.—Under Sec. 7, Chap. 169, Acts of 1862, an action is maintainable against a railroad company for injury to, or the death of an employe occasioned by the negligence, or mismanagement of a fellow servant, an engineer or other agent or employee in the operation or its railroad, or of its trains, pp. 341, 343, 344.

Reaffirmed and explained in Deppe v. Ch. R. I. & P. R. R. Co., 36 Iowa 54-56; Frandsen v. C. R. I. & P. R. R. Co., 36 Iowa 376; Schroeder v. C. R. I. & P. R. R. Co., 41 Iowa 347; Foley v. C. R. I. & P. Ry. Co., 64 Iowa 646, 649, 650, 21 N. W. 125; Pierce v. Cent. Iowa Ry. Co., 73 Iowa 141, 142, 34 N. W. 784; Akesson v. Ch. B. & Q. Ry. Co., 106 Iowa 56, 75 N. W. 676, holding that the rule applies to all persons employed by a railroad company whose employment is connected with the operation of trains, and which exposes them to the hazards and perils thereon attendant, but not to persons otherwise employed by such company, the common law doctrine of fellow servant applying to this latter class.

Cross reference. See further on this question, annotations under Sullivan v. M. & M. R. R. Co. (11 Iowa 421), Vol. I, p. 837.

3. Negligence—Contributory.—No one can recover for an injury of which his own negligence was in whole or in part the proximate cause.

This rule applies against an administrator who is suing for the death of his decedent so caused in whole or in part by his own negligence, p. 346.

Reaffirmed in Rietveld, Adm'r v. Wabash R. R. Co., 129 Iowa 253, 105 N. W. 517.

Reaffirmed and explained in Sherman v. Western Stage Co., 24 Iowa 557-561; Spencer v. Ill. Cent. R. R. Co., 29 Iowa 58; Reynolds v. Hindman, 32 Iowa 148, 149, holding that where in an action of damages for negligence, it appears that there was mutual negligence, and negligence of each party was the proximate cause of the injury, the plaintiff cannot recover: That no one can recover for an injury which his own negligence was in whole or in part the proximate cause.—And this rule applies in an action by a personal representative for damages for the death of his decedent.

Reaffirmed and explained in Bonning, Adm'x v. C. R. I. & P. Ry. Co., 89 Iowa 81, 56 N. W. 279, holding that recovery cannot be had for an injury to or death of a party, when he, in any way or in any degree, directly contributed thereto; and that an instruction in such case allowing recovery, unless plaintiff, or his decedent in case of an action by an administrator, "substantially," or "materially" contributed, etc., is reversible error.

Reaffirmed and extended in Artz v. C. R. I. & P. R. R. Co., 38 Iowa 296, 297; Jerolman v. Ch. G. W. Ry. Co., 108 Iowa 179, 78 N. W. 856, holding further that one cannot recover for an injury, to

which his own want of ordinary care or prudence in any way directly contributed.

Reaffirmed and extended in Smith v. C. R. I. & P. R. R. Co., 55 Iowa 36, 7 N. W. 399, holding that where a plaintiff's own testimony shows that he was guilty of a total want of ordinary or reasonable care, and that his own conduct directly contributed to the injury for which he sues, the trial court should direct a verdict for the defendant.

Cross reference. See further on this question, annotations under Rule 5 of Donaldson, et al, Adm'rs v. M. & M. R. R. Co. (18 Iowa 280), ante. p. 627.

4. Constitutional Law—Title to Act—What Included in—Statutes Prescribing Duties Include Penalties.—An Act entitled "An Act in relation to the duties of railroad companies" sufficiently includes the liabilities for failure to perform them, under Art. 3, Sec. 29 of the Constitution.

All provisions of an Act in relation to the subject expressed in the title, or which are properly connected therewith, are constitutional under the above constitutional provision, pp. 341, 342.

Reaffirmed as to second paragraph in Rex Lumber Co. v. Reed, 107 Iowa 114, 77 N. W. 573, the court, however, holding that Chap. 35, Acts of the Twenty-fourth General Assembly (Session of 1892) purporting to amend Sec. 853 of the Code of 1873, is unconstitutional, because the subject is not expressed in the title.

Reaffirmed as to second paragraph in Beebe v. Tolertson & Stetson Co., 117 Iowa 596, 91 N. W. 906, upholding the constitutionality of Chap. 36, Acts of Twenty-fourth General Assembly, in relation to the protection of Union Labels, trade marks, etc.

Reaffirmed as to second paragraph in State v. Edmunds, 127 Iowa 339, 340, 101 N. W. 434, upholding constitutionality of Sec. 2581 of the Code of 1897, prescribing a penalty against an itinerant physician who practices medicine without a license.

Reaffirmed as to second paragraph in Boggs, Sup't. v. School Township of Cass, 128 Iowa 17, 102 N. W. 797, upholding constitutionality of Chap. 84, Acts of Twenty-seventh General Assembly, amending Chap. 12, Title 13, of the Code of 1897.

(Note.—See further, Iowa Sav. & Loan Ass'n v. Selby, 111 Iowa 402, 82 N. W. 968; Guaranty Sav. & L. Ass'n v. Ascherman, 108 Iowa 150, 78 N. W. 823; State v. Forkner, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206; State v. Aulman, 76 Iowa 627, 41 N. W. 379; Martin v. Blattner, 68 Iowa 286, 25 N. W. 131; State v. Shroeder, 51 Iowa 197, 1 N. W. 431; Williamson v. City of Keokuk, 44 Iowa 88, some important cases in this connection, not citing the text.—Ed.)

5. Constitutional Law—Uniform Operation of Statutes—Requirement as to.—A statute meets the constitutional requirement as to being of a general nature and uniform operation, if it applies to

all persons coming within the relations, circumstances and situation dealt with by it; and its validity or constitutionality is not affected by the fact that it grants powers, privileges or immunities to, or imposes duties and liabilities upon, or otherwise regulates a particular class of persons, real or legal, when it applies to all of the class, pp. 342-344.

Reaffirmed in Iowa R. R. Land Co. v. Soper, 39 Iowa 116; Bucklew v. Cent. Iowa Ry. Co., 64 Iowa 611, 21 N. W. 107; Leicht v. City of Burlington, 73 Iowa 31, 34 N. W. 495; Iowa Eclectic Medical College Ass'n v. Schrader, et al, board of medical examiners, 87 Iowa 668, 55 N. W. 27, 20 L. R. A. 355; City of Ottumwa v. Zekind, 95 Iowa 625, 64 N. W. 647, 58 Am. St. Rep. 447, 29 L. R. A. 734; Primghar State Bank v. Rerick, treasurer, 96 Iowa 240, 64 N. W. 802; Scottish Union Nat'l Ins. Co. v. Herriott, State Treasurer, 109 Iowa 612, 80 N. W. 665, 77 Am. St. Rep. 548; Morris v. Stout, sheriff, 110 Iowa 660, 78 N. W. 843, 50 L. R. A. 97; Burk v. Putnam, 113 Iowa 234, 84 N. W. 1054, 86 Am. St. Rep. 372; McGuire v. Ch. B. & Q. R. R. Co., 131 Iowa 351, 108 N. W. 906.

Reaffirmed and explained in Gano v. Minn. & St. L. R. R. Co., 114 Iowa 726, 87 N. W. 719, 89 Am. St. Rep. 393, 55 L. R. A. 263; City of Des Moines v. Bolton, 128 Iowa 112, 102 N. W. 1046, holding that the legislature may, where the public interests, or the administration of justice requires, or in the exercise of the police power of the state, classify persons, corporations, or associations, and impose duties or liabilities upon them, or grant them privileges not conferred upon the entire people: Provided, that all such laws shall not be arbitrary, or unreasonable.

Reaffirmed, explained and narrowed in State v. City of Des Moines, 96 Iowa 526, 527, 65 N. W. 820, 59 Am. St. Rep. 381, 31 L. R. A. 186, holding that if the law is made to operate upon a particular condition as to persons or property, and is operative whenever and wherever the same conditions exist, affixing the same consequences, then it is a general law in its operation, even though it only operates on one of the conditions or classes specified: That general legislation looks not alone to the present, but to the future; and a law which at a given time operates as to only one corporation, company, or society of a particular kind, because there is then no other, but is so framed as to operate on the same conditions, when and where they arise in the state, is a general law, and of uniform operation: But, as applied to cities, if the Act is such that it is operative, because of its terms, as to only a single city, it is local legislation: Hence, holding that the legislature cannot pass a special law annexing territory to a city; and that where the law for such purpose, is made applicable to cities of a certain population, there being only one such city in the state, it is a special law and unconstitutional.—But see Eckerson v. City of Des Moines, 137 Iowa 469-471, 115 N. W. 184, (reaffirming the text and partially overruling this last case) holding that an act concerning

municipal corporations is not local or special if it brings all municipalities similarly conditioned, then existing and thereafter to come into existence, into a class, and in respect of each of which the law is to have uniform operation; nor is such an act subject to such an objection which confers upon a class of municipalities theretofore existing, or brought into existence by the act itself, powers to be exclusively enjoyed: Hence, upholding the constitutionality of Chap. 48, Acts of Thirty-second General Assembly, entitled "An act to provide for the government of certain cities, and the adoption thereof by special election. Additional to Title 5 of the Code (of 1897)," and granting certain powers to "any city of the first class, or with special charter, now or hereafter having a population of twenty-five thousand or over."

Reaffirmed and varied in City of Fairfield v. Shallenberger, 135 Iowa 620, 113 N. W. 461, holding that an ordinance requiring "all traveling physicians" to pay a license of fifty dollars per year to practice medicine in a city, is of uniform operation to all of a class, is not unreasonable and is constitutional.

Cited in Deppe v. Ch. R. I. & P. R. R. Co., 36 Iowa 54, 55; Frandsen v. C. R. I. & P. R. R. Co., 36 Iowa 376; Foley v. Ch. R. I. & P. Ry. Co., 64 Iowa 646, 21 N. W. 127; Akeson v. C. B. & Q. Ry. Co., 106 Iowa 56, 75 N. W. 676, turning upon other questions intimately connected with and upon other rules hereof.

6. Appeal—Verdict Against Evidence—Reversal for.—Where, upon appeal to the Supreme Court, it appears from the record that there was no conflict of evidence upon the trial below, and there is no reasonable doubt but that the verdict was against the evidence, the judgment will be reversed; but it is with reluctance and caution that the Supreme Court interferes with a jury's verdict on this ground, and if there be a conflict of evidence upon the whole case, or a reasonable doubt in its favor, the verdict and judgment will not be disturbed. p. 346.

Reaffirmed and explained in Lester & Bro. v. Sallack, 31 Iowa 478, holding that where a verdict is clearly against the evidence, and, if permitted to stand would work injustice to the appellant, a judgment based thereon will be reversed upon appeal.

Reaffirmed and explained in Sadler v. Bean, 38 Iowa 685 (Abstract), holding that a judgment will be reversed because the verdict was against the evidence, only when the fact clearly appears from the record, and to allow the verdict and judgment to stand would work manifest injustice.

Reaffirmed and extended in Starker & Co. v. Luse & Mahana, 33 Iowa 596 (abstract), holding further that in order to justify reversal because the verdict was against the evidence, it must be clearly and manifestly unsustained by the evidence: And that this rule applies to the finding of the trial court in a law action wherein a jury is waived.

(Note.—There are very many cases, sustaining, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 764.

NEY *v.* DUBUQUE & SIOUX CITY R. R. Co., 20 IOWA 347

1. **Railroads—"Employee" Defined.**—An "employee" of a railroad company is a conductor, agent, superintendent, those engaged in operating the road and the like; but a contractor, or a person building or constructing the road-bed or laying down the ties and rails under an independent contract is not such an employee, p. 352.

Special cross reference. For cases citing the text, and others in this connection, see annotations under *McAunich v. M. & M. R. R. Co.* (20 Iowa 338), ante. p. 823.

HENRY COUNTY *v.* BRADSHAW, 20 IOWA 355

1. **Deeds and Mortgages—Presumption as to Date of Delivery.**—Where there was in fact a delivery of a deed, or mortgage, but the proof in an action involving the question fails to show the time of its delivery, it will be presumed to have been done at the time of its execution; and in such case the date of the acknowledgment of the instrument is to be taken as the true date of its execution, pp. 361, 362.

Reaffirmed in *Nichols v. Sadler*, 99 Iowa 431, 68 N. W. 709.

Reaffirmed and extended in *Crabtree v. Crabtree*, 136 Iowa 432, 15 A. & E. Ann. Cas. 149, 113 N. W. 924, holding further that where a deed bears one date and the certificate of its acknowledgment bears a later date, the latter, in the absence of other evidence, is presumed to indicate the time of delivery.

STATE *v.* KENNEDY, 20 IOWA 372

1. **Witnesses—Personal Attendance of Convict as—Right of Accused to Demand—Discretion of Trial Court—Reversal, when.**—An accused person has no absolute right under the Constitution or under Sec. 4019 of the Code of 1860, to demand the personal attendance as a witness in his behalf, of a convict in the penitentiary or county prison, under an order of court; but this question is addressed to the sound judicial discretion of the trial court, and his ruling thereon will not be reversed, except in case of manifest abuse, p. 373.

Cited with approval in *State v. Wiltsey*, 103 Iowa 56, 72 N. W. 415, holding the same rule applicable where a witness for an accused person is absent by reason of sickness, provided that the case shall be continued, under Sec. 2751 of the Code of 1873, if the state does not admit the affidavit of accused as the evidence of the absent witness.

KOONS v. GROOVES, 20 IOWA 373

1. **Vendor and Purchaser—Notice to Purchaser of One Lien on Land Bought, no Notice of Others.**—Because a purchaser of land is notified, either actually or constructively, of one lien on the land, he is not thereby charged with notice of other liens thereon of which he is not so notified; and as to these latter he is a *bona fide* purchaser, p. 375.

Distinguished in Wallace v. Bartle, 21 Iowa 350, 89 Am. Dec. 584, holding that where a creditor purchases the equitable title of his debtor in land, and under an execution, he buys at his peril, and takes that title and no more.

CURTIS v. O'BRIEN AND SEARS, 20 IOWA 376, 89 AM. DEC. 543

1. **Contracts and Notes—Waiver of Exemption Laws.**—A person contracting a debt cannot by a contemporaneous and simple waiver of the benefit of the exemption laws, entitle or enable the creditor to levy an execution therefor upon exempt property over the objection of the debtor.

So a waiver of the exemption laws in a note, does not allow an execution upon a judgment therefor to be levied upon property of the debtor which is exempt from execution by the general laws of the state, and over the debtor's objection, pp. 376, 377.

Reaffirmed and extended in Rutt v. Howell, 50 Iowa 537, holding further that homestead, or other exemptions, cannot be waived by a stipulation in a confession of judgment.

Reaffirmed and varied in Maguire v. Kennedy, 91 Iowa 273, 59 N. W. 37, holding that the fact that an adult non-resident heir has signed a note waiving the benefit of "all homesteads and exemptions," does not effect his interest in the homestead of his deceased parents.

Cited in Maguire v. Ch. B. & Q. R. R. Co., 131 Iowa 371, 108 N. W. 913, not in point.

Distinguished in Nycum v. McAllister, 33 Iowa 376, holding—as does the present case in argument that a debtor may mortgage his homestead, or other exempt land to secure a debt; and that such a mortgage will be enforced.

Distinguished in Fejavary v. Broesch, 52 Iowa 89, 90, 2 N. W. 964, holding that a mortgage of exempt personal property is valid: And that a stipulation in a lease that the rent shall be a lien on all crops raised on the premises, and on all stock kept thereon belonging to the lessee "whether exempt from execution or not," is, in effect, a mortgage, and is valid as such.

Distinguished in Sioux Valley State Bank v. Honnold, 85 Iowa 357, 52 N. W. 245, holding that a provision in a lease which creates a lien upon exempt personal property will be treated as a mortgage and upheld; and that a stipulation in a lease that all damages to the lessor

by reason of the lessee's breach of its conditions or failure to comply therewith, shall be the same as rent due, and the lessor shall have a lien on "all crops growing or grown on, and on any and all property of the lessee taken upon or used on the leased premises during the continuance of the lease, *whether exempt or not*," is a mortgage of all such exempt property for such damages, and is valid.

Distinguished in Grover v. Younie, 110 Iowa 447 (cited in dissenting opinion), 81 N. W. 685, 686, holding—as does the present case in argument—that a debtor may mortgage exempt property to secure a debt: Holding further that where a debtor mortgages one of three teams of horses to secure a debt, the instrument is valid, although his wife does not concur in and sign it, as provided by Sec. 2906 of the Code of 1897; as such transaction is simply an agreement of the debtor not to claim the mortgaged property as the exempt team, and does not amount to a mortgage of exempt personal property.

Distinguished in Dowling & Allgood v. Wood, 125 Iowa 245, 246, 101 N. W. 114, 106 Am.St. Rep. 301, holding that where a debtor induces his creditor to garnish his earnings exempt to him under Sec. 4011 of the Code of 1897, under an agreement with the creditor that he will not interpose the exemption in the garnishment proceeding he (the debtor) is thereby estopped from such interposition therein: That such an agreement amounts to an assignment of such earnings by the debtor to his creditor, and is not required to be concurred in and signed by the former's wife, under Sec. 2906 of the Code of 1897.

HEROLD v. MEYERS, 20 IOWA 378

1. Fences—Breachy Cattle, Damage Done by—Action for, When Allowed.—If cattle feeding upon the commons break and enter an inclosure, the owner of the close can only maintain an action of damages for the trespass by showing, if the fact is controverted, that his fence was such as required by statute: But if such cattle break and enter through or over a good and sufficient legal fence into one field, and thence through or over an insufficient legal fence into another field of the same land owner, the owner of the closes may recover of the owner of the cattle for all damages thereby done, p. 380.

Reaffirmed in Frazier v. Nortinus, 34 Iowa 83.

Reaffirmed and extended in De Mers v. Rohan, 126 Iowa 492, 102 N. W. 415, holding further that where there has been no partition of an unlawful division fence, and the cattle of one land owner enters into the field of the other adjoining owner through or over it, and thence into another field inclosed by a lawful fence, the owner of the cattle is liable for the damages caused by them in and to the lawfully inclosed field.

Distinguished in Broadwell v. Wilcox, 22 Iowa 569, 92 Am. Dec. 404, holding that where plaintiff sues defendant for damages for willfully allowing his sheep to run in an inclosure, and alleges that both

parties' lands were inclosed in common, the question of the lawfulness of the fence is not involved, the action being for the tort, or willful act of the defendant.

Cross references. See further on this question, annotations under Rule 2 of *Wagner v. Bissell* (3 Iowa 396); *Heath v. Coltenback* (5 Iowa 490); *Alger v. M. & M. R. R. Co.* (10 Iowa 268), Vol. I, pp. 274, 374, and 680, respectively.

CAMPBELL v. LONG, 20 IOWA 382

1. Limitation of Actions—Action to Recover Real Estate—When Minor Barred.—An action for the recovery of real estate must (under Sec. 2740 of the Code of 1860, and Sec. 1659 of the Code of 1851) be brought within ten years after the cause of action accrues, or it is barred.

But under Sec. 2747 of the Code of 1860, where the ten years has run, or a part of a year remains to run at the time an infant attains majority, he has one year after his arrival at majority in which to commence action to recover such real estate, pp. 385, 386.

Reaffirmed in *Colvin v. McCune*, 39 Iowa 507.

Reaffirmed and explained as to first paragraph in *Burdick v. Heivly*, 23 Iowa 514, holding that the declarations and acts of a party in possession of land, are admissible on the question of adverse possession, and to show the extent of the interest claimed by him; that a claim of ownership, and use and occupation of land for the statutory period of ten years, bars the owner thereof.

Distinguished in *Cowin v. Toole*, 31 Iowa 517, 518, holding that an action by the owner to recover real estate against a person who obtained title thereto by fraud, may be instituted within five years after the discovery of the fraud.

Unreported citation, 128 N. W. 398.

Cross references. See further on this question, annotations under *Johnson v. Hopkins* (19 Iowa 49), ante. p. 690; *Jones v. Hockman* (12 Iowa 101), ante. p. 19.

2. Limitation of Actions—Ignorance of Rights Under Statute—Effect.—Ignorance of one's rights under the statute of limitation does not, in the absence of fraud, prevent or suspend its operation or effect, p. 387.

Distinguished in *Carrier v. Ch. R. I. & P. Ry. Co.*, 79 Iowa 88, 44 N. W. 206, 6 L. R. A. 799, holding that where the right of action is fraudulently concealed from the person entitled thereto by the person against whom it lies, that the statute of limitation commences to run thereon from the time of the discovery of the fraud and the right of action by the person entitled to maintain it.

Cited in 149 Iowa 235, not yet published.

3. Statutes—Construction of—Exceptions not to be Judicially Ingrafted.—Courts are not at liberty to ingraft exceptions upon a statute, which the legislature did not deem necessary to enact, p. 387.

Reaffirmed in Shorick v. Bruce, 21 Iowa 307.

Distinguished in Carrier v. Ch. R. I. & P. Ry. Co., 79 Iowa 88, 44 N. W. 206, 6 L. R. A. 799, holding that where the right of action is fraudulently concealed from the person entitled thereto by the person against whom it lies, that the statute of limitation commences to run thereon from the time of the discovery of the fraud and the right of action by the person entitled to maintain it.

CITY OF FAIRFIELD v. RATCLIFF, 20 IOWA 396

1. Cities and Towns—Improvement of Sidewalks—Special Assessments Against Lots—When not Allowed.—The power of a city or town to assess the cost of sidewalks against lots abutting on the street or alley improved thereby, exists only when expressly conferred by charter, or is absolutely necessary to carry into effect the provisions thereof: Hence, a charter of a city which grants it power "to regulate and improve all streets, alleys, sidewalks, drains, sewers, etc," does not, without more, confer such power, p. 398.

Special cross reference. For cases citing, sustaining, etc., the text, and others in this connection, see annotations under B. & M. Riv. R. R. Co. v. Spearman (12 Iowa 112), ante. p. 22.

Cross reference. See further in this connection, annotations under Rule 2 of Buell v. Ball, marshal (20 Iowa 282), ante. p. 817.

HUGHES v. CORY, ADM'R, 20 IOWA 399

1 Recorded Chattel Mortgage—Retention of Possession of Property by Mortgagor, not Fraud—Evidence of Fraud—Use and Sale of Property by Mortgagor.—Mere retention of possession of mortgaged personal property by the mortgagor, where the mortgage is recorded does not—under Secs. 2201, 2203 and 2217 of the Code of 1860—render the instrument *per se* fraudulent, nor is such fact a badge of fraud: But it may be a circumstance along with others, to prove actual fraud.

A reservation in a recorded chattel mortgage of a stock of goods, whereby the mortgagor has the right to sell before default, in the usual course of retail trade, he agreeing to keep up the stock to its value at the time of the execution of the instrument, or he to retain in his hands the proceeds of the sales, except that he is to apply thirty-three per cent. thereof on the mortgage notes, does not constitute the instrument fraudulent, but may be evidence of actual fraud, along with other circumstances, pp. 403, 404, 408, 409.

Reaffirmed and extended as to second paragraph in Jaffray & Co. v. Greenbaum, 64 Iowa 496, 20 N. W. 777, holding further that the

fact that a mortgage on a stock of goods provides that the mortgagor (merchant) shall have the right to retain possession of the property, and carry on his business in the usual retail way for one year, paying the cost and expense of running the business, and keeping the stock up to about what it was at the execution of the instrument, but does not provide for the payment of any of the proceeds or profits arising from such sales, to the mortgagee, does not render such instrument fraudulent.

Reaffirmed and extended as to second paragraph in Meyer v. Evans, 66 Iowa 185, 23 N. W. 389, holding further that the fact that the mortgagor retains possession of the mortgaged property, and reserves the right to sell it in the ordinary course of trade, and apply the proceeds to his own use, does not render the mortgage fraudulent in law.

Distinguished in Silverman, Lindauer & Co. v. Kuhn, 53 Iowa 453, 5 N. W. 537, the court holding that unsecured creditors of a mortgage of personal property have no right to take the mortgaged property out of the hands of an agent of the mortgagee who is selling it under a power in the instrument to the mortgagee therefor, without alleging and proving that the agent and mortgagee are insolvent, and that the surplus of the proceeds after payment of the mortgaged debt will be endangered or lost.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on the question, see annotations under *Torbert v. Hayden, sheriff* (11 Iowa 435), Vol. I, p. 839.

Cross reference. See further on this question, annotations under, *Adler & Bro. v. Claflin, Mellin & Co.* (17 Iowa 89), ante. p. 499.

2. Fraudulent Conveyances—Mortgage Overstating Debt or when Debt does not Exist.—A mortgage is fraudulent in fact when the debt it purports to secure does not exist, or when the debt secured is therein knowingly and purposely overstated, to deceive and keep off other creditors, p. 405.

Reaffirmed, explained and narrowed in Wood v. Scott, 55 Iowa 116, 7 N. W. 466, holding that a mortgage given by a debtor for more than is due a particular creditor is not *conclusively* fraudulent as to the other creditors of the mortgagor; that such fact is only a *badge of fraud*: That fraud will not be imputed, but must be proven; and both parties to the alleged fraudulent conveyance must concur in the fraudulent intent to hinder, delay or defraud the creditors of the grantor.

STATE v. REID, 20 IOWA 413

1. Indictment—Failure to Allege Venue—Verdict—Effect—Motion in Arrest of Judgment.—The failure of an indictment to allege the venue or county wherein the offense was committed, is not-

under the Code of 1860—a ground for a motion in arrest of judgment upon a verdict of conviction, p. 417.

Reaffirmed in State v. Green, 20 Iowa 425.

2. **Burglary—Indictment for—Breaking Dwelling from Outside—Allegations.**—Where an indictment charges burglary, under Sec. 4232 of the Code of 1860, by breaking and entering a dwelling house *from the outside*, in the night time, with intent to commit the crime of murder, etc., it is not required to allege that some person was within the dwelling at the time the offense was committed, p. 418.

Reaffirmed in State v. Green, 20 Iowa 425.

3. **Burglary—Breaking, what Constitutes.**—Proof that accused pushed open a closed door of a dwelling house, is a sufficient *breaking* upon the trial of an indictment for burglary, pp. 421, 422.

Reaffirmed in State v. Green, 20 Iowa 425.

Reaffirmed and extended in State v. Conners, 95 Iowa 486, 64 N. W. 295, holding further that the opening of a closed screen door to a dwelling house is a sufficient breaking to constitute burglary.

4. **Burglary—Evidence—Possession by Accused of Stolen Property—Effect—Instruction as to.**—Upon the trial of an indictment for burglary where it is proved that goods were stolen in connection with the burglary, and that the accused had them in possession immediately after the burglary, an instruction that “where goods are stolen in connection with a burglary, possession of such goods immediately after the burglary, without other evidence of guilt, would not be *prima facie* evidence that the possessor was guilty of the burglary: but if you (the jury) find there is other evidence of guilty conduct in the case, besides the possession of the goods, such as that he (accused) had burglar’s tools in his possession, or was acting with others, aiding and abetting them in committing the burglary, then such possession is *prima facie* evidence in connection with such further testimony, and is sufficient to convict,” is not error, pp. 420, 421.

Partially overruled in State v. Golden, 49 Iowa 49, 50, holding that upon the trial of an indictment for burglary with intent to commit larceny, where the State introduces independent proof of the breaking and larceny, this, together with proof of the possession of the stolen goods by accused immediately after the burglary, is sufficient to authorize a conviction, unless the accused satisfactorily explains the lawfulness of his possession thereof.

*Partially overruled in State v. Brady, 121 Iowa 566, 97 N. W. 63, 12 L. R. A. (New Series) 199, holding that the possession of property which has been stolen from a building which had been broken and entered is not alone *prima facie* evidence that the one having it is guilty of burglary: But where it is shown that the burglary and the stealing of the goods were a part of the same transaction, then the*

finding of the stolen goods within a short time thereafter is evidence of the possessor's guilt of both offenses.

(Note.—See further, *State v. Ryan*, 113 Iowa 539, 85 N. W. 812; *State v. Marshall*, 105 Iowa 38, 74 N. W. 763; *State v. Ham*, 98 Iowa 61, 66 N. W. 1045; *State v. Wohe*, 87 Iowa 33, 53 N. W. 1088; *State v. Jennings*, 79 Iowa 513, 44 N. W. 799; *State v. Frahm*, 73 Iowa 355, 35 N. W. 451; *State v. Rivers*, 68 Iowa 611, 27 N. W. 781; *State v. Tilton*, 63 Iowa 117, 18 N. W. 716; *State v. Shaffer*, 59 Iowa 290, 13 N. W. 306; *State v. Kelly*, 57 Iowa 644, 11 N. W. 635, some important cases on this subject not citing the text.—Ed.)

5. Trial—Continuance in Criminal Case—Discretion of Trial Court—Abuse—Reversal.—An application for a continuance in a criminal prosecution, made subsequent to the term at which the indictment was returned, and for other grounds than the absence of witnesses is (under the Code of 1860) peculiarly within the discretion of the trial court; and he will rule thereon so that substantial justice may be done; but his ruling thereon will not be ground for reversal, unless the record upon appeal clearly shows an abuse of such discretion, resulting in injustice, p. 419.

Reaffirmed in *State v. Wilson*, 124 Iowa 265, 99 N. W. 1061, under the Code of 1897.

Reaffirmed and extended in *State v. Pell*, 140 Iowa 663, 119 N. W. 157, holding further that under Sec. 3663 of the Code of 1897, the whole matter of granting a continuance rests largely in the discretion of the trial court, and it should only be granted for a cause which satisfies the court that substantial justice will be more nearly obtained thereby: And the Supreme Court will not interfere with the action of the trial court in this respect, unless it clearly appears that such discretion has been abused, and an injustice has been done.

(Note.—There are many other cases sustaining the text and its annotations, but not citing the text.—Ed.)

Cross reference. See further on this question, annotations and note under *State v. Cox* (10 Iowa 351), Vol. I, p. 703.

6. Grand Jury—Talesman Part of—Reconvening Grand Jury After their Discharge.—Where talesmen are summoned to fill the panel of the grand jury, they are part of the regular jury for the entire term.

The district court has power to reconvene the grand jury after they are finally discharged, but during the term for which they were summoned, to consider, pass upon and return indictments for offenses committed immediately after their discharge; and in such case talesmen composing part of the jury must be reconvened as the rest, p. 423.

Reaffirmed in *State v. Green*, 20 Iowa 425.

Cited in *State v. Miller*, and *Kremling*, 53 Iowa 86, 4 N. W. 840, the case involving when a grand jury may be summoned by a new

precept, and when the panel may be filled by talesmen—under the Code of 1873.

Cited in State v. Adams, 20 Iowa 487, not in point.

7. Grand Jury—Objection to—When to be Made—Waiver.—

Objection to a grand jury because of irregularity or illegality in its selection, summoning, organization or impaneling, must be made by an accused person before pleading to an indictment against him returned by it, p. 424.

Reaffirmed and extended in State v. Belvel, 89 Iowa 409, 412-414, 56 N. W. 548, 27 L. R. A. 846, upholding constitutionality—under amendment to Constitution adopted in 1884—of Chap. 42, Acts of Twenty-first General Assembly, requiring grand juries to be composed of five members in counties of a certain population, and seven members in counties of a certain population, and allowing an indictment to be returned which is concurred in by four of the jury of five, or five of the jury of seven.—The court holding that when a grand jury is composed of five when it should be composed of seven, or *vice versa*, that an indictment returned by it is good, when the accused does not object thereto on such ground before pleading to it.

Reaffirmed and extended in State v. Kouhns, 103 Iowa 726, 73 N. W. 355, holding further that the fact that two members of the grand jury which returns an indictment are residents of the same township, contrary to Sec. 241 of the Code of 1873, and laws of 1886, p. 44, is waived by accused pleading to the indictment, without raising the question or attacking the indictment therefor.

(Note.—In this last case it did not appear that the accused was ignorant of the irregularity at the time he pleaded to the indictment.—Ed.)

Reaffirmed and extended in State v. Brown, 128 Iowa 26, 27, 102 N. W. 801, holding further that the fact that a defendant who was held to answer the charge of the grand jury was not granted an opportunity to challenge the grand jury which returned the indictment against him, cannot be raised by a motion in arrest of judgment: That such question must be raised by a plea in abatement or by motion to set aside, or to quash the indictment.

Cited in State v. Kaufman, 51 Iowa 579, 2 N. W. 275, 33 Am. Rep. 148, the case holding that an accused person may waive a statute or even a constitutional provision in his favor; and that he may, therefore, agree to a trial by a jury of less than twelve.—But see State v. Carman, 63 Iowa 133, 18 N. W. 692, 50 Am. Rep. 741 (dissenting opinion citing the text), the majority court holding that an accused person cannot—under Sec. 4350 of the Code of 1873—waive his constitutional right to a jury trial, and consent to being tried by the court.

Cross reference. See further on this question, annotations and note under State v. Howard and Cress (10 Iowa 101), Vol. I, p. 650.

STATE v. GREEN, 20 IOWA 424

1. **Petit Jury—Special Venire—How Names Selected or Called.**—If a special venire is summoned to fill up a petit jury for a term, the names of the jurors so summoned must—under the Code of 1860—be placed upon ballots and drawn by lot from the box as required for the selection of the regular *venire* of petit jurors for a term.

But where a special *venire* of petit jurors is summoned for the trial of a particular indictment, they may be called in the order and as they appear upon the list of the sheriff who summoned them, and are not required—under such Code—to be placed upon ballots and drawn by lot from the box, although, perhaps, this latter course is the better practice, pp. 425, 426.

Reaffirmed as to second paragraph in State v. Ryan, 70 Iowa 155, 156, 30 N. W. 398, under the Code of 1873.

SEEBERGER v. MILLER, 20 IOWA 428

1. **Appeal from Justice's to District Court—Time Case Stands for Trial—Docket Fee, when to be Paid.**—Where an appeal is taken from a justice's to the district court, and ten days does not intervene between the taking thereof and the commencement of the next term of the district court, neither party is required—under Secs. 3926, 3929 and 3930 of the Code of 1860—to go to trial at that term of the district court, nor is the appellant required thereunder to pay the docket fee until the term following such next term of the district court, to which time the cause will be continued, in the absence of an agreement of the parties, p. 429.

Cited in Durand v. N. W. L. & S. Co., 112 Iowa 298, 83 N. W. 972, the case turning upon another point.

PATTERSON v. CLARK AND TINSON, 20 IOWA 429

1. **Trespass—Defense—Title in Another than Plaintiff—Pleadings and Proof.**—In an action of trespass the defendant cannot prove that the right to the possession of or title to the property involved, was in another than the plaintiff, unless he (defendant) affirmatively sets up such fact as a defense: It cannot be proved under a general denial, pp. 430, 431.

Special cross reference. For cases citing the text, and others on the question, see annotations under *Dyson v. Ream* (9 Iowa 51), Vol. I, p. 542.

CHILDS v. MCCHESENEY, 20 IOWA 431, 89 AM. DEC. 545

1. **District Court—Orders and Judgments—Signing by Judge not Necessary to Validity.**—The orders, judgments or other record entries of the district court, are valid and effective and proceedings may be had thereunder, although such record is not signed by the

judge of such court. Secs. 2664, 2665 of the Code of 1860, in reference to the signing of the record by the district court judge, are directory, not mandatory, pp. 434, 435.

Reaffirmed in Hamilton v. Barton, 20 Iowa 508.

Reaffirmed in Traer Bros. v. Whitman, 56 Iowa 445, 9 N. W. 340; Dullard v. Phelan, 83 Iowa 474, 50 N. W. 205, holding—under the Code of 1873—that a judgment of the district court is valid, although the record thereof is not signed by the judge.

And see 147 Iowa 624, 125 N. W. 230.

Cross reference. See further on this question, annotations under Rule 2 of Vanfleet v. Phillips (11 Iowa 558), Vol. I, p. 860.

2. Husband and Wife—Wife's Liability on Covenants in Deed to Her Own Land—Estoppel of Wife.—Whether a married woman would, under the Code of 1860, be liable in damages for a breach of covenant in a deed to her own land, or whether by such a conveyance with a covenant of warranty she would be estopped to set up an after acquired estate against her grantee, are questions not decided herein, p. 436.

Cited in Richmond v. Tibbles and Husband, 26 Iowa 477, 478, the court holding that a wife is liable, under the Code of 1860, for breach of covenants contained in a deed to her own land.

3. Husband and Wife—Wife Joining in Deed of Husband—After Acquired Title of Wife.—Where a wife joins in a deed of her husband to land, the covenants therein do not bind her personally, or estop her from subsequently acquiring title thereto under an execution sale, and adverse to the grantees in the husband's deed, p. 437.

Reaffirmed and explained in O'Neil v. Vandenburg, 25 Iowa 107, holding that the subsequent purchase of land by a wife with her separate money does not enure to a grantee of a prior deed of her husband thereto, although she had joined in the prior instrument for the purpose of relinquishing her dower.

Reaffirmed and explained in Thompson v. Merrill, 58 Iowa 424, 425, 10 N. W. 798, holding that under Sec. 1937 of the Code of 1873, a wife who joins in a conveyance of her husband to his land, or in a conveyance of land owned by her husband jointly with a third person, is not bound by the covenants therein, unless her liability be expressly stated on the face of the instrument: And she is not estopped by such an instrument in which her liability is not expressly stated, from setting up against the purchaser, an incumbrance [in this case a lease] on the land existent at the time the conveyance was executed.

4. Practice—Objection to Evidence—Ground of to be Stated—Review on Appeal.—Where it is sought, upon an appeal to the Supreme Court, to reverse a judgment for error of the trial court in the admission of evidence, the record must—under Sec. 3107 of the

Code of 1860—show the grounds on which it was objected to below; and no other grounds will be considered upon the appeal, p. 438.

Reaffirmed in Lake v. Miller, 31 Iowa 597 (abstract).

Reaffirmed, explained and qualified in Clark v. Connor, 28 Iowa 314, holding that where the party appealing to the Supreme Court has made a general objection to the admission of evidence, which was overruled, and the record fails to show the ground of such objection, the trial court's ruling thereon will not be reviewed; but where the successful party makes a general objection to the admission of evidence below, which is sustained by the trial court, then if the unsuccessful party shows upon appeal that there is no legal or possible ground upon which the trial court's ruling thereon can be sustained, he is entitled to a reversal of the judgment therefor.

5. Executions—Levy Before Return Day—Sale After—Procedure.—Where, before the return day of an execution, the sheriff makes a levy thereunder, he may sell the property levied on thereunder after the return day: This should be done by the officer under a writ of *venditioni exponas*, but the fact that the sale is made under an *alias* execution will not render it invalid, p. 438.

Cited with approval in Hill v. Wolfe, 28 Iowa 584, not in point, but upon analogy.

Special cross reference. For further cases citing, sustaining, explaining and extending the text, and others on the question, see annotations under Stein v. Chambless & Banford (18 Iowa 474), ante. p. 669.

STATE v. BECKER, 20 IOWA 438

(Later Appeal, 22 Iowa 597.)

1. Intoxicating Liquors — Nuisance — Indictment — Duplicity, what is not.—An indictment for nuisance under Sec. 1564 of the Code of 1860, which charges that "the defendant kept intoxicating liquors in a certain building for sale, *and* did then and there sell them," does not charge two distinct offenses, and is not bad for duplicity, p. 439.

Reaffirmed and explained in State v. Baughman, 20 Iowa 499, 500; State v. Layton, 25 Iowa 195, 196; State v. Niers, 87 Iowa 724, 726, 54 N. W. 1077, holding that an indictment for nuisance under Secs. 1564 of the Code of 1860, or 1543 of the Code of 1873, which charges that the defendant kept and maintained a building for the purpose and with the intent of selling intoxicating liquors contrary to law, *and* kept such liquors therein with such purpose and intent, *and* sold them unlawfully therein, is not bad for duplicity: That such an indictment may aver any or all of the acts set out in the statute as constituting the nuisance as done by defendant, they being alleged in the conjunctive where more than one is charged or set out therein.

2. Intoxicating Liquors—Keeping Building for Unlawful Sale of—Nuisance—Indictment—Allegations—Description of Building.—In an indictment under Sec. 1564 of the Code of 1860, for nuisance in keeping a building for the purpose of the unlawful sale of intoxicating liquors, the description of or the specific location of the building need not be set out or averred, p. 439.

Reaffirmed in State v. Shaw, 35 Iowa 578.

Cross reference. See further on this question, annotations and cross reference under Rule 1 of State v. Schilling (14 Iowa 455), ante. p. 267.

3. Intoxicating Liquors—Indictment for Nuisance—Exceptions to Statute a Defense.—Upon the trial of an indictment for nuisance in keeping a building for the purpose of selling, and keeping with intent to sell, intoxicating liquors contrary to law, the State need not prove that the liquors were not kept by accused as allowed by law—Code of 1860: Any such a fact is a defense to be proved by accused, p. 439.

Reaffirmed in State v. Guisenhouse, 20 Iowa 231.

Cross reference. See further on this question, annotations under Rule 2 of State v. Guisenhouse (20 Iowa 227), ante. p. 806.

PORTER v. CITY OF DUBUQUE, 20 IOWA 440

(Cases arising out of this controversy, 22 Iowa 391; 86 Iowa 175, 53 N. W. 108.)

1. Vendor and Purchaser—Vendor's Lien When not Given by Contract of Sale—Equitable Nature of—When Allowed.—A vendor's lien for purchase money on land sold where no lien is given by the contract of sale is a simple equity created and administered by the court of chancery: It is not measured by fixed rules, depends upon no particular fact or facts, and each case rests upon its own peculiar circumstances, and the lien is granted or denied according to its rightfulness and the equity in each case.

Such a lien is not based upon contract, nor is it considered as an equitable mortgage, or a trust in favor of the vendor, p. 442.

Reaffirmed and explained in Allen v. Loring, 34 Iowa 501, holding that a vendor's lien is never allowed to take priority of equities or rights of third persons which have attached or have been acquired in ignorance thereof: Hence, holding that a vendor's lien is inferior to the rights of an attachment on the land sold, levied by a creditor of the purchaser without notice of the vendor's lien.

Reaffirmed and explained in Cutler v. Ammon, 65 Iowa 282, 283, 21 N. W. 605, holding that a judgment lien of a creditor of the purchaser of land is superior to a vendor's lien on the land, where such creditor obtains such judgment without either actual or constructive notice of the lien of the vendor.—And this is the rule as to all liens acquired on the land without such notice.—But see Devin v. Eagles-

ton, 79 Iowa 276, 44 N. W. 547, distinguishing the text and this last case, and holding that where a vendor sells and conveys land, the purchaser paying part of the purchase price, and executing notes for the balance thereof and agreeing, as part of the consideration, to execute a mortgage on the land to the vendor, to secure them (the notes), but afterwards failing and refusing so to do, that the vendor has a lien on the land sold, for the unpaid price, as against the purchaser and a judgment creditor of the latter for a debt created without knowledge of the purchaser's title and before the recording of his deed, and as against the assignee of such purchaser: Holding further that such vendor's lien extends to taxes agreed to be paid by the purchaser and paid by the vendor.

Reaffirmed and narrowed in Erickson v. Smith, 79 Iowa 377, 378, 44 N. W. 682, holding that where a vendor, by contract, settlement or otherwise, blends the amount of the unpaid purchase price of land with other amounts or considerations, so that the exact amount of the purchase price of the land cannot be ascertained, he thereby loses his vendor's lien.

Partially overruled in Johnson v. McGrew, 42 Iowa 560, 561; Jordan v. Wimer, 45 Iowa 66, 67, 69, (citing in dissenting opinion, 70) holding that under Secs. 3671, 3672 of the Code of 1860, a vendor has a lien on the land sold for the unpaid purchase price, as against the purchaser and the rights of others who take *with notice* thereof, although the contract of sale does not expressly grant such lien, or even though a conveyance to such land may have been executed; and such lien may be foreclosed by the vendor as against such parties, as in case of the foreclosure of a mortgage of land: But the vendor's lien is inferior to the rights of innocent third persons, acquired without notice thereof—the last case holding that Sec. 1940 of the Code of 1873, does not apply to contracts entered into before its enactment.

Overruled in State Bank of Iowa Falls v. Brown, 142 Iowa 195, 196, 119 N. W. 83, holding that—under the Codes of 1873 and 1897—a vendor has an implied lien on land sold for the purchase money, and that the lien passes to an assignee of the purchase money notes as an incident of the debt; and that the rule obtains whether the title has passed or not.

Cross reference. See further in this connection, annotations, note and cross reference under Rule 2 of Rakestraw v. Hamilton (14 Iowa 147), ante. p. 219.

2. Municipal Corporations—Report of Committee—Evidence—Statements by Party in Interest, to Committee.—Where a committee is appointed by a city council to adjust a claim against the city, and the committee reports its action to the council in writing and signed by its members, but not by the person making the claim, in an action thereafter on such claim, the statements of the claimant (plain-

tiff) to the committee as to how he would settle the claim, are competent against him, p. 444.

Distinguished in Dunbar v. Stickler, 45 Iowa 386, 387, holding that in the absence of fraud, accident or mistake, a condition expressed in a deed cannot be enlarged or varied by parol evidence.

DELVEE v. BOARDMAN, 20 IOWA 446

1. Seduction—Action for—What Constitutes Seduction.—In an action by an unmarried female for damages for her seduction under Sec. 2790 of the Code of 1860, proof of illicit sexual intercourse between plaintiff and defendant is not alone sufficient to sustain the plaintiff's case; but she must further prove that her consent thereto was obtained by flattery, promises or other artifices used by the defendant, p. 448.

Reaffirmed and explained in Hawn v. Baughart, 76 Iowa 685, 39 N. W. 252, 14 Am. St. Rep. 261, holding that if, in an action for seduction, the proof conduces to show that the means made use of by the defendant were calculated to overcome the will of a person of the years and experience of the prosecutrix, and were intended to create in her mind an affection for him and had this effect, whereby she consented to sexual intercourse with him, such facts are sufficient to constitute an "artifice," and to sustain plaintiff's case.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 3 of Smith v. Milburn (17 Iowa 30), ante. p. 485.

2. Seduction—Action for—Evidence—Sufficiency of Corroboration of Prosecutrix.—If, upon the trial of an action for seduction by an unmarried female, the plaintiff gives her testimony in a clear, candid and straightforward manner, and is furthermore corroborated by independent facts and circumstances testified to by other witnesses, it is sufficient to sustain a verdict in her favor, although there may be an unimpeached witness whose testimony contradicts hers in all material points, p. 449.

Cited in State v. Crawford, 34 Iowa 40, a case wherein there was no sufficient corroboration of the testimony of the plaintiff in an action for seduction, connecting the defendant with the commission thereof, the court reversing a judgment in her favor for this and other causes.

3. Trial—Instructions—Province of Jury—Evidence and Credibility of Witnesses.—It is the province of the jury to judge of the credibility of witnesses and the weight of evidence under the legal rules given by the court; and an instruction which takes from them the right to weigh the entire evidence in the case is erroneous, pp. 448, 449.

Reaffirmed and explained in Madden v. Sylor Coal Co., 133 Iowa 707, 111 N. W. 60, holding that it is never the province of the court to say to the jury what evidence shall or shall not be given weight; and it is always dangerous for a trial court to indicate to the jury, by instruction or otherwise, his own conclusion as to where the weight of the testimony lies: That the credibility of witnesses and the weight and sufficiency of the evidence, are matters for the determination of the jury under the law as given them by the court.

Cited in Kesselring v. Hummer, 130 Iowa 151, 106 N. W. 503, the case turning upon other questions.

HAM v. MILLER, 20 IOWA 450

1. **Municipal Corporations—Powers to be Expressly Granted—Power to Sell and Convey for Taxes—When not Conferred.—**

Power to a city or town to sell and convey real estate for non-payment of taxes must be expressly granted, and will not be inferred.

So where a city charter [in this case the charter of 1857-58 of the City of Dubuque] grants power to "provide for the assessment of all taxable property" and "to collect taxes," it does not authorize the city to sell and convey real estate for non-payment of taxes, by tax sale and deed, pp. 452, 453.

Reaffirmed and explained in McNamara v. Estes, 22 Iowa 254, holding that the power of a municipal corporation to levy and collect taxes, particularly special assessments, must be clearly conferred; and such an act will receive a strict construction.

Reaffirmed and extended in McInerny v. Reed, 23 Iowa 413, 414, holding further that a power to a city to "levy and collect" a special tax for the opening, paving, or improving of streets, the tax being made a lien upon abutting lots, authorizes the city to collect such special taxes by actions in equity to enforce the liens: Holding, however, that such rights of action are not assignable by the city: And holding, also, that a sale by the city of real estate for such taxes without judicial proceedings or the action in equity, is void.

Reaffirmed and extended in Merriam v. Moody's Ex'rs., 25 Iowa 170-175, holding that a municipal corporation has only the powers expressly granted, those necessarily implied or incident to powers expressly granted, and those absolutely essential and indispensable to the declared objects and purposes of the corporation; and that any fair doubt as to the existence of such a corporate power is to be resolved against it and against the corporation: Holding further that the power to "levy and collect a special tax on lots, for curbing, macadamizing, etc., in front thereof," to be "enforced and collected as may be provided by ordinance," does not authorize the city to pass an ordinance providing for a sale and conveyance of such lots without an action to enforce the taxes; and such sale or sales and deeds made thereunder is or are void.

Reaffirmed and extended in City of Dubuque v. Harrison, 34 Iowa 165, 166, holding further that where a city is granted the power to "levy and collect taxes," but the charter or act granting the power is silent as to the mode of collection, the city may provide that it be done by judicial proceedings.

Reaffirmed and varied as to first paragraph in Logan & Sons v. Pyne, 43 Iowa 525, 22 Am. Rep. 261, holding that a city can exercise only granted powers, or those necessarily implied as incident to those expressly granted, or those which are indispensable to the object and purpose for which it is created; and these powers will be pursued strictly, and all doubt as to the extent thereof must be resolved in favor of the public and against the city.—The case involving a different question from that of the text.

Cited with approval in Parker v. Sexton & Sons, 29 Iowa 425, the case turning on other questions.

Cited in Augustine v. Jennings, 42 Iowa 201, the case involving and construing Chap. 3, Acts of Twelfth General Assembly, which Act grants power to cities and towns with special charters to sell both real and personal property for delinquent taxes, general or special, and execute tax deeds, etc.

Cross references. See further as intimately connected herewith, annotations under Rule 2 of City of Burlington v. Kellar (18 Iowa 59), ante. p. 585; Rule 1 of Clark, Dodge & Co. v. City of Davenport (14 Iowa 494), ante. p. 272.

DAVIS v. CITY OF DUBUQUE, 20 IOWA 458

I. Municipal Corporations—Agricultural Lands Exempt from Taxation.—Lands used exclusively for agricultural purposes, and receiving no city benefits are not subject to either general or special taxation for city purposes, although within the extended boundary thereof, p. 459.

Special cross reference. For cases citing, explaining and qualifying the text, and many others on the question, see annotations and note under Langworthy v. City of Dubuque (13 Iowa 86), ante. p. 121.

Cross reference. See further on this question, annotations and cross references under Rule 1 of Buell v. Ball, marshal (20 Iowa 282), ante. p. 817.

WHITNEY v. HACKNEY, 20 IOWA 460

I. Costs—When Portion of may be Taxed Against Successful Party.—When costs are incurred by an unsuccessful party by reason of an issue made by the successful one and abandoned by the latter thereafter, the trial court may—under Sec. 3465 of the Code of 1860.—make such disposition of the costs as in his sound discretion seems right; and may so require the successful party to pay any part or all of such costs. This rule applies where an unsuccessful party sum-

mons witnesses to sustain his side of an issue joined by the successful one, but which the latter thereafter abandons and refuses to go to trial upon, p. 461.

Reaffirmed and extended in Hatch v. Judd, 29 Iowa 98, holding that a successful party is not entitled, as a matter of course and of law, to full costs under Sec. 3449 of the Code of 1860; but that if there be equitable circumstances, such as a plaintiff, or successful party failing in part of his demand, the costs being unnecessarily large by the act or acts of the plaintiff or successful party, or the like, the trial court may, within a sound discretion, apportion the costs as to him seems right.

Cited in McGuire v. Montrass, 102 Iowa 22, 70 N. W. 744, the court holding that in an action for a tort, where the plaintiff recovers damages, the defendant cannot—under Sec. 2934 of the Code of 1873—require him to pay any of the costs for witness fees to support a plea in mitigation, although such proof reduced the verdict to nominal damages; nor can the defendant in such case who is successful under an issue on one of two counts, require the successful plaintiff—under such section—to pay any part of the costs of witnesses used by the defendant in defense of both counts.

PORTER v. MCKINZIE, 20 IOWA 462

I. Limitation of Actions—Cause of Action on Contract Proved Just by Defendant's Evidence, not within Statute—Sufficiency of Proof for.—In order to avoid the statute of limitation in an action on a contract, as provided by Sec. 2742 of the Code of 1860, it must appear affirmatively from the evidence of the defendant *alone*, that the cause of action still justly subsists, p. 464.

Reaffirmed in Robey & Robey v. Knowlton, 23 Iowa 545, 546; Stewart v. McMillan, 34 Iowa 457.

Cross reference. See further in this connection, annotations under Rule 1 of Hunt v. Coe and Wells (15 Iowa 197), ante. p. 325.

MORRISON v. OVERTON, 20 IOWA 465

I. Trial—Verdict not Signed by Foreman, Valid.—A verdict otherwise sufficient, and returned into court and received as required by law, is valid and effective although not signed by the foreman of the jury. Sec. 3073 of the Code of 1860, requiring a verdict to be signed by the foreman of the jury, is directory, not mandatory, and applies to those sealed as well as to those unsealed, pp. 465, 466.

Reaffirmed in McFarland v. City of Muscatine, 98 Iowa 204, 67 N. W. 235, under Sec. 2803 of the Code of 1873, corresponding to the section of the text.

Reaffirmed and varied in Gillespie v. Ashford, 125 Iowa 738-740, 101 N. W. 652, holding that where a jury fills in the amount of the verdict for plaintiff in the space left in the printed form of the verdict

for the plaintiff, and the verdict is returned into court, and judgment is rendered thereon for plaintiff, and the defendant files a motion for a new trial, the fact that the foreman of the jury signed his name below the printed form of the verdict for the defendant on the same sheet of paper with the other form, and just above the word "foreman" thereon, will not affect such verdict.

Cited in Lee & Co. v. Bradway, 25 Iowa 218; Heiser v. Van Dyke, Martin & Co., 27 Iowa 360; Walker v. Dailey, Ottman & Minter, 87 Iowa 383, 54 N. W. 347, not in point, but upon analogous questions.

DAVIDSON v. SMITH, Ex'r, 20 IOWA 466

1. Husband and Wife—Wife Converting Husband's Money—Right of Husband or Assignee Against Her or Her Executor.—Where a wife takes possession of her husband's money and converts it to her own use against his wishes, and refuses to pay it over to him, he or his assignee of the claim may sue her therefor in equity; or, in case of her death, the husband or the assignee of the claim may recover the amount thereof by proper proceedings against her executor or her estate in the county court as provided by statute for the filing, proof and allowance of claims against decedents estates, pp. 468, 469.

Special cross reference. For cases citing the text, and many others on the rights of husband and wife, see annotations under Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

2. Practice—Objection to Evidence—Ground of to be Stated—Review on Appeal.—Where it is sought upon appeal to the Supreme Court, to reverse a judgment for error of the trial court in the admission of evidence, the record must—under Sec. 3107 of the Code of 1860—show the grounds on which it was objected to below; and no other grounds will be considered upon the appeal, p. 469.

Special cross reference. For cases citing, explaining and qualifying the text, and others, see annotations under Rule 4 of Childs v. McChesney (20 Iowa 431), ante. p. 837.

NELSON v. WORRALL, 20 IOWA 469

1. Land—Purchase Price Furnished by one, Title Taken by Another—Resulting Trust—Parol Evidence—Sufficiency of to Establish.—Where it is sought to establish a resulting trust to land by parol evidence that the purchase money was furnished by the person claiming the trust, and the title was taken in the name of the person against whom it is claimed. the proof thereof must be clear and explicit and such as goes directly to prove the facts necessary to create the trust, p. 471.

Reaffirmed, explained and extended in Cunningham v. Cunningham, 125 Iowa 687, 101 N. W. 473, holding that the proof to establish

an implied or resulting trust to land must be clear, satisfactory, explicit and decisive, leaving the existence of no essential element thereof to conjecture or to remote and uncertain inference.

Reaffirmed and varied in Ensminger v. Ensminger, 75 Iowa 90, 39 N. W. 209, 9 Am. St. Rep. 462, holding that evidence to establish that a deed absolute on its face was intended to be a mortgage, or that the real estate described therein belongs in fact to some other person than the grantee, must be clear, satisfactory and conclusive, and not made up of loose and random statements.

Distinguished in Burden v. Sheridan, 36 Iowa 128, 135, 136, 14 Am. Rep. 505, holding that no trust results in favor of a person who has paid no part of the purchase money of land, on account of a breach of a verbal contract in relation thereto; and parol evidence is inadmissible to prove such a contract.

Cross reference. See further on this question, annotations and cross reference under Sunderland v. Sunderland (19 Iowa 325), ante. p. 733.

SPRAY v. SCOTT, 20 IOWA 473

1. **Trial—Instructions—General Exceptions to Those Given—Review of Errors in upon Appeal.**—General exceptions to the instructions when some of them are correct will not—under the Code of 1860—authorize a review of specific errors therein upon appeal to the Supreme Court, p. 473.

Special cross reference. For cases citing, sustaining and explaining the text, and many others on this question, see annotations under Rule 5 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

HIGGINS v. KINNEADY, 20 IOWA 474

1. **Arbitration and Award—Award Delivered to Clerk Unsealed—Effect.**—When an award is delivered *unsealed* by one of the arbitrators to the clerk of the court wherein judgment is to be thereon rendered as provided by the submission to arbitration, the fact that it is unsealed will not affect its validity, where all admitted or established facts show that the parties were not thereby prejudiced, pp. 475, 476.

Cited in McKnight v. McCullough, 21 Iowa 113, the court holding that an agreement to submit a controversy to arbitration will not be set aside because it fails to provide as to *what court* is to render judgment on the award of the arbitrators (as provided by Sec. 3676 of the Code of 1860).

Cited in Corbitt v. Nealy, 29 Iowa 446, the court holding that where, by agreement of parties to an action, the cause is referred to arbitrators, and the court, by order, allows the arbitrators to fix the

time for hearing, they may fix such time to a date more than ten days after the order of reference, and their proceedings will be legal although done after such time, Sec. 3103 of the Code of 1860 not applying in such case; and especially is this the rule where the parties appeared before the arbitrators, made no objection, and were fully heard upon the merits.

SOWDEN & CO. v. CRAIG, 20 IOWA 477

(Later Appeal, 21 IOWA 580.)

1. New Trial—Motion for Filed within Three Days—Amendment After.—Where a motion for a new trial for grounds other than newly discovered evidence is filed within three days after the verdict is rendered, as required by Sec. 3114 of the Code of 1860, it is proper for the court to thereafter, during the term, allow it to be amended, where the amendment is germane to the grounds in the original motion, p. 478.

Reaffirmed, explained and qualified in Dutton, Adm'x v. Seevers, 89 Iowa 305, 306, 56 N. W. 399, holding that—under Sec. 2838 of the Code of 1873, corresponding to Sec. 3114 of the Code of 1860—a party cannot amend his motion for a new trial, made within three days after the rendition of the verdict for grounds other than for newly discovered evidence, after the expiration of the three days and so as to aver matters and grounds not germane to the original motion, but amounting to a new motion: Hence holding that when such original motion is based upon the errors of the court in *giving* instructions, an amendment thereto cannot be filed after the three days seeking a new trial for the trial court *failing to give* certain instructions; and it is reversible error for the trial court to allow such an amendment to be so filed and to grant a new trial thereon.

Reaffirmed and extended in Means Bros. v. Yeager, 96 Iowa 695, 696, 65 N. W. 993, holding that an unsuccessful party may, after a motion for a new trial filed within three days after verdict and on grounds other than newly discovered evidence (as required by Sec. 2838 of the Code of 1873) has been overruled, at any time during the term file his petition, or motion for a new trial for newly discovered evidence, and may thereafter, by leave of court, amend the last petition, or motion, the amendment being germane to the original: Holding further that, although such last proceeding should be by petition, instead of by motion, such question cannot be raised for the first time in the Supreme Court: And that where a party appears and resists such proceeding or motion, he thereby waives notice required to be given to him in relation thereto.

Unreported citation, 80 N. W. 431.

FISHER v. TICE, 20 IOWA 479

1. **Libel and Slander—Pleadings—Answer—Defense—Damages—Mitigation of, what Cannot be Pleadable as.**—The defendant in an action for libel or slander cannot—under Sec. 2929 of the Code of 1860—plead, either as a defense or in mitigation of damages, that the plaintiff has been guilty of a specific crime independent of and not connected with the defamatory words, or of the occasion on which they were published.

In such an action it is the plaintiff's *general character* that is in issue, p. 480.

Reaffirmed in Fountain v. West, 23 Iowa 13, 92 Am. Dec. 405.

Reaffirmed and extended in Marker v. Dunn, 68 Iowa 721, 722, 28 N. W. 39, holding that where in an action for slander or libel, it appears that the defamatory words were published as of the defendant's own knowledge, evidence of rumors or reports or that they were communicated by another to defendant, is inadmissible either as a defense or in mitigation of damages: That in such case particular acts or instances of misconduct of the plaintiff cannot be proved, nor rumors and reports, unless they are so general and prevalent that they have affected the general character.

COTTLE v. COLE & COLE, 20 IOWA 481

1. **Pleadings—Facts not Conclusions to be Stated in.**—Pleadings shall state facts, not legal conclusions, pp. 483, 485.

Reaffirmed and qualified in Thompson v. Cook, 21 Iowa 474, holding that where a pleading states legal conclusions and not facts, the defect must be reached by motion to make specific, and not by demurrer.

Distinguished in Provident Bank Stock Co. v. Schafer, 110 Iowa 442, 81 N. W. 890, holding that an answer which consists of general and specific denials of the allegations of facts of a petition, is sufficient under Subsecs. 2 and 3 of Sec. 3566 of the Code of 1897.

2. **Judgment—Obtaining by False Testimony—Collateral Attack.**—The fact that a judgment was obtained by the false testimony of plaintiff upon a trial, when the defendant was in court, is no defense in an action thereon, p. 484.

Reaffirmed and extended in Parker v. Albee, 86 Iowa 48, 52 N. W. 534, holding further that in an action on a foreign judgment, the fact that a certain paper [in this case a will] material to the issue being tried in the action in which the judgment was rendered, was fraudulently and secretly put in evidence by handing it to the judge at the time of the trial of the first action, both parties being present in court at the time, is no defense to the action thereon.

Reaffirmed and extended in Mahoney v. State Ins. Co., 133 Iowa 576, 578, 579, 110 N. W. 1044, 9 L. R. A. (New Series) 490, holding

further that a judgment cannot be collaterally attacked for false testimony, or for false written evidence, produced upon the trial of the action wherein the judgment was rendered, when both parties are before the court: That a judgment cannot be collaterally attacked for fraud, unless the fraud be such as will render it absolutely void.

Cross reference. See further on this question, annotations under Rule 3 of *Mason v. Messenger & May* (17 Iowa 261), ante. p. 525.

3. Written Instruments—Holder of Legal Title may Sue on—Action by Agent or Trustee—Defenses—Action by Party Beneficially Interested.—The party holding the legal title of a note, or other instrument may sue on it although he be an agent or trustee and liable to account for the proceeds to another; but in this latter case he is open, in such action, to any defense existing against the person beneficially interested.

So, also, a party beneficially interested in any such note, or other written instrument may—under the Code of 1860—sue thereon in his own name, although he has not the legal title thereto, pp. 485, 486.

Reaffirmed as to first paragraph in *Abell Note Brokerage & Bond Co. v. Hurd*, 85 Iowa 560, 52 N. W. 489; *Lehman v. Press*, 106 Iowa 392, 76 N. W. 819.

Reaffirmed in *Searing v. Berry*, 58 Iowa 24, 11 N. W. 709, holding that the holder of the legal title to a judgment, who holds it in trust for the judgment creditor and for the purpose of collecting it, is the real party in interest to maintain an action to enforce its collection.

Reaffirmed in *Goodnow v. Litchfield*, 63 Iowa 279, 19 N. W. 228, holding that under Sec. 2544 of the Code of 1873, a trustee may maintain an action in his own name on a chose in action which he holds in trust.

Reaffirmed and explained in *Cassidy v. Woodward*, 77 Iowa 357, 42 N. W. 320, holding that under Sec. 2544 of the Code of 1873, the party holding the legal title to a cause of action, although he be a mere agent or trustee with no beneficial interest therein, may sue thereon in his own name.

Reaffirmed and extended in *Grimmell, Ex'x v. Warner*, 21 Iowa 13, holding further that a personal representative who is bequeathed certain notes, may sue thereon either individually or as representative.

Reaffirmed and extended in *Swan v. Yapple*, 35 Iowa 250, holding further that it is no defense to an action by a party holding the legal title to the cause of action, to show that another is the party beneficially interested: Nor will the fact that another person is the holder of the legal title constitute a defense in an action by the party holding the beneficial interest.

Reaffirmed and extended in *Trustees of Northwestern College v. Schwagler*, 37 Iowa 579, holding further that the holder of a note payable to the payee or order, if the real party in interest, may main-

tain an action thereon in his own name, without it being indorsed to him.

Reaffirmed and varied in Taylor v. Adair and Goff, 22 Iowa 282, 283, holding that in an action by the payee of a promissory note against the maker thereof, the party who *owns the debt* for which the note was given may—under Secs. 2930-2932 of the Code of 1860—intervene and obtain judgment for the amount thereof *as evidenced* by the note, against the maker and debtor, and thus defeat recovery by the plaintiff, payee.

Special cross reference. For further cases citing, sustaining and extending the text, and many others on the question, see annotations under Rule 2 of Conyngham v. Smith (16 Iowa 471), ante. p. 458.

Cross references. See further in this connection, annotations under Younger v. Martin (18 Iowa 143), ante. p. 598; Farwell v. Tyler (5 Iowa 535), Vol. I, p. 379.

STATE v. ADAMS, 20 IOWA 486

(Same facts, 20 Iowa 488.)

1. **Grand Jury—Persons Exempt from Service on—Privilege is Personal—Validity of Indictment.**—Although justices of the peace, supervisors, and ministers of the Gospel are exempt from grand jury service, under the Code of 1860, still, this is a personal privilege which must be claimed by the exempted person, or it is waived; and the fact that some of the members of the grand jury are such exempted persons, does not affect the validity of an indictment returned by it, p. 487.

Special cross reference. For cases citing the text, and many others on the question of what irregularities in the selection, formation, etc., of a grand jury are insufficient to affect validity of indictment, see annotations under Rule 1 of State v. Knight (19 Iowa 94), ante. p. 697.

STATE v. STUTZ, 20 IOWA 488

1. **Intoxicating Liquors—Violation of State Law—Federal License no Defense—No Presumption of Guilt from.**—A United States license authorizing the sale of intoxicating liquors, is no defense to an indictment for a violation of the state law: But proof that the accused has such Federal license, or its production in evidence upon the trial of the indictment for violation of the state law, raises no presumption of, nor is it evidence of the guilt of accused, pp. 489, 490.

Reaffirmed and extended in State v. Baughman, 20 Iowa 497, holding further that upon the trial of an indictment for a violation of the state law in reference to intoxicating liquors [in this case for nuisance] it is not error for the court to refuse to permit the Federal license of accused to be admitted in evidence.

Cited in State v. Cobb, 123 Iowa 629, 99 N. W. 300, not in point.

Special cross reference. For further cases citing and sustaining the text, and many others on the question, see annotations under Rule 3 of State v. Carney (20 Iowa 82), ante. p. 779.

McKENNEY & DELASHMUTT v. HOPKINS, 20 IOWA 495

1. Appeal to Supreme Court—From What Orders or Decrees May be Taken—Final Orders, etc.—Under Secs. 2631, 2632, of the Code of 1860, an appeal may be taken to the Supreme Court from any order or decree of the district court finally settling and adjudicating the rights of the parties upon a material issue in reference to part of the subject-matter of the action, although there may be still pending therein, other and independent issues, p. 492.

Unreported citation, 129 N. W. 58.

LUCAS, THOMPSON & Co v. PICKEL, 20 IOWA 490

1. Change of Venue in Justice's Court—When Application for to be Made.—Under Sec. 3875 of the Code of 1860, an application for a change of venue in an action pending in a justice's court must be made before the trial therein is commenced: If made *afterwards* it will be overruled.

So where the defendant, in an action in a justice's court upon an account, moves for a bill of particulars, and his motion is overruled, the motion and ruling thereon constitutes *the commencement of the trial* within the meaning of the above section; and his application for a change of venue thereafter made will be overruled, pp. 495, 496.

Reaffirmed, varied and extended in Columbus Junction Telephone Co. v. Overholt, 126 Iowa 580, 581, 102 N. W. 498, holding—under Sec. 4502 of the Code of 1897, corresponding to the section of the text—that the hearing of a motion assailing an answer in an action in a justice's court is the commencement of the trial therein—under Secs. 3647 and 3649 of the Code of 1897,—and that a motion for a change of venue cannot thereafter be made in such action in such court, and, if made, must be overruled: Holding further that an error in granting a change of venue is not waived by a trial in the court to which the action is erroneously changed.

STATE v. BAUGHMAN; STATE v. MUNZENMAIR; STATE v. BAHLER;
STATE v. BENNETT; STATE v. NEWAN, 20 IOWA 497

1. Intoxicating Liquors—Nuisance—Indictment for—Duplicity.—An indictment for nuisance—under Sec. 1564 of the Code of 1860—is not vulnerable to the charge of duplicity if it *conjunctively* avers the offense to have been committed in two or all three of the unlawful acts specified by that section and by Secs. 1561-1562 of that Code, in relation to the selling, or keeping intoxicating liquors for

unlawful sale, or using or maintaining a building for such purposes, p. 499.

Reaffirmed and extended in State v. Phipps, 95 Iowa 493, 64 N. W. 411, holding further that where a statute sets out several acts in the disjunctive, any one of which may constitute the offense denounced, that an indictment therefor may aver that the offense was committed in all the ways specified, the averments being made conjunctively: Hence, holding that an indictment for malicious mischief under Sec. 3985 of the Code of 1873, charging defendants with willfully and unlawfully taking and riding off one horse and one mare, *and* willfully, unlawfully and maliciously secreting them, *and* injuring them by riding them a long distance through the mud and snow, etc., charges but one offense.—And to the same effect is State v. Lewis, 96 Iowa 295, 65 N. W. 298 (reaffirming and extending the text), holding further that an indictment under the statute for threatening to accuse a person of crime, etc., with intent to extort money, etc., may conjunctively allege that the offense was committed in all the ways therein specified.

Special cross reference. For further cases citing and sustaining the text, and others on the question, see annotations under Rule 1 of State v. Becker (20 Iowa 438), ante. p. 839.

Cross reference. See further in this connection, annotations and cross references under State v. Myers (10 Iowa 448), Vol. I, p. 726.

2. Intoxicating Liquors—Federal License no Defense to Violation of State Law—Admissibility.—A United States license authorizing the sale of intoxicating liquors is no defense to a violation of the state law; and upon the trial of an indictment for a violation of this latter law (in this case an indictment for nuisance) it is not error for the court to refuse to permit the Federal license of accused to be admitted in evidence, p. 500.

Reaffirmed and extended in Stommel v. Timbrel, sheriff, 84 Iowa 343, 51 N. W. 161, holding further that the payment of a special Federal intoxicating liquor tax does not exempt from punishment for violation of the intoxicating liquor statutes of this state.

Special cross reference. For further cases citing and sustaining the text, and others on the question, see annotations under Rule 3 of State v. Carney (20 Iowa 82), ante. p. 779.

3. Intoxicating Liquors—Nuisance—Indictment for—Evidence of Sale, When Sufficient to Convict—Instructions as to.—Upon the trial of an indictment for nuisance under Sec. 1564 of the Code of 1860, evidence that the accused sold intoxicating liquor contrary to law at the place or in the building charged in the indictment, is presumptive evidence of the commission of the offence and is sufficient, unless rebutted by accused, to authorize a conviction; and an instruction to the jury to this effect in such case and under such evidence, is proper, pp. 500, 501.

Reaffirmed and qualified in State v. Munzenmaier, 24 Iowa 90, holding, also, that proof of a sale of or the keeping for sale of intoxicating liquors by accused is sufficient to convict, unless he proves that they were lawfully kept or sold.

Cross reference. See further in this connection, annotations under Rule 2 of State v. Guisenhouse (20 Iowa 227), ante. p. 806.

EDWARDS v. SULLIVAN, 20 IOWA 502

1. **Husband and Wife—Wife Joining in Husband's Deed to Land—Effect—Dower.**—Where a wife joins in the granting and covenanting clauses of her husband's deed to land, and signs the conveyance, it passes—under Secs. 2209 and 2215 of the Code of 1860—all her interest therein, including the right to dower, and without an express relinquishment thereof, pp. 504, 505.

Reaffirmed in Sturdevant v. Norris, 30 Iowa 69; Jones v. City of Des Moines, 43 Iowa 210.

Cross references. See further on this question, annotations under Sharp v. Bailey (14 Iowa 387), ante. p. 251; Rule 2 of Grapengeth v. Fejavary (9 Iowa 163), Vol. I, p. 556.

HAMILTON v. BARTON, 20 IOWA 505

1. **Trial—Sealed Verdict—Correction of Informality or Omission in—When Allowed.**—When a sealed verdict is delivered by the jury to the bailiff to be by him presented in open court, and pursuant to instructions from the court, it is proper for the court, upon such verdict being presented and read, and upon a suggestion from one of the jurors, to direct the jury to retire and correct an inadvertent omission or informality, pp. 507, 508.

Reaffirmed and explained in Lee & Co. v. Bradway, 25 Iowa 218; Oxford Junction Sav. Bank v. Cook, 134 Iowa 191-194, 111 N. W. 808, holding that where there is no issue as to the *amount* of the claim of the party (plaintiff or defendant) for whom a verdict is returned, but only an issue as to his right to recover at all, and the verdict as returned does not state the *amount*, the jury may retire and correct it.—The last case holding that in such a case it is not improper for the jury to retire, and correct their verdict, so as to state the *amount* or *value* of collaterals for which it was admitted the party for whom the verdict was returned was entitled to recover, if entitled to recover at all.

Reaffirmed and extended in Bank of Monroe v. Gifford, 79 Iowa 310, 44 N. W. 561, holding further that where a jury inadvertently fails to answer a material point required to be answered, in a special finding returned by them, it is not error for the court to direct them to retire and make their finding definite in reference thereto.

Reaffirmed and varied in Heiser v. Van Dyke, Martin & Co., 27 Iowa 360, holding that the fact that a jury without leave of court or

consent of parties, seal their verdict, place it in the hands of the sworn bailiff to be by him returned into court, and then separate, does not affect its validity, it being received into court and read in the presence of the jury, and they agreeing thereto as their verdict as required by law, at the time it is so received and read.—And to the same effect is, *Walker v. Dailey, Ottman & Minter*, 87 Iowa 380-383, 54 N. W. 347 (reaffirming and varying the text), holding that a verdict sealed and delivered by the jury to a bailiff under directions of the court, and without the knowledge or consent of the parties is valid when received and read in open court in the presence of the jury as required by law, although neither of the parties are present at the time the verdict is so received and read.

STATE *v.* TUCKER, 20 IOWA 508

1. **Indictment—Ground for Setting Aside—Incompetent Evidence before Grand Jury is not.**—The fact that incompetent evidence was introduced before the grand jury, is no ground—under Sec. 4691 of the Code of 1860—for setting aside an indictment.

Subsec. 4 of Sec. 4691 of the Code of 1860, providing that no one be present when a grand jury is investigating a charge, except as required or permitted by law, has reference to the excluding of spectators, p. 510.

Reaffirmed and extended in *State v. Smith*, 74 Iowa 584, 38 N. W. 494; *State v. De Groate*, 122 Iowa 662, 98 N. W. 496, holding further that, under the Codes of 1873, and 1897, an indictment cannot be assailed by motion because of incompetent or insufficient evidence before the grand jury.

Reaffirmed and extended in *State v. Baughman*, 111 Iowa 73, 82 N. W. 453; *State v. De Groate*, 122 Iowa 662, 98 N. W. 496, holding further that an indictment cannot be set aside except for the causes therefor allowed by statute.

Reaffirmed and extended in *State v. Shepherd*, 129 Iowa 706, 707, 106 N. W. 191, holding further that the fact that an accused person in custody was taken before the grand jury, and sworn and examined by them without being instructed as to his right not to answer, is not a ground for setting aside the indictment against him—under Subsec. 4 of Sec. 5319, and Sec. 5484 of the Code of 1897.

(Note.—See further, *State v. Phillips*, 118 Iowa 660, 92 N. W. 876; *State v. Easton*, 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389; *State v. Frost*, 95 Iowa 448, 64 N. W. 401; *State v. Russell*, 90 Iowa 569, 58 N. W. 915, 28 L. R. A. 195; *State v. Porter*, 74 Iowa 623, 38 N. W. 514; *State v. Smith*, 74 Iowa 580, 38 N. W. 492; *State v. Fowler*, 52 Iowa 103, 2 N. W. 983; *State v. Morris*, 36 Iowa 272, some important cases sustaining and intimately connected with, but not citing, the text.—Ed.)

HYATT v. SPEARMAN, 20 IOWA 510

1. Homestead—What Debts Subject to—Prior Debts, and Purchase Price.—Homestead is subject to the satisfaction of its purchase price; and, also, to debts created by its owner prior to its use and occupancy as a home, or to any improvements made thereon, p. 513.

Reaffirmed and extended in Clifton Land Co. v. Davenport, 130 Iowa 95, 96, 106 N. W. 366, holding further that a homestead is subject to the vendor's lien for its purchase money price; and that any contract of the purchaser securing the vendor his rights, lien, or otherwise protecting his right to the payment of the purchase price, is valid, without the signature or concurrence of the purchaser's wife.

(Note.—See further, Campbell v. Maginnis, 70 Iowa 589, 31 N. W. 946; Thompson v. Hanson, 44 Iowa 651; Barnes v. Gay, 7 Iowa 26, some important cases sustaining, explaining and extending, but not citing, the text.—Ed.)

Cross reference. See further on this question, annotations and cross references under Hale v. Heaslip (16 Iowa 451), ante. p. 456.

BRINGHLOFF v. MUNZENMAIER, 20 IOWA 513

1. Fixtures—Mortgage of Land, and Chattel Mortgage of Fixtures on—Rights of Subsequent Purchaser of Land without Notice.—Where fixtures are so attached to realty as to be part thereof as between its owner and a subsequent purchaser or mortgagee thereof, and thereafter the owner executes a mortgage on the land, and later a chattel mortgage on the fixtures, the chattel mortgagee having no notice actual or constructive of the real estate mortgage at the time he takes his mortgage, a purchaser of the land under a foreclosure of the mortgage thereon, and who purchases *without actual notice* of the chattel mortgage, which is recorded, takes the land free from the latter, pp. 517-519.

Reaffirmed and extended in Stillman v. Flenniken, 58 Iowa 453, 454, 10 N. W. 844, 43 Am. Rep. 120, holding further that a smutter placed in a mill as a part thereof, and necessary for the purpose of grinding buckwheat and rye, passes to a purchaser of the mill and machinery at a sheriff's sale thereof under a special execution against the owner of the mill, although the smutter was only loaned to the mill owner, the execution purchaser not knowing this latter fact at the time of his purchase.

Reaffirmed and extended in Thomson v. Smith, 111 Iowa 719, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780, holding further that a purchaser of real estate, either from the owner or at a sheriff's sale under a decree foreclosing a lien thereon, takes the fixtures attached thereto free from the prior liens or rights on or to them, where such purchaser buys without notice thereof and in good faith.

Cited in Sowden & Co. v. Craig, 26 Iowa 166, (dissenting opinion) 96 Am. Dec. 125, the majority court qualifying the text, and hold-

ing that where the owner of real estate executes a mortgage on chattels which may properly be made fixtures, and subsequently affixes them to the realty, no person having notice, actual or constructive, of these facts can, by purchase of the real estate or otherwise, acquire from the mortgagor any title to the chattels, paramount to the rights of the mortgagee thereof.—And that this rule applies to a subsequent lien of a mechanic or materialman for affixing such chattels to the realty.

Distinguished and narrowed in First Nat'l Bank of Waterloo v. Elmore, 52 Iowa 551-553, 2 N. W. 556, holding that where a mortgage is executed upon machinery, and it is afterwards placed in a mill, but is so placed therein as to be capable of being removed without material injury to the building, the chattel mortgage is valid as against a prior mortgage of the mill building and realty.

And see 146 Iowa 59, 124 N. W. 773.

Cross references. See further on this question, annotations under Price, Assignee v. Brayton (19 Iowa 309), ante. p. 731; Pick-erell v. Carson (8 Iowa 544), Vol. I, p. 535.

EDWARDS v. MCCADDON, 20 IOWA 520

1. Constitutional Law—Remedial Statutes—Statutes of Limitation are—Statute Suspending or Extending Time to Sue.—Statutes of limitation relate to the *remedy* and not to the *essence* of a contract or other cause of action: And a statute suspending or extending the time allowed to sue on certain contracts is constitutional, and applies to those existing at the time it goes into effect, p. 522.

Reaffirmed in Gray v. Spanton, 35 Iowa 510.

Cited in Weiser, Adm'x v. McDowell, 93 Iowa 784, (dissenting opinion) 61 N. W. 1098, the majority court holding that an action may be maintained on a judgment of a court of record of this state, if commenced within twenty years after the expiration of fifteen years from its rendition, and not counting any time the statute of limitation is suspended, where the judgment is not lost or destroyed, or leave of court, for cause shown and upon notice, is not granted to sue within fifteen years after its rendition, as provided by Sec. 2521 of the Code of 1873.—The court construing Secs. 2521, 2529, and 1541 of the Code of 1873.

2. Verdict—When may be Modified or Reformed by Court.—The trial court cannot modify or reform a verdict, or put it into form, so as to effectuate the intention of the jury, unless there is certain and unmistakable data upon which to base such action, pp. 522, 523.

Reaffirmed and varied in Helphrey v. Ch. & R. I. R. R. Co., 29 Iowa 483, 484, holding that a verdict, whether general or special, is good if it expresses the intention of the jury upon the matters in issue, with sufficient certainty to enable the court to pronounce judgment thereon.

Cross reference. See further on this question, annotations and cross reference under Rule 5 of *Fromme v. Jones* (13 Iowa 474), ante. p. 176.

See, also, in this connection, annotations under Rule 3 of *State v. Turner* (19 Iowa 144), ante. p. 707.

GEAR *v.* DUBUQUE & SIOUX CITY R. R. CO., 20 IOWA 523, 89 AM. DEC. 550

1. **Condemnation of Land for Railroad Right of Way—Judgment in Such Proceedings—Rights of Parties.**—An assessment of damages to the land owner by a sheriff's jury or a judgment upon appeal to the district court therefrom, in a proceeding to condemn land for a railroad right of way, gives the railroad company the right to pay the land owner the amount thereof within a reasonable time, and then take possession of the land; but the land owner cannot compel the company to accept such assessment or judgment and pay the amount thereof; and it may refuse to so accept and pay, and abandon, or change its route.

If, however, there has been a great enhancement in the price of the land between the time of such assessment or judgment and its acceptance by the company, the land owner may demand a re-assessment, pp. 529, 532.

Reaffirmed and explained in *Ellsworth & Jones v. Ch. & Iowa Western Ry. Co.*, 91 Iowa 389, 59 N. W. 78, holding that upon an appeal to the district court from an assessment of damages for a railroad right of way, the damages are to be assessed as of the time when the commissioners made their appraisal, if the company proceeds under the assessment with reasonable diligence.

Reaffirmed, explained and extended in *Hastings v. B. & M. R. R. Co.*, 38 Iowa 318-320, holding further that when land is condemned for a right of way of a railroad, and the assessment of the sheriff's jury is paid to the sheriff, the assessment is binding until changed by appeal, the land owner is entitled to such sum unless an appeal is prosecuted; and the company cannot thereafter abandon the use of the land, and defeat his right thereto: Holding further that where a railroad company pays such assessment of damages to the sheriff, takes possession of the land, and thereafter abandons its use as such right of way, such abandonment is permanent, and it cannot again reoccupy or use it, without another proceeding of condemnation and assessment; nor can the land owner thereupon, prosecute an appeal from the original assessment, and obtain an additional assessment for damages *in case the company should again reoccupy or use it.*

Reaffirmed and extended as to first paragraph in *Hartley v. K. & N. W. Ry. Co.*, 85 Iowa 459-461, 52 N. W. 353, holding further that a land owner has a right to commence a proceeding for the assessment of a right of way of a railroad, taken possession of and used by the

company without paying him therefor, or without condemning and paying therefor as required by law; and that Sec. 2529 of the Code of 1873, requiring actions to be commenced within five years on "unwritten contracts * * * and all other actions not provided for," does not apply to such a proceeding; nor does the general statute of limitation apply to such a proceeding.

Reaffirmed and qualified as to first paragraph in Dimmick v. C. B. & St. L. R. R. Co., 58 Iowa 637, 639, 12 N. W. 711, holding that no action lies to recover damages assessed to the land owner by a sheriff's jury for a railroad right of way, unless the company has entered upon and appropriated it without payment thereof; but that in this last case, the land owner may sue the company for the amount of the damages, or he may sue for trespass, or may enjoin the use of the land by the company until it pays the damages assessed—a case, however, where the facts do not sustain the rule.

Cited in Robertson v. Hartenbower, 120 Iowa 412, 94 N. W. 858, the court holding that a city may in good faith abandon an assessment condemning land for municipal purposes; but that in order to do so it must abandon *the entire proceeding*, or the assessment will be binding until set aside or reversed upon an appeal.

Cited in Mahaska County R. R. Co., v. Des Moines Valley R. R. Co., 28 Iowa 453, the case turning on other questions.

Distinguished in Hayes v. Ch. M. & St. P. Ry. Co., 64 Iowa 754-756, 19 N. W. 246, holding that where a railroad company pays to the sheriff the amount of damages assessed to a land owner for a railroad right of way, then prosecutes an appeal, and, pending the appeal, or after the first assessment, takes possession of the land, that although the land owner is entitled to interest at the rate of six per cent. per annum upon the money deposited with the sheriff, from the time the company so takes possession of the land, still, this question of interest must be adjudicated upon appeal; and the land owner cannot after final determination thereof, maintain a separate action for the interest, and to enjoin the company from use of the land until it is paid.

And see 148 Iowa 6, 126 N. W. 1032.

Cross reference. See further in this connection, annotations and cross reference under Richards v. Des Moines Valley R. R. Co., (18 Iowa 259), ante. p. 625.

LEVALLY v. HARMON'S ADM'R, 20 IOWA 533

(Later Appeal, 24 Iowa 592.)

1. Evidence—Depositions—Requisites of Commission to take.—A commission—under the Code of 1860, Secs. 4068, 4070, 4078, 4081—to take depositions in a state of the Union must name some particular officer, either by his name of office, or by his individual

name and his official style, and must name the county and state where he resides; a commission to take depositions in such a case directed to several officers in the alternative, is not sufficient, p. 537.

Special cross reference. For cases citing, and explaining the text, and others on the question, see annotations under *Lyon v. Barrows* (13 Iowa 428), ante. p. 168.

STATE *v.* WOODERD, 20 IOWA 541

1. **Forgery Defined.**—Forgery is the making or altering any writing with a fraudulent intent, and whereby another may be prejudiced. In order to constitute the crime it is not essential that any person be actually injured: It is sufficient that the instrument, if genuine, would be the foundation, or the evidence of another's liability. So a material alteration in a part of a genuine instrument, whereby it is given a new operation, is forgery, pp. 547, 548.

Reaffirmed in *Caulkins v. Whisler*, 29 Iowa 496, 4 Am. Rep. 236.

Special cross reference. For further cases citing and sustaining the text, and others to the same effect, see annotations under Rule 2 of State *v.* Thompson (19 Iowa 299), ante. p. 729.

2. **Evidence—Book Entries of Deceased Person Against Interest Admissible Against Third Person—Weight to be Given.**—Book entries of a deceased person clearly shown to have been hostile to the financial interest of the person who made them at the time they were made, are receivable in evidence against a third person; but in such case the jury should be instructed that though the evidence is competent, still, as the right of cross examination does not exist, it is not highly favored by the law, and that they may give it such weight and value as they think it justly entitled under the circumstances. This rule is applicable both in civil and criminal cases, pp. 550, 551.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Rule 2 of *Mahaska County v. Ingalls, Ex'r* (16 Iowa 81), ante. p. 410.

WHITING *v.* WESTERN STAGE CO., 20 IOWA 554

1. **Principal and Agent—General Power to Agent to Transact Business—Power to Agent to Bind Principal by Negotiable Paper.**—General authority to an agent to transact business, does not confer power for him to make his principal a party to negotiable paper.

When a power is given for an agent to do some things in regard to negotiable paper, it will not be enlarged by construction, so as to enable him to do other, although somewhat similar things in relation thereto, p. 557.

Reaffirmed and extended in *Edgerly & Co. v. Cover*, 106 Iowa 672, 673, 77 N. W. 329, holding further that an authority to an agent to "work things to the best advantage, and to do anything you can to keep the business going; to go ahead, and do the business just as

though it is your own," does not grant such agent power to execute a mortgage on the principal's goods and fixtures, with the right to the possession thereto granted to the mortgagee.

Reaffirmed and qualified in Peoria Steam Marble Works v. Hickey, 110 Iowa 278, 281, 81 N. W. 474, 80 Am. St. Rep. 296, holding that general authority to an agent to transact business does not invest him with power to make his principal a party to negotiable paper, unless the duties to be performed cannot be discharged without the exercise of such power.—And that this rule applies to all agents: Hence, holding that a receiver has no power to execute promissory notes, and thereby bind the estate he represents, unless the order appointing him expressly confers such power [Note.—Or he is later authorized so to do by order of court.—Ed.]; and that a receiver who executes such a note without such authority, and who fails to report his action, and have it confirmed by the court, and show in such report that the money, if any, derived from the note benefited the estate, is personally liable thereon.

Distinguished and narrowed in Gould v. Bowen, 26 Iowa 79, holding that a power of attorney which grants to a person "full power and authority to do and perform all and every act and thing whatsoever, required and necessary to be done in and about the premises [in this case the selling, conveying and disposing of all property real and personal of the principal in a certain county, and to make any bill of sale of personal property that may be necessary, etc., these being set out in such power of attorney] as fully as I (the principal) might or could do if personally present," confers power on such person to transfer a promissory note of the principal, by indorsement.

2. Principal and Agent—Ratification of Unauthorized Acts of Agent—Effect.—The ratification by the principal of the unauthorized act or acts of his agent has the same effect as if a previous authority had been conferred, p. 558.

Reaffirmed in Berryhill v. Jones, 35 Iowa 339.

(Note.—There are many cases sustaining, but not citing, the text. N. B. Of course the ratification by the principal, must be *with full knowledge*: This is held by all the authorities.—Ed.)

3. Principal and Agent—When Authority to Agent Presumed to Continue.—A general authority to an agent, or a special one unlimited as to time, is presumed as to those previously dealing with him and against the principal, to continue until there is notice of revocation, p. 561.

Reaffirmed in Moore v. First Ruthven Circuit Methodist Episcopal Church, 117 Iowa 35, 90 N. W. 492.

HOBEN v. BURLINGTON & MISSOURI RIVER R. R. CO., 20 IOWA 562

1. Negligence—Action for—Contributory Negligence—Instruction.—Plaintiff cannot recover in an action for negligence, if his own

carelessness materially or approximately contributed to the accident causing the injury of which he complains; and in such case this proposition must be covered by the instructions, p. 566.

Reaffirmed in Ford v. C. R. I. & P. Ry. Co., 106 Iowa 94, 75 N. W. 653, holding that in an action for the injury to or the death of a person claimed to have been caused by the negligence of the defendant, the court must instruct on the contributory negligence of the injured or deceased person.

Reaffirmed and extended in Lang v. Holiday Creek R. R. & Coal Mining Co., 49 Iowa 472, holding further that in an action for an injury to or the death of a person claimed to have been caused by the negligence of the defendant, the burden of proof is on the plaintiff to show, either by direct proof or from circumstances, that the person injured or killed did not contribute thereto by his own negligence.

Cited in York, Adm'r v. Ch., M. & St. P. Ry. Co., 98 Iowa 551, 67 N. W. 576, the case turning on questions not decided in the present case.

Special cross reference. For further cases citing, sustaining and explaining the text, and others on the question, see annotations under Rule 3 of *McAunich v. M. & M. R. R. Co.* (20 Iowa 338), ante. p. 823.

2. Trial—Instructions Conflicting or Misleading—Appeal—Reversal.—When the instructions given are conflicting or otherwise misleading, it is ground for reversal, p. 567.

Reaffirmed and explained in Brown v. Bridges, 31 Iowa 143; Almond v. Nugent, 34 Iowa 305, 11 Am. Rep. 147; Hawes v. B. C. R. & N. Ry. Co., 64 Iowa 319, 20 N. W. 718; Gibson v. B. C. R. & N. Ry. Co., 107 Iowa 605, 78 N. W. 193, holding that if, upon appeal, it appears that the instructions given by the trial court, when considered, together, do not contain a correct exposition of the law, or that they are conflicting or tended to mislead the jury, to the prejudice of the party appealing or complaining, the judgment will be reversed.

(Note.—There are many other cases, sustaining, but not citing, the text.—Ed.)

STATE v. KENNEDY, 20 IOWA 569

1. Homicide—Self Defense—Homicide in Defense of Property or Habitation.—A person may repel force by force in defense of his person, habitation or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony on either; and if a conflict ensue in such case, and the life is taken, the killing is justifiable. It must be proved that the assault was imminently perilous. And unless there be a plain manifestation of a felonious intent, no assault will justify killing the assailant. A party is not compelled to flee from his adversary who assails him with a deadly weapon before he can justify the homicide. The assault may be so fierce as not to allow the party assailed to yield a step without manifest

danger to his life, or of enormous bodily injury. In such case, if there be no other way of saving his own life, he may, in self defense, kill his assailant. But an assault without a weapon of any kind by a quarrelsome and violent man upon another, when there is no reason for the belief by the person attacked, that his person was in danger of death or great bodily harm, but that an ordinary battery was all that was intended, and all that he had reason to fear from the acts of his assailant, then the party assailed has no right to take the life of an assailant, pp. 571, 572, 574.

Cited in State v. Decklots, 19 Iowa 451, the case turning on other questions.

Special cross reference. For further cases citing, sustaining and explaining the text, and many others on this question, see annotations under Rule 2 of State v. Thompson (9 Iowa 188), Vol. I, p. 560.

Cross references. See further on this question, annotations under Rule 2 of State v. Neely (20 Iowa 108), ante. p. 786. See, also, in this connection, annotations under State v. Decklots (19 Iowa 447), ante. p. 748.

STATE v. MCCONKEY, 20 IOWA 574

1. Indictment—Name of Person Injured to be Averred—Trespass.—If the name of the person injured is known to the grand jury it must—under the Code of 1860—be stated in an indictment, and if not so known, such fact must be therein averred.

So an indictment under Sec. 4324 of the Code of 1860, for trespass in cutting down and carrying away standing and growing timber on the land of another, must aver the name of the owner of the land, pp. 576-578.

Reaffirmed and extended as to first paragraph in State v. Wasson, 126 Iowa 322, 323, 101 N. W. 1126, holding further that an indictment for robbery must allege the ownership of the property.

Reaffirmed and extended as to first paragraph in State v. Clark, 141 Iowa 299, 301, 119 N. W. 721, holding further that an indictment for obtaining property by false pretenses must aver the owner of the property.

Cited in State v. Brandt, 41 Iowa 608, (dissenting opinion, 622) the case involving the sufficiency of allegations in an indictment for embezzlement, not connected with the text.

And see 149 Iowa 411, 128 N. W. 562.

(Note.—See further, State v. Jackson, 128 Iowa 543, 105 N. W. 51; State v. Cosgrove, 109 Iowa 68, 80 N. W. 227; State v. Allen, 32 Iowa 248; State v. Mullen, 30 Iowa 203, some important cases sustaining, but not citing, the first paragraph of the text—And there are many others.—Ed.)

LYON v. WELSH, 20 IOWA 578

1. **Husband and Wife—Homestead—Mortgage on Homestead for Usurious Debt—Wife may Plead Usury.**—Where a husband and wife execute a mortgage on homestead, to secure a note tainted with usury and signed by the husband alone, the wife may interpose the plea of usury in an action to foreclose, p. 580.

Cited in Carmichael v. Bodfish, 32 Iowa 421, the court holding that a stranger to a usurious contract cannot interpose the plea of usury.

Cross reference. See further as to who may plead usury, annotations under Perry v. Kearns (13 Iowa 174), ante. p. 134.

2. **Confession of Judgment for Usurious Debt—When Debtor Barred from Pleading Usury.**—A debtor is not estopped from setting up a plea of usury to, or objecting to the rendition of judgment upon a note or other debt tainted with usury, by making a written statement for the confession of judgment thereon, pp. 580, 581.

Distinguished in Twogood & Elliott v. Pence, 22 Iowa 544, 545, holding that *after* a judgment by confession has been entered upon a verified statement of the debtor and for a debt tainted with usury, he is thereby concluded from afterward pleading or taking advantage of usury as to such debt.

STATE v. RAYMOND, 20 IOWA 582

1. **Perjury — Indictment for — Allegations — Knowledge of Falsity by Accused.**—An indictment for perjury need not allege that accused knew the matter testified to by him was false, except where perjury is claimed upon a statement by accused of his *belief* or a denial of his *belief* of certain alleged false matter, p. 585.

Cited in State v. Gallagher, 123 Iowa 382, 98 N. W. 908, the court holding that an indictment for perjury must expressly allege that the matter sworn to by accused and claimed to constitute the perjury, was false; that is it must specifically negative the truth of the alleged false statement.

2. **Perjury—Evidence—Sufficiency to Convict.**—One witness and strong corroborative circumstances of the falsity of the matter sworn to by accused, is sufficient to authorize a conviction for perjury, p. 587.

Reaffirmed in State v. Clough, 111 Iowa 715, 83 N. W. 727; State v. Booth, 121 Iowa 712, 97 N. W. 75.

EASON v. WEBSTER, 20 IOWA 591

(Abstract.)

1. **Appeal—Verdict or Judgment Against Evidence—When no Ground for Reversal.**—Where the evidence upon the trial below in a

law action was conflicting and there is a doubt as to whether the verdict of the jury, or decision of the court if the action was so tried, was against the evidence, the Supreme Court will not reverse the judgment for such cause, p. 592.

Special cross reference. For cases citing the text, and others on the question, see annotations under *Martin v. Orndorff* (20 Iowa 217), ante. p. 804.

Cross reference. See further on this question, annotations and cross references under Rule 2 of *Templin v. Iowa City* (14 Iowa 59), ante. p. 206.

JONES v. GRAVES, 20 IOWA 596

(Abstract. Later Appeal, 21 Iowa 474.)

1. Action at Law—Receiver may be Appointed in—When.—Under Sec. 3419 of the Code of 1860, a receiver may be appointed in an action at law; and this may be done before the defendant is affected with notice of the pendency of the action, upon a proper case made in the original or a distinct petition, and supported by evidential facts: But in this last case, the defendant must have notice of the motion, p. 597.

Reaffirmed in *Paine v. Mueller*, 130 N. W. 134, holding that, under Sec. 3822 of the Code of 1897, a receiver may be appointed in a law action, before the defendant is affected with notice of the suit.

Cited in *Rabb v. Albright*, 93 Iowa 54, 61 N. W. 403, the court holding that Sec. 2903 of the Code of 1873, authorizes the appointment of a receiver in a law action.

BOTKINS v. SPURGEON, 20 IOWA 598

(Abstract.)

1. Appeal from Justice's to District Court—United States Revenue Stamp Required—Failure to Affix—Dismissal.—Under the Act of Congress of June 30, 1864, a revenue stamp must be affixed to the notice, bond, transcript, or some other part of the written record upon an appeal from a justice's to the district court; and if such stamp is not so affixed, the district court will have no jurisdiction, and the appeal will be dismissed, p. 598.

Special cross reference. For cases citing and OVERRULING the text, and others, see annotations under *Hugus v. Strickler* (19 Iowa 413), ante. p. 743.

Annotations to Decisions Reported in Volume 21 Iowa.

GRIMMEL, EX'X *v.* WARNER, 21 IOWA 11.

1. Executors and Administrators—Contract for Sale of Land—Unpaid Purchase Money Notes Passed to Executor of Vendor—When Executor may Sue either Individually or as Representative.—Where a vendor sells land under a contract to convey upon the payment of purchase money notes, and dies before the maturity thereof, they (the notes) pass to his executor or administrator as assets until the debts and legacies are paid, and he may sue thereon as such.

When such notes are bequeathed to his executor or administrator by such vendor, the former may sue thereon, either as representative or individually, p. 13.

Reaffirmed and extended in In re Estate of Bernhard, 134 Iowa 607, 608, 112, N. W. 87, 12 L. R. A. (New Series) 1029, holding that purchase money notes under an executory contract for the sale of land, pass as assets to the executor or administrator of a deceased vendor: Such notes or their proceeds do not pass to the devisees under the vendor's will, devising "all real property, etc."

2. Promissory Note—Execution of by Debtor—Presumption as to Settlement.—When a debtor executes a promissory note to his creditor, the presumption arises, until overcome by proof, that all matters between them to the date of the execution of the note was thereby settled, p. 14.

Reaffirmed in Wilcox v. Jackson, 57 Iowa 284, 10 N. W. 665; Morse & Littell v. Minton, 101 Iowa 606, 70 N. W. 692; Danes v. Slitor, 118 Iowa 83, 91 N. W. 818.

Reaffirmed and extended in Allen v. Bryson, 67 Iowa 597, 25 N. W. 823, 56 Am. Rep. 358, holding further that the execution of a mortgage, or a bill of sale to secure an indebtedness, raises the same presumption as the execution of a note, as set out in the text.

3. Vendor and Purchaser—Action in Equity to Foreclose Lien on Land for Purchase Money—Tender Unnecessary.—An action in equity to foreclose a lien on land for unpaid purchase money under an executory contract of sale, may be maintained by the vendor, or, in case of his death, by his executor or administrator, without first tendering a deed to the purchaser.

In such case the chancellor may grant relief upon such terms as will protect all parties, pp. 14, 15.

Reaffirmed in Barrett v. Dean, 21 Iowa 428.

And see 147 Iowa 540, 126 N. W. 370.

Cross references. See further on this question, annotations under Rule 1 of Winton v. Sherman (20 Iowa 295), ante. p. 819; Rutherford v. Haven & Co. (11 Iowa 587) Vol. I, p. 864.

HALEY, ADM'R, v. CHICAGO & NORTHWESTERN RY. CO., 21 Iowa 15.

1. Negligence—Action for—Contributory Negligence—Mutual Negligence.—There can be no recovery for injury to or the death of a person whose own negligence was in whole or in part the proximate cause thereof.

When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be maintained, pp. 24, 25.

Reaffirmed in Sherman v. Western Stage Co., 24 Iowa 558-560, 566; Spencer v. Ill. Cent. R. R. Co., 29 Iowa 58; Hamilton v. Des Moines Valley R. R. Co., 36 Iowa 39, 40; Artz v. C. R. I. & P. Ry. Co., 38 Iowa 296, 297; Portman v. City of Decorah, 89 Iowa 337, 338, 56 N. W. 512.

Reaffirmed and explained in Artz v. C. R. I. & P. Ry. Co., 38 Iowa 296, 297; Banning, Adm'r v. C. R. I. & P. Ry. Co., 89 Iowa 80, 81, 56 N. W. 279, holding that recovery cannot be had for injury, or death of a party, when he, in any way or in any degree directly contributed thereto; and that an instruction in such case allowing recovery, unless plaintiff, or his decedent in case of an action by an administrator, "substantially," or "materially" contributed, etc., is reversible error.

Reaffirmed and explained in Dale v. Webster County, 76 Iowa 373, 374, 41 N. W. 2, holding that when the person injured or killed knew of the danger and could have avoided it by the exercise of due care, but failed so to do, no recovery can be had.

Reaffirmed and explained in Jerolman v. Ch. G. W. Ry. Co., 108 Iowa 179, 78 N. W. 856, holding that when a person injured or killed failed to use such care as a man of ordinary prudence under similar circumstances would have used to have avoided the danger, and such failure in any degree directly contributed to his injury or death, no recovery can be had.

Reaffirmed and extended in Reynolds v. Hineman, 30 Iowa 149, holding further that in an action for negligence, the plaintiff must not only prove the negligence of the defendant, but he must also show that his own want of ordinary care and prudence did not directly contribute to the injury.

Reaffirmed and extended in Hamilton v. Des Moines Valley R. R. Co., 36 Iowa 39, 40, holding further that in an action for negligence, an instruction to the jury in the language of the second paragraph of the text, when authorized by the evidence, is proper.

Cross reference. See further on this question, annotations and cross reference under Rule 3 of *McAunich v. M. & M. R. R. Co.* (20 Iowa 338), ante. p. 823.

HATCH & THOMPSON v. GRAY, 21 IOWA 29

1. **Husband and Wife—Contracts Between—Validity—Rights of Husband's Creditor's.**—Although a court of equity will enforce contracts between a husband and wife where the rights of creditors have not intervened or are not prejudiced; still, a secret parol agreement between a husband and wife will not be enforced, as against creditors whose rights have intervened in ignorance thereof, p. 32.

Reaffirmed and extended in *Brainard v. Van Kuran*, 22 Iowa 265-268, a case involving a fraudulent conveyance of real estate of a husband to his wife, as against the former's creditors, the court holding further that the question of whether or not a conveyance is fraudulent and made with intent of the parties to hinder and delay creditors, is one of fact, and a verdict of a jury or finding of the court in such a case will not be disturbed upon appeal, unless clearly against the weight of the testimony.

Distinguished and narrowed in *Nicholas & Shepard v. Higby*, 35 Iowa 403, 404, holding that where notes are, in good faith, for a valuable consideration, and without intent to defraud creditors, transferred by a husband to his wife, the transaction is valid as against existing creditors of the husband, when the latter does not retain control thereof: Holding further that the fact that such sale and transfer was secretly made by the parties and was not evidenced by writing, does not, of itself, render the transaction void, although this latter fact is evidence on the question of a fraudulent intent.

Cross references. See further in this connection, annotations under *Hook v. Moore* (17 Iowa 195), ante. p. 516; *Wright v. Wright* (16 Iowa 496), ante. p. 464; Rule 1 of *Wilson v. Horr* (15 Iowa 489), ante. p. 369.

O'HARA, ADM'R v. HEMPSTEAD, COUNTY JUDGE, 21 IOWA 33

1. **Certiorari—When Does not Lie.**—*Certiorari* does not lie—under Sec. 3487 of the Code of 1860—where the party applying therefor has a plain, speedy and adequate remedy by appeal, pp. 35, 36.

Reaffirmed, explained and qualified in *Berkey v. Thompson*, judge, 126 Iowa 397, 398, 102 N. W. 136, holding that if the trial court has no jurisdiction, or the judge thereof has acted illegally, its or his rulings may be corrected by *Certiorari*: Holding, also, that the question of whether or not a court acted illegally and without jurisdiction in a matter involved in an action otherwise properly pending, may be reviewed by *Certiorari*.

Reaffirmed and qualified in *Royce v. Jenney*, 50 Iowa 679, holding that where a county board of equalization exercises powers in refer-

ence to taxation and not within its jurisdiction, the remedy of the party thereby aggrieved is by *Certiorari*.

Cross reference. See further on this question, annotations and cross references under *Edgar v. Greer* (14 Iowa 211), ante. p. 228.

STATE *v.* JARVIS, 21 IOWA 44

1. **Assault with Intent to Commit Murder—Degrees, or what Offenses Included in—Jurisdiction—Constitutional Law.**—An assault with intent to commit murder includes a simple assault; and one indicted for the former may—under Secs. 4835 and 4836 of the Code of 1860—be convicted of the latter or simple assault.

Section 11, Article 1 of the Constitution of 1857, in reference to the summary trial upon information before a justice of the peace or other officer in all offenses where the punishment does not exceed one hundred dollars fine, or thirty days imprisonment, does not oust the district court of jurisdiction in such above case, or in any case wherein the lesser offense is a degree of the higher for which accused is indicted, pp. 45, 46.

Reaffirmed and extended in *State v. Hoot*, 120 Iowa 246, 247, 94 N. W. 567, 98 Am. St. Rep. 352, holding further that an indictment for an assault with intent to commit murder authorizes a conviction—under Sec. 5407 of the Code of 1897—for an assault with intent to commit manslaughter, for an assault with intent to commit great bodily injury, or a simple assault, according to the facts; such lesser offenses being included in the higher: That upon such a trial it is the duty of the court to instruct the jury on all the included offenses, except where all the facts in the case tend to prove accused guilty, if at all, of only one such offense, in which latter case the court may instruct as to only the one the proof tends to support.

Reaffirmed and varied in *State v. Gaffeny*, 66 Iowa 264, 23 N. W. 660, holding that upon the trial of an indictment for the unlawful sale of intoxicating liquors, alleged in the indictment as being the third offense of the accused, and that he had been twice before convicted of such an offense, the accused may—under Sec. 4466 of the Code of 1860—be convicted as for a first offense, without any proof of the additional averments.

Reaffirmed and qualified as to first paragraph in *State v. White*, 41 Iowa 319, 320, 20 Am. Rep. 602, holding, however, that under an indictment for an assault with intent to commit murder, a conviction cannot be had—under Secs. 4465 and 4466 of the Code of 1873, corresponding to the sections of the text—for an assault with an intent to commit manslaughter.—But see *State v. White*, 45 Iowa 326, 327, reaffirming the text, and overruling this case on rehearing, and holding that such conviction may be had under such indictment, and under Secs. 3876 and 4466 of the Code of 1873.

(Note.—See further, *State v. Schele*, 52 Iowa 608, 3 N. W. 632; *State v. Shepard*, 10 Iowa 126, important cases sustaining, explaining and extending, but not citing, the text.

See, also, in this connection, *State v. Cater*, 100 Iowa 501, 69 N. W. 880; *State v. Beabout*, 100 Iowa 155, 69 N. W. 429; *State v. Cody*, 94 Iowa 169, 62 N. W. 702; *State v. Akin*, 94 Iowa 50, 62 N. W. 667; *State v. Sterrett*, 80 Iowa 609, 45 N. W. 401, cases not citing, but intimately connected with the text.—Ed.)

2. Assault with Intent to Commit Murder—Gist of Crime.—*Intent* is the gist of the crime of an assault with intent to commit murder, p. 46.

Cited in *State v. Debolt*, 104 Iowa 109, 73 N. W. 499, the court holding that when an act becomes criminal only by reason of the intent with which it is done, proof of the intent is as necessary as proof of the act.

Cross reference. See further in this connection, annotations under *State v. Malcolm* (8 Iowa 413), Vol. I, p. 522.

NELSON v. WADE, 21 IOWA 49

1. Lands—Possession of by Tenant is Notice to Purchaser, etc., of the Rights, Title, etc., of the Landlord.—Possession of land by tenant is sufficient to put a subsequent purchaser, or mortgagee, thereof upon inquiry, and constitutes constructive notice as to the rights and equities of the landlord, p. 54.

Reaffirmed in *Bowman v. Anderson*, 82 Iowa 212, 47 N. W. 1088, 31 Am. St. Rep. 473; *Hannan v. Seidendopf*, and *Maloney, et al*, 113 Iowa 662, 86 N. W. 46; *O'Neil v. Wilcox and Rohert*, 115 Iowa 17, 87 N. W. 742.

Cross reference. See further on this question, annotations and cross references under *Dickey v. Lyon* (19 Iowa 544), ante. p. 763.

ROGERS v. GWINN, 21 IOWA 58

1. Judgments—Foreign, Action on—Defenses—Fraud.—In an action in this state on a foreign judgment of another state of the Union, the defendant may plead as a defense, any facts which would be sufficient to obtain direct relief against it if they were made the basis of an action, or motion, for that purpose in the foreign state.

So in such action on the judgment the defendant may plead and prove as a complete defense, that the judgment was procured by the fraud of the plaintiff—judgment creditor, pp. 60, 63.

Reaffirmed in *Toof, McGowen & Co. v. Foley*, 87 Iowa 13, 14, 54 N. W. 61.

Reaffirmed and extended as to first paragraph in *Pollard v. Baldwin*, 22 Iowa 332, holding further that in an action in this state on a foreign judgment, the defendant may plead and prove as a complete

defense, that he was not served with notice or process in the foreign action wherein the judgment was rendered: That this is the rule although the foreign judgment recites that he (defendant) was "served" or "duly served;" but that, in this last case, the defendant must clearly show in the action in this state that he was not so served, as, until he does so, the presumption is in favor of the truth of the recitals in the foreign judgment.

Reaffirmed and extended in Dunlap & Co. v. Cody, 31 Iowa 263, 267, 7 Am. Rep. 129, holding further that in an action in this state on a foreign judgment, the defendant may plead and prove as a defense, that the jurisdiction of his person by the foreign court, was obtained by the fraud of the plaintiff, his agent, or attorneys: Hence, holding that where defendant is induced to go to the foreign state by the false representations of the plaintiff's attorneys that a particular contract of work in his line was to be let, and while there he was served with the process in the plaintiff's action against him in such state, such facts constitute fraud, and a complete defense to an action in this state on the foreign judgment thereon rendered.

Reaffirmed, varied and extended in Whetstone v. Whetstone, 31 Iowa 281, holding further that where a judgment in another action between the same parties concerning the same subject-matter and in another court, whether foreign or domestic, is set up in bar of a later action, the plaintiff may plead by way of reply, that such former judgment was obtained by fraud of the party relying thereon.

Cross reference. See further on this question, annotations under Harshey v. Blackmarr (20 Iowa 161), ante. p. 797.

KING v. THORP, 21 IOWA 67

(Later Appeal, 26 Iowa 283.)

1. **Pleadings—Equitable Cross-bill in Answer in Law Action—Dismissal of Bill or Petition—Effect.**—Where in an action at law, the defendant files an answer containing an equitable and separate issue in the nature of a cross-bill, it is reversible error for the court, pending a motion by the defendant to transfer to equity, upon the plaintiff dismissing his petition, to dismiss the cross-bill, p. 68.

Reaffirmed, varied and qualified in Spearing v. Chambers, and Ingham, 25 Iowa 101, holding further that—under Sec. 2892 of the Code of 1860—the dismissal by plaintiff of his bill in equity, does not authorize the dismissal of a cross-bill therein filed, unless the matter set up in the cross-bill is necessarily dependent upon the establishment by plaintiff of the facts set out in his bill.

Cross reference. See further on this question, annotations under Worrell v. Wade's Heirs (17 Iowa 96), ante. p. 501.

ORR v. TRAVACIER, 21 IOWA 68

1. **Tax Sale of Land which is Invalid—Cancellation of Tax Deed—Lien of Tax Purchaser for Taxes Paid.**—Where the owner of land sold for taxes sues and obtains a cancellation of the tax deed, the grantee or purchaser is entitled to a lien on the land for taxes paid by him in good faith, with interest at six per cent. per annum from date of payments, p. 70.

Reaffirmed in Stewart v. Corbin, 38 Iowa 572.

Reaffirmed, explained and qualified in Thompson v. Savage, 47 Iowa 524, 525, holding that where the owner of land sold for taxes successfully maintains an action to set aside the sale as void, because there was no levy of taxes for the year for which the land was sold, the tax purchaser may thereafter sue to enforce his lien for taxes paid on the land by him in good faith, with interest at six per cent. per annum from the date of payments: Provided that such tax purchaser may only sue and recover for *legal taxes* so paid by him, and within five years next preceding the commencement of his action.

Reaffirmed and extended in Oliver v. Montgomery, 42 Iowa 37, 38, holding further that where one tenant of land pays the taxes thereon, he is entitled to a lien thereon to the amount of the taxes paid, with six per cent. per annum interest from the date of the payments.

Reaffirmed and extended in American Emigrant Co. v. Iowa R. R. Land Co., 52 Iowa 327, 3 N. W. 91, holding further that where the owner of the legal title to land pays the taxes thereon in good faith and under a mistake of fact as to the rights of the owner of the equitable title, the latter must reimburse the former for the taxes paid, with interest at the rate of six per cent. per annum from date of the payments, upon obtaining a decree setting aside such legal title; and the owner of the legal title is entitled to a lien on the land therefor.

Distinguished and narrowed in Garrigan v. Knight, 47 Iowa 527, (cited in dissenting opinion, 528) holding that where one claiming land under color of title pays taxes thereon he cannot recover from the owner therefor, although so paid with the knowledge of the latter.

Cross reference. See further on this question, annotations, note and cross reference under Rule 1 of Claussen & Kuehl v. Rayburn (14 Iowa 136), ante. p. 218.

CORBIN v. HILL, 21 IOWA 70

1. **Tax Sale—Warrant Necessary—Tax Deed not Conclusive of Existence of at Time of Sale—Constitutional Law.**—The tax warrant is a material and fundamental step in the sale for taxes, and the rightfulness of any sale must rest upon the *fact* of such warrant, and it is not competent for the Legislature to create a presumption which shall override the fact or estop the party proving the truth in relation thereto.

Section 784 of the Code of 1860, in so far as it conflicts with this rule is unconstitutional, p. 72.

Reaffirmed in McCready v. Sexton & Son, 29 Iowa 387, (cited in dissenting opinion, 406, 408) 4 Am. Rep. 214, holding that so much of Sec. 784 of the Code of 1860, as provides that a tax deed is *conclusive evidence* that land sold thereunder was legally listed, assessed, levied upon under a valid tax warrant, and sold as prescribed by statute, is unconstitutional: That the Legislature cannot make a tax deed *conclusive evidence* of the regularity of proceedings which are essential to a valid tax sale.—But see Parker v. Sexton & Son, 29 Iowa 427-429; Hurley v. Powell, Levy & Co., 31 Iowa 65, 66, **OVERRULING** the text, and holding that a failure to comply with the statute as to giving notice for a tax sale of land, and other directory parts thereof, does not invalidate it; and that land may be so sold without a tax warrant.

Cross reference. See further on this question, annotations under Allen v. Armstrong (16 Iowa 508), ante. p. 465.

2. Tax Sale—Tax Warrant, who to Sign.—Under the law applicable to sales for taxes for the year 1860, the county judge must sign the tax warrant, unless in case of his absence, inability or interest, when, under Sec. 247 of the Code of 1860, it may be signed by the county clerk as acting county judge; but a tax warrant so signed by the county clerk will not be invalidated because the record fails to show the absence, etc., of the county judge, pp. 73, 74.

Reaffirmed and extended in Sully v. Kuehl, 30 Iowa 277, 278, holding further that when a tax warrant is so signed by the county clerk, the absence, etc., of the county judge and consequent power of the clerk, may be shown by parol.

Cited in Ferguson v. Heath, 21 Iowa 440, the case turning on other questions.

STANTON v. WARRICK, 21 IOWA 76

1. Appeal from Justice's to District Court—When New Pleading may be Filed.—Upon an appeal from the justice's to the district court, a party may file a new pleading, upon a proper showing as to his omission to so file it in the former or inferior court, p. 77.

Reaffirmed and explained in Packard v. Snell, Aiken & Co., 35 Iowa 82, holding that the district court has a sound judicial discretion on the question of allowing or refusing to allow a party to file a new, or additional pleading, upon proper showing as set out in the text, upon an appeal from a justice's court; and the district court's ruling thereon will not be ground for reversal upon appeal to the Supreme Court in such case, except in case of his abuse of such discretion.

Reaffirmed and explained in Clow v. Murphy, 52 Iowa 697, 3 N. W. 724, holding that upon an appeal either to the circuit or the dis-

strict court from a justice's court, amendments to pleadings are to be allowed, within a sound judicial discretion, and in furtherance of justice.

Reaffirmed and extended in Griswold v. Bowman, 40 Iowa 369, holding further that the filing of amendments upon appeal from a justice's to the district, or circuit, court, is a matter within the discretion of the latter court; but that the refusal to allow an amendment upon such an appeal is proper, when it sets up a matter over which the justice's court had no jurisdiction.

Cross references. See annotations under May v. Wilson (21 Iowa 79), below. See further, specially, on this question, annotations and cross references under Rule 2 of Leftwick, and Barton v. Thornton (18 Iowa 56), ante. p. 584; Dicks v. Hatch (10 Iowa 380), Vol. I, p. 707.

SANBORN & FOLLET v. CASADY, 21 IOWA 77

1. **Husband and Wife—Wife's Rights as to Separate Real Estate.**—Under Sec. 2215 of the Code of 1860 (Sec. 1207 of the Code of 1851) a married woman may convey, or incumber real estate owned by her in her own separate right, p. 79.

Special cross reference. For cases citing, sustaining, explaining, etc., the text, and many others on this question, see annotations under Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

MAY v. WILSON, 21 IOWA 79

1. **Appeal from a Justice's to District Court—When New, or Additional Pleading may be Filed.**—Upon appeal to the district court from a judgment in a justice's court, a party cannot file additional, or new pleadings as a matter of right, but may do so under equitable circumstances and by leave of court and upon proper terms, but not without satisfactorily excusing his failure to so plead in the inferior court, p. 81.

Reaffirmed and qualified in Warren v. Scott, 32 Iowa 25, 26, holding that upon an appeal from a justice's to the circuit court, a party may be allowed, under equitable and proper circumstances, and after excusing his failure to plead before the justice, to file an amended, or additional pleading which sets up a new and distinct cause of action, or defense; and that an agreement therefor dispenses with the necessity for him to show such equitable circumstances, etc.

Partially overruled in Harty v. D. M. & M. R. R. Co., 54 Iowa 330, 331, 6 N. W. 546, holding that under Sec. 3596 of the Code of 1873, where the defendant appeals to the circuit court from a default judgment entered in a justice's court, he has the absolute right to file his answer in the circuit court, without leave of that court and without excusing his default below, the costs in the justice's court to be taxed against him in such case.

Special cross reference. For other cases citing, sustaining and explaining the text, see annotations under *Stanton v. Warrick*, (21 Iowa 76), ante. p. 873.

WARREN COUNTY *v.* WARD, 21 IOWA 84

1. **Officers—County Treasurer—Liability of Sureties on Bond for Misappropriations by Officer.**—The sureties on the official bond of a public officer are liable thereon for any money received by him in his official character after the execution of the bond, and misappropriated by him.

So the sureties on the official bond of a county treasurer are liable for money received by him in *partial payment* of taxes after the execution of the bond, and which he misappropriates, pp. 87, 88.

Reaffirmed and extended in *Fuller v. Calkins*, 22 Iowa 305, holding further that when a public officer receives money by virtue of his office, and misappropriates it, the sureties on his official bond are liable therefor, although he was not required by law to so receive it.

Special cross reference. For further cases citing, reaffirming and qualifying the text, and others on the question, see annotations under Rule 3 of *Mahaska County v. Ingalls, Ex'r* (16 Iowa 81), ante. p. 410.

LUTHER *v.* DRAKE, 21 IOWA 92

1. **Homestead—Conveyance of by Husband and Wife by Separate Deeds.**—Whether a conveyance of a homestead by a husband and wife by two separate deeds thereto is valid, under Sec. 2279 of the Code of 1860, is questionable, and is not determined herein, p. 93.

Cited in *Barnett v. Mendenhall*, 42 Iowa 299, the court holding that under Sec. 1990 of the Code of 1873, a conveyance of, or a contract to convey, homestead is of no validity whatever, unless both the husband and wife concur in and sign *the same instrument*: Holding further that a contract by a husband to sell and convey homestead, but which is not concurred in and signed by the vendor's wife, is *void ab initio*, and no action may be maintained for its specific performance, nor for damages by reason of its breach.

Cross reference. See further on this question, annotations and cross references under *Larson v. Reynolds & Packard* (13 Iowa 579), ante. p. 190.

KAISER *v.* KELLAR, 21 IOWA 95

1. **Malicious Prosecution—Bringing Action Concerning and Having Receiver Appointed for Property—When Plaintiff not Liable in Damages to Defendant—Receiver is for All Parties, Liability of.**—When plaintiff brings an action involving the title to or a lien upon personal property, and therein procures a receiver to be ap-

pointed to take charge thereof, he is not, although he fails in his action, liable to the defendant for damages thereby occasioned, if he (plaintiff) acted in good faith and with probable cause.

A receiver is appointed for the benefit of all parties to an action: If he acts wrongfully or negligently in relation to the property, he and the sureties on his bond are liable therefor to the party aggrieved, pp. 96, 97.

Cited in Snow v. Winslow, 54 Iowa 207, (dissenting opinion) 6 N. W. 194, the majority court holding that a lienholder who is not a party to an action involving the property on which he has a lien, is not affected by anything done by a receiver, or by other proceedings, orders or judgments therein.

Cited in State Central Savs. Bank of Keokuk v. Fanning Ball-Bearing Chain Co., 118 Iowa 703, 92 N. W. 714; Home Sav. & Trust Co. v. District Court of Polk County, 121 Iowa 12, 95 N. W. 527, cases concerning the powers, duties and liabilities of receivers, the effect of superseding order appointing receiver, and other matters intimately connected with, but not involving, the text.

BUTTERFIELD v. WALSH, 21 IOWA 97, 89 AM. DEC. 557

(Later Appeals, 25 Iowa 263; 36 Iowa 534.)

1. Prior Equity in Land Sold Under Subsequent Judgment—Purchase by Judgment Creditor, Rights of.—Where a judgment creditor purchases land at a sheriff's sale under his judgment, and without notice, either actual or constructive, of a prior equity of a third person therein, he takes it free therefrom, unless such third person pleads and proves in equity, such strong equitable circumstances as will prevent this rule being applied in favor of such purchaser (judgment creditor), pp. 99, 100.

Distinguished in Merritt v. Grover, 57 Iowa 496, 10 N. W. 880, holding that where land is levied on under an execution, and before the return day thereof, and after such date the judgment creditor, without having the first execution returned, or seeing that it is done, causes a second execution to be issued on his judgment, a sale under this latter, at which the judgment creditor becomes purchaser will be set aside in an action therefor by the judgment debtor, or land owner.—Sec. 3025 of the Code of 1873, providing that but one execution shall be in existence at the same time, and it being the judgment creditor's duty to see that this provision is pursued.

Special cross reference. For further cases citing, sustaining, explaining, extending, etc., the text, and many more on the question, see annotations under Rule 3 of Evans v. McGlasson (18 Iowa 150), ante, p. 601; and see, also, other rules thereof, and cross references there found.

2. Executions—Levy on Land Under Before Return Day, Sale After is Valid.—If an execution be levied upon land before the return day thereof, a sale thereunder may—under the Code of 1860—lawfully be made after that time, p. 101.

Reaffirmed in Childs v. McChesney, 20 Iowa 438, 89 Am. Dec. 545; Thorington v. Allen, 21 Iowa 292; Moomey v. Maas, 22 Iowa 386, 92 Am. Dec. 395; Wright v. Howell, 35 Iowa 295.

Reaffirmed, explained and extended in Walton v. Wray, 54 Iowa 533, 6 N. W. 743, holding that where a levy is made under an execution before the return day thereof, it is a sufficient authority for a sale of the property levied on after such day; and that the rule applies equally to executions issued from a court of record, or from a justice's court.

Reaffirmed and extended in Cox v. Currier, sheriff, 62 Iowa 554, 555, 17 N. W. 769, holding further that—under the Code of 1873—when a sheriff levies upon property under an execution before the return day thereof, he may exhaust the property under that execution, no matter what time expires between the levy and the sale.

Distinguished in Merritt v. Grover, 57 Iowa 496, 10 N. W. 880, holding that where land is levied on under an execution, and before the return day thereof, and after such date the judgment creditor, without having the first execution returned, or seeing that it is done, causes a second execution to be issued on his judgment, a sale under this latter, at which the judgment creditor becomes purchaser will be set aside in an action therefor by the judgment debtor, or land owner.—Sec. 3025 of the Code of 1873, providing that but one execution shall be in existence at the same time, and it being the judgment creditor's duty to see that this provision is pursued.

(Note.—See further, sustaining, but not citing the text, Stein v. Chambless & Banford, 18 Iowa 474, 87 Am. Dec. 411.

N. B. The case given as distinguishing this rule, cites this present case on Rule 1; but, as it belongs under this rule also, it is so placed.—Ed.)

BALCOM v. DUBUQUE & SIOUX CITY R. R. Co., 21 IOWA 102

1. Railroads—Liability for Killing Stock at Public Crossing—Negligence.—Where cattle are killed by a railroad train at a point where the track crosses a public highway, the company is liable if it (by its employes) failed to exercise reasonable and proper care to avoid the killing, and if the cattle were not on the track by the act or negligence of their owner, p. 103.

Reaffirmed, explained and varied in Davis v. B. & M. Riv. R. R. Co., 26 Iowa 552, 554, 556, holding that if stock is killed or injured by a railroad company where there is a right to fence—under Chap. 169, Acts of 1862,—and none has been erected, the liability is absolute: That if there be a fence, gross negligence on the part of the company

must be shown: That if the killing or injuring takes place where there is no right to fence, the company is held to reasonable care and is liable for ordinary negligence: Holding, however, that the above mentioned law does not apply to unfenced depot grounds, and that a railroad company is not liable for the injury to or the killing of stock thereon, except where negligence is shown.

Cited in Carlin v. Ch. R. I. & P. Ry. Co., 37 Iowa 322, not in point.

Special cross reference. For further cases citing, sustaining, explaining and qualifying the text, and many others on the question, see annotations under Alger v. M. & M. R. R. Co. (10 Iowa 268). Vol. I, p. 680.

Cross references. See further on this question, the next succeeding case; and annotations and cross references under Russell v. Hanley (20 Iowa 219), ante. p. 804.

WHITBECK v. DUBUQUE & PACIFIC R. R. Co., 21 IOWA 103

1. Railroads—Liability of for Killing or Injuring Stock at Place where it has no Right to Fence.—Where stock is killed or injured by a railroad train at a point where the railroad company has no right to fence, then Chap. 169, Acts of 1862, has no application, and the company is liable in damages only in case its employes in charge of the train fail to exercise ordinary care to avoid the killing or injury, pp. 105, 106.

Reaffirmed, explained and varied in Davis v. B. & M. Riv. R. R. Co., 26 Iowa 551, 552, 554, 556, holding that if stock is killed or injured by a railroad company where there is a right to fence—under Chap. 169, Acts of 1862—and none has been erected, the liability of the company is absolute: That if there be a fence, gross negligence on the part of the company must be shown: That if the killing or injuring takes place where there is no right to fence, the company is held to reasonable care, and is liable for ordinary negligence: Holding, however, that the above mentioned law does not apply to unfenced depot grounds, and that a railroad company is not liable for the injury to or the killing of stock thereon, except where negligence is shown.

Reaffirmed, explained and narrowed in Connyers v. Sioux City & Pac. Ry. Co., 78 Iowa 414, 415, 43 N. W. 269, holding that a railroad company is not required to reduce the scheduled speed of its passenger trains in approaching public highway crossings at night, and in order to avoid the injury to or the killing of cattle which are likely to be thereon; and a railroad company is not liable for the injury to or the killing of stock at such a crossing, by reason of the failure to so reduce the speed.

Special cross reference. For further cases citing, sustaining and explaining, etc., the text, and many others on the question, see anno-

tations under *Alger v. M. & M. R. R. Co.* (10 Iowa 268), Vol. I, p. 680.

Cross reference. See further on this question, annotations and cross references under *Russell v. Hanley* (20 Iowa 219), ante. p. 804.

WILSEY v. MAYNARD, 21 IOWA 107

1. Actions—Original Notice—Defects in or in its Service—Appearance Waives.—Defects in the original notice, or in the service thereof, is waived by the defendant entering his appearance, and he cannot thereafter in another action raise or rely thereon, pp. 110, 111.

Reaffirmed and explained in *Rahn v. Greer*, 37 Iowa 630, holding that under Sec. 2850 of the Code of 1860, an appearance by defendant for any purpose connected with the cause and although special, is a full appearance, and is a complete waiver of notice.

Reaffirmed and explained in *Lesure Lumber Co. v. Mut. Fire Ins. Co.*, 101 Iowa 519, 70 N. W. 762, holding—under Sec. 2626 of the Code of 1873—that an appearance by the defendant, even though special and for the purpose of objecting to the service of notice, confers jurisdiction of *the person* on the court, without other notice or its service.—And so holds *Moffitt v. Ch. Chron. Co.*, 107 Iowa 411, 415, 78 N. W. 47, reaffirming and explaining the text under the Code of 1897.

(Note.—There are many cases sustaining, but not citing the text.—Ed.)

*MCKNIGHT v. MCCULLOUGH, 21 IOWA 111

1. Arbitration and Award—Submission Failing to State What Court to Render Judgment—Effect.—An agreement to submit a controversy to arbitration will not be set aside because it fails to decide as to *what* court is to render judgment on the award of the arbitrators (as provided by Sec. 3676 of the Code of 1860), p. 113.

Cited in *Corbitt v. Nealy*, 29 Iowa 446, the court holding that where, by agreement of parties to an action, the cause is referred to arbitrators, and the court, by order, allows the arbitrators to fix the time for hearing, they may fix such time to a date more than ten days after the order of reference, and their proceedings will be legal although done after such time, Sec. 3103 of the Code of 1860 not applying in such case; and especially is this the rule where the parties appeared before the arbitrators, made no objection, and were fully heard upon the merits.

*This case is erroneously cited in *Lesure Lumber Co. v. Mut. Fire Ins. Co.*, 101 Iowa 519, 70 N. W. 762; *Moffitt v. Ch. Chron. Co.*, 107 Iowa 411, 78 N. W. 47, the court evidently intending to cite *Wilsey v. Maynard*, 21 Iowa 107.—Ed.

2. Arbitration and Award—Agreement of Submission—Sufficiency of Acknowledgment.—A substantial compliance with Sec. 3677 of the Code of 1860, in reference to the acknowledgment by the parties of an agreement of submission of arbitration, is all that is required: The same particularity is not demanded in such a certificate of acknowledgment as in those to deeds; p. 113.

Cited with approval in Smith v. Sherman, 113 Iowa 605, 85 N. W. 748, on the sufficiency of a certificate of acknowledgment to articles of incorporation.

MORGAN v. CORBIN, 21 IOWA 117

1. Descent and Distribution—Heir not a Purchaser—Rights of Third Persons Claiming Under or Through Ancestor.—One who takes and holds property by descent is not a *bona fide* purchaser; and his rights are inferior and subordinate to those of one claiming a title, interest, or lien thereto or thereon under a contract, or deed of the ancestor, p. 118.

Reaffirmed and explained in McGee v. Allison, and Lawrence, 94 Iowa 534, 63 N. W. 324, holding that an heir is not a subsequent purchaser within the meaning of our recording statutes; and is not protected against an unrecorded deed to the land inherited, made by his ancestor.

BELL v. FOUTCH, 21 IOWA 119

(Case involving the same facts, 21 Iowa 145.)

1. Bridges—Power of Board of Supervisors Concerning—Taxation for Bridges.—The county board of supervisors may—under the Code of 1860, and Acts of 1866, p. 80—erect, or repair, all bridges in the county; and may levy a tax therefor of not exceeding three mills on the dollar of taxable property therein.

The board may also—under such Code—so aid others in constructing a free bridge, if it does not part with its supervisory power thereover when it is so constructed. And this rule applies to the erection of a bridge over a river and within the limits of a city, unless the charter thereof expressly deprives the board of supervisors of this power, pp. 126, 127, 129, 133.

Reaffirmed in Barrett v. Brooks, 21 Iowa 150.

Reaffirmed and explained in Tubbs v. City of Maquoketa, 32 Iowa 565, holding that a city is liable for labor performed and materials furnished in repairing and maintaining a large bridge within its limits, although part of a county road, where the work was done and materials furnished under the city's express or implied authority.

(Note.—This last case involved the liability of the city of Maquoketa under its Charter of 1857, and as a city of the second class under Chap. 51 of the Code of 1860.—Ed.)

Reaffirmed, explained and extended in Moreland v. Mitchell County, 40 Iowa 396-398, holding that a county is bound to erect and keep in repair "county bridges," or those which are large and require an extraordinary expenditure of money; and that this includes the duty of the county to erect railings or barriers on the sides of approaches thereto: Hence, holding further that a county is liable in damages for injuries resulting from its failure to erect railings or barriers on the sides of approaches to a bridge; and that where a horse takes fright, and by reason of the absence of such railings or barriers, throws and injures its rider, the county is liable in damages therefor.

Reaffirmed and qualified in Oskaloosa Steam Engine Works v. Pottawattamie County, 72 Iowa 135, 136, 33 N. W. 606, holding that the county board of supervisors may—under Secs. 303, Subsec. 18, and 527 of the Code of 1873—erect and keep in repair, all public bridges in the county over any stream crossing a state or county highway, *and exceeding forty feet in length*: And that this rule applies to such bridges within a city's limits, or on a highway leading to it, irrespective of whether or not such city appropriates the sum allowed by such last section (527) therefor: That such board may—under Sec. 796 of the Code of 1873—levy a tax of not more than three mills on the dollar of taxable property for such purposes.

(Note.—This last case quotes Sec. 796 of the Code of 1873 as allowing "not less than three mills, etc." As such Sec. says, "not more than three mills, etc.," the syllabus correctly states the rule.—Ed.)

Reaffirmed and narrowed in McCullom v. Black Hawk County, 21 Iowa 413-415, holding that a city of the second class is liable in damages for injuries resulting by reason of a defective bridge over a non-navigable stream within its limits; that as the Code of 1860, gives the city control in such case over and charges it with the duty of repairing such bridges, the county is not liable.

Reaffirmed and narrowed in Soper v. Henry County, 26 Iowa 269, 271, holding that a county is not bound—under the Code of 1860—to erect or keep in repair, small bridges and culverts requiring a small expenditure of money; as they must be kept in repair by the respective road districts: Holding, therefore, that a county is not liable in damages for injuries to a person occasioned by the defective condition of a culvert over a small ditch or ravine on a highway.

Reaffirmed and narrowed in Chandler v. Fremont County, 42 Iowa 59, 60; Taylor v. Davis County, 40 Iowa 296, 297, holding that it is the duty of the road district to erect and keep in repair, small bridges within its limits which require no extraordinary expenditure of money therefor; and that a bridge which costs from five to seventy-five dollars is such an one: Holding, also, that a county is not liable in damages for injuries resulting from defects in such a bridge.

Cited with approval in McCord v. High, 24 Iowa 350, (concurring

opinion) the court holding that a road supervisor is liable in damages for diverting a channel of a stream in constructing a small bridge or culvert not built by the county officers or authorities, or under their direction.

Cited with approval in C. R. I. & P. Ry. Co. v. Murphy, 106 Iowa 47, 75 N. W. 682, the court holding that under Sec. 1, Chap. 200 of the Twentieth General Assembly, all taxable property within a county, whether within or without the limits of cities thereof, are subject to taxation for the county road fund as provided by such Act.

Cited in Aldrich v. Paine, 106 Iowa 469, 76 N. W. 815, the case turning on the power of the county board of supervisors to construct ditches in a city limits.

Cross references. See further on this question, and in its connection, annotations under Yant v. Brooks (19 Iowa 87), ante. p. 696; Wilson & Gustin v. Jefferson County (13 Iowa 181), ante. p. 134.

2. Navigable Waters—Bridges Over—Authority to Build—Right of Party to Complain of.—Whether Sec. 1252 of the Code of 1860, requiring authority to be obtained from the district court to build a bridge over a navigable river, applies to *free bridges constructed by the public*, and whether a person having no *special interest* in the navigation of such a river can complain of the construction of such bridge, although without such authority and though such statute applies thereto, are propositions which are questionable, and not decided, p. 132.

Cited in Snyder v. Foster, 77 Iowa 640, 42 N. W. 506, the court holding that injunction lies upon complaint of a tax payer of a county to restrain the application of any of the county's funds to the payment of claims for the building of a bridge over a navigable lake, built or about to be built without lawful authority [in this case without a special Act of Congress or of the General Assembly of Iowa granting authority therefor, to the county board of supervisors]: The court holding, further, that—under the Code of 1873—the county board of supervisors has no authority to erect a bridge over a navigable lake.

McCLURE v. OWENS, 21 IOWA 133

(Later Appeal, 26 Iowa 243.)

1. Appeal—Practice—Constitutional Question—When not Decided without Whole Court.—Unless it is absolutely necessary to the disposition of the case, the Supreme Court will not decide upon a constitutional question, when, for any reason, all of the judges cannot sit and assist in its determination, p. 134.

Reaffirmed in Eldridge v. Kuehl, 27 Iowa 171.

MILLER v. COLVILLE, 21 IOWA 135

1. **Execution Sale of Land—Prior Recorded Deed—Rights of Execution Purchaser—Innocent Third Persons.**—A purchaser of land at an execution sale, takes it subject to the rights of the grantee in a prior recorded deed of the judgment debtor thereto, or to the holder of the purchase money notes of such deed.

Such execution sale, or a sheriff's deed made thereunder will be set aside in an action in equity by such prior grantee, or holder of the notes, if the action is commenced before the rights of innocent third persons have attached, p. 139.

Reaffirmed and explained in Wallace v. Bartle, 21 Iowa 350, 351. 89 Am. Dec. 584, holding—as does the present case in argument—that where a creditor purchases the equitable title of his debtor in land, and under an execution, he buys at his peril, and takes that title and no more.

Cited in Burmeister v. Dewey, 27 Iowa 471, the court holding that although homestead which is subject to the satisfaction of a judgment is sold before other property of the debtor subject thereto, is exhausted, still it will not be a ground for setting aside the sale and deed made thereunder in 1859 in an action therefor commenced in 1868; a case, however, in which the court decides that the other property was properly exhausted before the homestead was sold.

Cited in Hultz v. Zollars, 39 Iowa 593, the court holding that a judgment is not a lien upon an equitable interest in real estate of the judgment debtor, and is not such a lien as will affect a *bona fide* purchaser without notice.

BARRETT v. BROOKS, 21 IOWA 144

1. **Swamp Lands—Act of Congress Granting to State—Title and Right of State—Title and Rights of Counties.**—The Act of Congress of September 28, 1850, and the issuance of a patent to swamp lands to the State of Iowa thereunder, vested the fee simple title thereto in the state, with the power of their disposal in the Legislature; and by the Act of January 13, 1853, Secs. 956-960 of the Code of 1860, the Legislature passed the fee simple title to swamp lands within the respective counties to the counties wherein they are situated, pp. 147-149.

Reaffirmed in Snell v. Dubuque & Sioux City Ry. Co., 78 Iowa 90, 42 N. W. 589; Smith v. Miller, 105 Iowa 691, 70 N. W. 124.

Cited in Koehler & Lange v. Hill, 60 Iowa 626, 15 N. W. 621, not in point.

Cross reference. See in this connection, annotations under Allison v. Halfacre (11 Iowa 450), Vol. I, p. 841.

2. **Swamp Lands—Act of Congress Granting to State—Breach of Conditions by State—Who can Complain.**—Even if the State or

a county holding under the State, grants swamp lands in violation of the conditions and limitations of the Act of Congress of Rule 1 hereof, no one but the donor—the United States—can complain thereof, pp. 148, 149.

Reaffirmed in Keltner v. Story County, 28 Iowa 36; Hatch, Holbrook & Co. v. Pottawattamie County, 43 Iowa 443, 444.

Reaffirmed and varied in C. R. I. & P. Ry. Co. v. Grinnell, 51 Iowa 485, 1 N. W. 720, holding that where lands are granted by Act of Congress to aid in the construction of certain named lines of railroad, that the fact that such a railroad was not completed within the time limited by the grant and thereby working a forfeiture, can only be insisted upon or raised by the United States.

3. Swamp Lands—When Proceeds may be Used to Erect Public Bridges—Submission to Voters—Contract Need not be Submitted.—Under Secs. 925, 957, 986, of the Code of 1860, and the Acts of 1862, p. 78, a county may use the proceeds of swamp lands in the erection of a public bridge upon being so authorized by a vote of the people.

In submitting such question to the vote, it is unnecessary to also submit the contract for the erection of the bridge, where the amount to be expended, the conditions, and the character and location thereof are all set out in the submission, pp. 149, 150.

Reaffirmed in Parks v. Iowa Cent. R. R. Co., 24 Iowa 189, a case involving the appropriation of the proceeds of swamp lands of a county to aid in the construction of a railroad—allowed by Sec. 986 of the Code of 1860, and the Acts of 1862, p. 78.

4. Bridges—Power of Board of Supervisors Concerning—Taxation for Bridges.—The county board of supervisors may—under the Code of 1860, and Acts of 1866, p. 80—erect, or repair all bridges in the county; and may levy a tax therefor of not exceeding three mills on the dollar of taxable property therein.

The board may also—under such Code—so aid others in constructing a free bridge, if it does not part with its supervisory power thereover when it is so constructed. And this rule applies to the erection of a bridge over a river and within the limits of a city, unless the charter thereof expressly deprives the board of supervisors of this power, pp. 150, 152.

Reaffirmed and varied in Long v. Boone County, 32 Iowa 183, holding that under Sec. 117 of the Code of 1851, the county had an implied authority to issue warrants to construct, or aid in constructing a road, or bridge.

Special cross reference. For further cases citing, sustaining and qualifying the text, and many others on the question, see annotations under Rule 1 of Bell v. Foutch (21 Iowa 119), ante. p. 880. See, also, cross references there found.

CITY OF DES MOINES *v.* LAYMAN, 21 IOWA 153

1. **Municipal Corporations—Condemnation of Land for City Purposes, Streets, etc., in County Court—Rights of Land Owner upon Appeal to District Court—Jury Trial—Constitutional Law.**—Upon an assessment of damages to a land owner in the county court for land taken by a city for a street [or other public purposes provided in Secs. 1064 and 1065 of the Code of 1860], the land owner may appeal to the district court under Sec. 267 of the Code of 1860; and thereon is entitled to a jury trial upon the merits and as a matter of Right: But if, instead of adopting this course, the land owner takes the case to the district court for review under Sec. 1067 of the Code of 1860, he is not entitled to a new assessment by a jury and *as a matter of Right*, but this may be ordered by the district court, if, within a sound judicial discretion, he finds that substantial justice has not been done: And the land owner cannot complain of the latter court's abuse of discretion and a failure to have such new assessment, upon appeal to the Supreme Court, where it was not claimed, or demanded below.

Section 1067 of the Code of 1860, in reference to this subject is constitutional, pp. 156, 157.

Reaffirmed in part and explained in Sigafoos *v.* Talbot, 25 Iowa 215, holding that an appeal lies to the district court from an assessment of damages by the board of supervisors to a land owner, occasioned by the establishment of a public road; and upon the appeal the question of the amount of such damages may be tried *de novo* and by a jury: That no motion to set aside the appraisement, or claim of appeal before such board, is necessary before taking it.

Reaffirmed and varied in Wilson *v.* Shorick, 21 Iowa 334, 335, holding that an appeal lies to the district court from an order of the county court appointing a guardian for a person of unsound mind; that it is to be taken within thirty days after the making of the order, under Sec. 267 of the Code of 1860, or, under Sec. 270 of such Code, within a year thereafter, upon due notice and upon application to the district court therefor, and on reasonable terms: And Sec. 1457 of that Code, authorizing the probate judge or county court to terminate such guardianship, if the letters are improperly issued, or the insane person is restored to sound mind, does not take away the right of appeal given by the first mentioned sections, but only provides an additional remedy.

Cited in Gano *v.* Minn. & St. L. R. R. Co., 114 Iowa 720, 87 N. W. 717, 89 Am. St. Rep. 393, 55 L. R. A. 263, the court upholding the constitutionality of Sec. 2007 of the Code of 1897, allowing a taxed attorney's fee against a railroad company upon appeal to the district court in condemnation proceedings.

Cited in City of Keokuk *v.* Keokuk Northern Line Packet Co., 45 Iowa 211, not in point.

Distinguished and narrowed in In re Bradley, and Hansen, et al, 108 Iowa 477-479, 79 N. W. 281, holding that unless specially provided by statute, parties are not entitled to a trial by jury *as a matter of Right* in condemnation cases, and other *special proceedings*: Hence, holding that upon an appeal to the district court from the action of the board of supervisors in a proceeding to secure the drainage of wet lands, under Sec. 2, Chap. 186, Acts of Twentieth General Assembly, the parties are not entitled to a trial by jury—in the absence of an agreement therefor.

Cross reference. See further in this connection, annotations under Umbarger v. Bean (15 Iowa 256), ante. p. 338.

LIVINGSTONE v. McDONALD, 21 IOWA 160, 89 AM. DEC. 563

1. **Adjoining Land Owners—Percolating or Surface Water—Dominant Owner Increasing Flow to Servient Estate—Damages.**—The dominant or owner of higher agricultural estate is liable in damages to the servient or owner of the lower agricultural estate adjoining, if he, by means of ditches or drains, either on the surface or underneath the soil, increases the flow of percolating or surface water so that a greater quantity empties upon the servient estate than would naturally flow upon it, or when the water is thereby collected and precipitated upon the servient in a manner different from its natural flow, resulting in damages to the servient land owner: And this is the rule although such act or acts of the dominant land owner be done in the ordinary use and improvement of his land, pp. 164, 165, 171, 172, 174.

Reaffirmed in Sheker v. Machovec, 139 Iowa 4, 116 N. W. 1043.

Reaffirmed in Williamson v. Oleson, 91 Iowa 291, 59 N. W. 267, a case, however, turning upon another point.

Reaffirmed and explained in Schrope v. Trustees of Pioneer Township, et al, 111 Iowa 113, 114, 82 N. W. 466, holding that the continuance of a culvert across a highway will not be enjoined upon complaint of the owner of a servient agricultural estate, when it does not increase the quantity of surface water which flows upon his land, or cause it to flow thereon in a manner different from its natural course.

Reaffirmed, explained and extended in Keck v. Venghause, 127 Iowa 531-534, 103 N. W. 774, 4 Am. & Eng. Ann. Cases 716, holding that neither the owner of a dominant nor of a servient estate has the right to dam, or to collect surface water and cast it upon his neighbor in an increased or unnatural way or quantity, to his injury: Holding further that a riparian land owner cannot embank against, or build a levee to prevent, the natural overflow from an inland stream, when it will result in casting an increased volume of water upon the land of another riparian owner, other than the usual overflow, and resulting in substantial injury to the latter: And that, in such cases, injunction lies upon complaint of the owner injured, or about to be thereby injured.

Reaffirmed and extended in Stinson v. Fishel, 93 Iowa 660, 661, 61 N. W. 1065, holding further that injunction lies upon complaint of the owner of the servient estate to restrain the acts of the dominant set out in the text, or the continuance thereof.—And to the same effect is Holmes v. Calhoun County, 97 Iowa 363, 364, 66 N. W. 146, (re-affirming and extending the text) holding the rule applicable to a county in constructing, or maintaining a ditch along a highway contrary to the rule of the text, and to the injury and damage of the owner of agricultural land below.

Reaffirmed and extended in Brown v. Armstrong, 127 Iowa 177, 178, 102 N. W. 1047, holding further that when water, no matter what its character, flows in a well defined course, be it only in a swale, and seeks discharge in a neighboring stream, its flow cannot be arrested or interfered with by one land owner to the injury of another: That the owner of a servient estate has no right to either dam the surface water and cast it back upon his neighbor, or to collect it in a body and precipitate it in increased or unnatural quantities, or in a different manner from the natural flow thereof, to the damage of his neighbor: And in such case injunction lies upon complaint of the injured land owner to restrain the commission or continuance of any such act or acts: But the owner of the dominant estate may, by consent, either express or implied, estop himself from relying upon these rights, or he may so abandon his rights as that the owner of the servient estate may acquire a counter-easement to have the water turned back upon the dominant estate: And where surface water has no defined channel, but spreads out over the land without a well defined course, it may be turned by the land owner in any direction.

Reaffirmed and extended in Baker v. Town of Akron, 145 Iowa 487-489, 122 N. W. 927, holding further that a city has no greater right than an individual to collect surface water from its lands or streets into an artificial channel, and discharge it, contrary to its natural flow, or in a manner different therefrom, upon the land of another *outside of the city limits*: That in such cases and in reference to all such land, the rule of the text applies to a city as well as to individuals; and an action for damages and injunction lies in favor of any such land owner thereby injured.

Reaffirmed and varied in Drake v. Ch. R. I. & Pac. Ry. Co., 63 Iowa 304, 306, 308, 19 N. W. 216, 50 Am. Rep. 746; 70 Iowa 61, 29 N. W. 805, holding that a railroad company is liable in damages for failure to construct and keep in repair, drains, ditches, or culverts through embankments made for its road, or along its right of way, when by reason of the embankment, or its failure to supply the ditches, drains, or culverts, surface water is obstructed and forced back upon higher agricultural land, resulting in damage to its owner.

Reaffirmed and varied in Sullens v. Ch. R. I. & P. Ry. Co., 74 Iowa 662-664, 38 N. W. 547, 7 Am. St. Rep. 501, holding that where

a railroad company constructs an embankment for its road-bed across the valley of a creek in such a manner as to turn, or retard the flow in its channel, it is the duty of the company to build and maintain a culvert of such a width and capacity as to properly pass all the waters so turned or retarded, and the waters of such floods as may be reasonably expected to occur: and when it fails to so do, whereby waters are forced back or upon agricultural lands above the embankment, such facts render it liable to such a land owner for resulting damages.

Reaffirmed and varied in Willitts v. Ch. B. & K. C. Ry. Co., 88 Iowa 286, 55 N. W. 315, 21 L. R. A. 608, holding that where a railroad company constructs an embankment for its road-bed, and it obstructs or retards the natural flow of surface water, it is its duty to cut or construct a ditch or culvert and to keep it open, or in repair, sufficient to pass such surface water as may be reasonably expected to accumulate or flow thereto; and for failure so to do it is liable to a land owner above the embankment for any resulting damage.

Reaffirmed and varied in Albright v. Cedar Rapids & Iowa City Ry. & Light Co., 133 Iowa 645, 110 N. W. 1052, holding that injunction lies to restrain the continuance of a ditch and pipe-culvert constructed by a railroad company along and through its right of way and road-bed, and which diverts the natural flow of surface water and casts it upon another's land, at another point, to his injury.

Reaffirmed, varied and qualified in Pohlman v. Ch. M. & St. P. Ry. Co., 131 Iowa 91-94, 96, 107 N. W. 1025, 6 L. R. A. (New Series) 146, holding that both at Common Law and under Chap. 70 of the Acts of 1904, the owner of a servient estate is not liable in damages resulting to the owner of the dominant by reason of a ditch constructed by the former over his land, whereby the flow of surface water is accelerated or its force increased, when such water flows in its natural course as before.

Reaffirmed, varied and qualified in Matteson v. Tucker, 131 Iowa 514-516, 107 N. W. 602, holding that in an action by the owner of a dominant estate to enjoin the owner of a servient estate from continuing to maintain a dike or levee, whereby surface water is obstructed in its natural flow and force, and is forced back upon the land of the plaintiff, the burden is on the plaintiff to prove both that his land is the dominant or higher, and that the waters are so obstructed.

Reaffirmed and qualified in Collins v. City of Keokuk, 91 Iowa 295, 59 N. W. 201, holding that a city will not be enjoined from constructing or maintaining a tile, or drain in the improvement of its street, although it conveys water to the land of another, when the volume of the water cast upon such land is not thereby increased, or it is not thereby caused to pass thereover in a manner essentially different from its natural course.

Reaffirmed and narrowed in Vannest v. Fleming, 79 Iowa 641-644, 44 N. W. 908, 18 Am. St. Rep. 387, 8 L. R. A. 277; Wharton v.

Stevens, 84 Iowa 113-117, 50 N. W. 563, 564, 35 Am. St. Rep. 296, 15 L. R. A. 630, holding that the owner of the dominant or higher agricultural estate has a right to tile, or ditch his land so as to pass the percolating, or surface water to and upon the lower agricultural land, provided he so tiles or ditches in accordance with the natural flow of the water, and its flow is not diverted, or its quantity increased; and that the owner of the servient estate may be enjoined from obstructing or damming such a tile, or ditch, or the flow of the water which interferes therewith.

Distinguished in Freburg v. City of Davenport, 63 Iowa 122, 123, 18 N. W. 707, 50 Am. Rep. 737, holding that a city has the right to grade its streets; and it is not liable in damages for failure to provide culverts, or gutters adequate to keep surface water from adjoining lots which are below the established grade of a street—"Particularly," says the court, "if the injury would not have occurred had the lots been filled up, so as to have been on a level with the street."

Distinguished in Phillips & Lansing v. Waterhouse, 69 Iowa 201, 28 N. W. 540, 58 Am. Rep. 220, holding that an owner of a lot in a city has the right to improve it in such manner as he deems proper, either by changing the surface or the erection of buildings, and such right is, in no respect, modified by the fact that his own land is so situated with reference to that of adjoining owners that the mode of improvement adopted will cause water which may accumulate thereon by rains, to flow over the lands of others in greater quantities, or in other directions, than they were accustomed to flow: Provided that the owner of the lot so improves with reference to the established grade of the street or alley on which it is situated.

Distinguished in City of Cedar Falls v. Hansen, 104 Iowa 192-194, 73 N. W. 586, 65 Am. St. Rep. 439, holding that where a city, as it has a right to do, diverts the natural course of surface water in grading its street, a lot owner has the right to, and he will not be enjoined or restrained from, bringing his lot to grade, although he thereby again obstructs and casts such water upon the street, or upon adjoining lots.

And see 146 Iowa 629, 643, 644, 125 N. W. 848, 851-854; 147 Iowa 380, 126 N. W. 342.

Unreported citation, 130 N. W. 904, 905.

2. Trial—Practice—Dismissal or Withdrawal Without Prejudice—When Allowed—Final Submission.—Plaintiff may, under the Code of 1860, at any time before final submission to the jury, and even after the giving of the instructions, upon the trial of an action at law, and by leave of court, withdraw or dismiss any portion of his petition or cause of action, pp. 161, 175.

Reaffirmed and extended in Oppenheimer v. Elmore, 109 Iowa 197, 198, 80 N. W. 307, holding further that, under Sec. 3764 of the Code of 1897, plaintiff may dismiss his action without prejudice to a

future action, at any time before the final submission of the case to the jury; and that final submission to the jury is when the court directs it to enter upon the consideration of the case: Hence holding that where the issue is made up, the jury empaneled and sworn, and the evidence is adduced by the plaintiff, that, pending a motion by defendant for the court to direct a verdict for him, the plaintiff may dismiss his action without prejudice.

WILGUS, AND EWING *v.* GETTINGS, AND GIDDINGS, 21 IOWA 177

1. **Trade Fixtures or Improvements Placed on Land by Tenant at Will Under License—Subsequent Purchaser of Land with Notice, Rights of.**—Where fixtures or other improvements are placed on land for the purpose of carrying on a business or trade, and by one who in good faith believes himself to be a tenant at will, and under a license therefor, express or implied, from the landlord, a subsequent purchaser of the land with full knowledge of the facts, takes subject to the rights of the owner of the fixtures or improvements, or to the rights of a purchaser thereof from him, pp. 179, 180.

Reaffirmed in Fischer, and Knorr *v.* Johnson, et al, 106 Iowa 184, 185, 76 N. W. 659; Roth *v.* Collins, 109 Iowa 503, 80 N. W. 544.

Cited in District Township of Corwin *v.* Moorehead, 43 Iowa 469, holding that where a building is erected on the land of another with the builder's own money, and for his own exclusive use, as disconnected from the use of the land, and with an agreement to that effect between the owner of the land and the builder, it will, as between the parties, be considered personal property; and especially is this true where the very contract by which the building was erected contemplated its removal: And that the builder can, in such case, maintain replevin therefor—under Sec. 3225 of the Code of 1860—against the land owner.

Distinguished in Bullard *v.* Hopkins, 128 Iowa 705, 105 N. W. 197, holding that as between vendor and vendee, it is the general rule that things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, being on the land, and especially if attached thereto in some permanent way at the time of its conveyance by deed containing covenants of warranty and no reservations, pass with the realty.

Distinguished and narrowed in Dostal *v.* McCaddon, 35 Iowa 320-322, holding that a lessee of real estate cannot, after the expiration of his lease and the termination of his possession thereunder, remove trade fixtures, as against a purchaser of the land without notice of his claim.

JONES *v.* SWAN & Co., 21 IOWA 181

1. **Mechanic's and Materialman's Lien—Sufficiency of Contract with Owner.**—Although in order to entitle a mechanic or mate-

rialman to a lien, it is necessary that the labor be performed or materials furnished under a contract with the owner, still, it is not necessary that the contract contemplate, or specifically name each item of labor or materials to be done or furnished, nor need such contract expressly provide for the lien: And the items of labor or material may be charged by the mechanic or materialman in the same manner that he charges his other customers, p. 184.

Reaffirmed and explained in Neilson, Benton & O'Donnel v. The Iowa Eastern R. Co., 51 Iowa 185, 186, 1 N. W. 436, 33 Am. Rep. 124; Carney Bros. v. Cook, 80 Iowa 749, 45 N. W. 919; Chase v. Garver Coal Co., 90 Iowa 27, 28, 57 N. W. 648, holding that the contract between the mechanic or materialman and land owner may be implied.

Reaffirmed and extended in Kidd v. Wilson, 23 Iowa 467, holding further that the contract may be with the agent of the land owner.

Reaffirmed and extended in Mornan v. Carroll, 35 Iowa 25, 26, holding further that the statute includes *laborers*.

(Note.—See further, sustaining, but not citing the text, Foerder v. Wesner, 56 Iowa 159, 9 N. W. 100; Coats & Davis v. Shorey, 8 Iowa 416.—Ed.)

2. Mechanic's and Materialman's Lien—When Attaches—Time Allowed for Filing Notice—Subsequent Purchaser or Mortgagee.—A mechanic's or materialman's lien attaches when he does the first work or furnishes the first item of materials; and where there is an open, current and continuous account therefor, he is allowed ninety days (under the Code of 1860) from the last item, in which to file notice of his lien; and from the commencement of the work or the furnishing of materials, in such a case, his lien is superior to the rights of a purchaser, or mortgagee of the land, acquired without notice during that period, p. 185.

Reaffirmed in Delaware R. R. Construction Co. v. Dav. & St. P. Ry. Co., 46 Iowa 413, 414.

Reaffirmed and extended in Evans v. Tripp, 35 Iowa 372, 373, holding further that, under the Code of 1851, as amended by Chap. 111, Acts 1862, a mechanic or materialman has a lien as against the owner, purchasers and incumbrancers on the premises on which work is done, or materials are furnished in the erection of a house or other improvements, for ninety days after the completion of the work, or furnishing of the last materials, and a lien on the premises from the expiration of such ninety days until he files his statement, as against the owner, and purchasers or incumbrancers with actual notice of his lien.

Cross reference. See further in this connection, annotations under Noel v. Temple (12 Iowa 276), ante. p. 47.

AYERS v. HOME INSURANCE CO., 21 IOWA 185

1. **Fire Insurance—Stipulation in Policy Against Sale, Transfer, etc.—Effect.**—Where a policy of fire insurance stipulates that upon a sale, transfer or change of title in the property insured, the policy shall be void and cease, etc., then if there be a change or transfer of title to such an extent that the insured will have greater temptation to burn the property, or less interest and watchfulness in guarding it from destruction by fire, the policy is void and ineffective: But a mere change or transfer of title which is no more than nominal, or where the real ownership in fact remains the same, although the evidence of title be changed or transferred, will not affect the effectiveness of the policy, pp. 189-191.

Reaffirmed in Cone v. Century Fire Ins. Co., 139 Iowa 207, 208, 117 N. W. 308.

(Note.—See, sustaining, but not citing, the text, Ayers v. Hartford Ins. Co., 21 Iowa 193.—Ed.)

Cross reference. See further on this question, annotations under Ayres v. Hartford Fire Ins. Co., (17 Iowa 176), ante. p. 513.

2. **Insurance Companies—Failure of Agent to Set out Facts in Application for Policy, which are Stated by Insured—Estoppel of Company.**—If the local agent of an insurance company has the power only to receive and forward applications for insurance to an insurance company, parol evidence is inadmissible to prove that the agent incorrectly took down, or changed the statements in such an application: But if a local agent of such a company has the power to and does pass upon a risk without submitting it to the insurer, and fails to correctly take down facts stated by the applicant, in ignorance of which the application is signed, then, in the absence of an express provision in the policy to the contrary, the insurer is thereby estopped from claiming any rights by reason thereof, p. 192.

Special cross reference. For cases citing, explaining, extending and narrowing the text, and others on the question, see annotations under Rule 3 of Ayres v. Hartford Fire Ins. Co. (17 Iowa 176), ante. p. 513.

AYERS v. HARTFORD INSURANCE CO., 21 IOWA 193

1. **Fire Insurance—Stipulation in Policy Against Sale, Transfer, etc.—Transfer as Collateral Security.**—The transfer by insured of a policy of fire insurance as collateral security for a debt, does not render it void under a stipulation therein against a "sale, transfer or change of title of or in the property insured," pp. 194, 195, 198.

Cited in Ayers v. Home Ins. Co., 21 Iowa 188.

Cross reference. See further on this question, annotations and cross references under Ayers v. Home Ins. Co. (21 Iowa 185), above.

NORRIS v. MCGAFFICK, 21 IOWA 201

1. **Descent and Distribution—Child Seized of Land Dying Intestate, without Wife or Issue—Mother the only Surviving Parent, Rights of—Purchaser from Mother—Rights of—Rescission.**—If a child dies intestate seized of real estate, leaving no wife nor issue, and his mother is his only surviving parent, she takes—under Secs. 2496 and 2498 of the Code of 1860—only a life estate therein: And if, thereafter, the mother sells and conveys such property by a general warranty deed, the purchaser may, in equity, rescind the contract of sale and recover the purchase price, with interest, less rent during the time he has had possession, or, he may by an action in equity elect to keep the title he has—a life estate—and recover the difference between it and the fee simple title conveyed, pp. 204, 205.

Cited in Meyer v. Meyer, 23 Iowa 369, 92 Am. Dec. 432, not in point.

*GARDNER v. COLE, 21 IOWA 205

1. **Fraudulent Conveyances—Rights of Subsequent Purchaser from Fraudulent Grantor.**—Where a conveyance to land is voluntary and tainted with actual fraud, and the grantor after its execution retains possession and claims ownership of the property and sells it to another for a valuable consideration, and the purchaser has no *actual notice* of the first deed at the time of his purchase, the latter may avoid, or set aside the prior fraudulent and voluntary conveyance; and constructive notice to the latter purchaser is not, in such case, sufficient to defeat such right, pp. 214, 215.

Reaffirmed and extended in Wright v. Howell, 35 Iowa 298, holding that where a fraudulent conveyance of land is executed and recorded, and the grantor thereafter remains in possession, a subsequent purchaser thereof, in good faith, for value and without actual notice, either from the fraudulent grantee, or under an execution against him, takes it free from all claims of the fraudulent grantor, or his purchaser or mortgagee who takes subsequent thereto.

Reaffirmed and narrowed in Wolf v. Van Metre, 23 Iowa 403, holding—as does the present case in argument—that where a voluntary conveyance to land is made in good faith and without fraud, and a subsequent purchaser, or incumbrancer, has notice, either actual or constructive, thereof, at the time he acquired his rights, he cannot defeat it: Hence holding that a voluntary conveyance of real estate by a wife cannot be defeated by a mortgagee under a mortgage executed by her on other real estate to secure her husband's debt; she not being personally bound for such debt.

*This case is cited in *Skiff v. Cross*, 21 Iowa 462, a case not involving any of the points hereof; so it is not given.—Ed.

Cited with approval in Hurley v. Osler, 44 Iowa 646, 647, holding that where a conveyance of land has been made to defraud creditors, a subsequent purchaser in good faith and for a valuable consideration, but with notice of the fraud, from the fraudulent grantor, may rely on the fraud to protect his title and possession, when sued in equity by the fraudulent grantee.

Cited in Laird v. Kilbourne, 70 Iowa 86, 30 N. W. 11; Mickel v. Walraven, 92 Iowa 428, 60 N. W. 634, involving the statute of limitation.

Cited in Kingman Plow Co. v. Knowlton, 143 Iowa 45, 119 N. W. 762, not in point, but upon analogy.

JONES v. BAMFORD, 21 IOWA 217

1. Principal and Agent—Attorney and Client—Notice to Attorney or Agent—Effect.—The knowledge or notice of facts acquired by an attorney or agent when engaged properly in the business of his client or principal, becomes, in law, the knowledge or notice of such facts to the client or principal, p. 219.

Reaffirmed in Crouse v. Morse, 49 Iowa 389; Sowler v. Day, 58 Iowa 255, 12 N. W. 299; Shoemaker v. Smith, 80 Iowa 662, 45 N. W. 746; Gensburg v. Marshall Field & Co., 104 Iowa 604, 74 N. W. 5; Baldwin, and Iowa Nat'l Bank of Ottumwa v. Davis, 118 Iowa 38, 91 N. W. 778; Manson v. Simplot, 119 Iowa 95, 96, 93 N. W. 76.

Reaffirmed and extended in Mankin v. Mankin, 91 Iowa 407, 59 N. W. 292, holding further that a person is bound by the fraudulent acts of his agent within the scope of his employment, although he has no notice thereof.

Reaffirmed and extended in Merritt v. Huber, 137 Iowa 137, 114 N. W. 628, holding further that an agent with authority therefor, may appoint a sub-agent, and in such case the knowledge of the latter will be imputed to the principal.

2. Notice—Facts Putting Person upon Inquiry—Constructive Notice Arising Therefrom.—Where a person has such knowledge as would put an ordinarily prudent man upon inquiry in reference to a particular matter or matters, he is thereby chargeable with notice of every fact relating thereto which such inquiry would reasonably develop, p. 220.

Reaffirmed in Ross v. C. R. I. & P. Ry. Co., 55 Iowa 695, 696, 8 N. W. 646.

Reaffirmed and qualified in Weare v. Allison & Williams, 85 Iowa 261, 52 N. W. 331, holding that in order to charge a subsequent *bona fide* purchaser, or mortgagee, with notice of a prior unrecorded conveyance by reason of knowledge of facts such as would put a reasonably prudent man upon inquiry, the proof thereof must be clear and decisive.

Cross reference. See further on this question, annotations under Rule 1 of *English v. Waples* (13 Iowa 57), ante. p. 118.

IOWA HOMESTEAD CO. v. WEBSTER COUNTY, 21 IOWA 221

1. **Taxation and Revenue—Railroads—Lands Granted to Railroad Company upon its Completing Road—When Taxable.**—Where under an Act of Congress and of an Act of the General Assembly of Iowa conformably thereto, a railroad company is entitled to certain public lands upon its completing a certain number of miles of railroad, then upon its completing the distance prescribed, the lands become subject to taxation—under the Code of 1860, and Chap. 173, Acts of 1862—although a patent thereto be not issued until after their assessment, pp. 227, 231, 233.

Reaffirmed in *Dubuque & Pacific R. R. Co. v. Webster County*, 21 Iowa 236, 237; *C. R. & M. R. R. Co.*, and *I. R. L. Co. v. Carroll County*, 41 Iowa 161, 162, 164, 169, 186-189; *C. B. & Q. R. R. Co. v. Holdsworth*, 47 Iowa 21; *Goodnow v. Stryker*, 62 Iowa 226, 17 N. W. 506; *Whitehead v. Blummer*, 76 Iowa 184, 40 N. W. 711.

Reaffirmed and qualified in *Iowa R. R. Land Co. v. Fitchpatrick*, 52 Iowa 245, 3 N. W. 40; *Dickerson v. Yetzer*, 53 Iowa 682, 683, 6 N. W. 41; *Doe v. Iowa R. R. Land Co.*, 54 Iowa 657, 658, 7 N. W. 123; *Grant v. Iowa R. R. Land Co.*, 54 Iowa 674-676, 7 N. W. 113, holding that lands granted by Congress to a railroad company become taxable from the time they are earned by the company under the conditions of the grant—unless they are reserved, and the title thereto withheld by competent authority, for the purpose of adjusting conflicting rights in them.

Cited with approval in *Goodnow v. Wells*, 67 Iowa 655, 25 N. W. 865; *Iowa R. R. Land Co. v. Davis*, 102 Iowa 132, 71 N. W. 230, not in point, but upon analogy.

Distinguished in *Iowa Falls & Sioux City Ry. Co. v. Cherokee County*, 37 Iowa 488-492, holding that when lands are granted to a railroad company by Act of the General Assembly of Iowa, upon its completing a certain number of miles of "first class road" on a specified route, the track to be "of good substantial rail, weighing not less than fifty-six pounds per lineal yard," etc., the lands thus granted to be patented by the Governor to the company "as the same shall be earned by the building of said road," but that "no patent shall be issued by him for any portion of said lands, until at least seventy-five miles of road shall be completed," and that "no patent shall be made for any lands more than forty miles in advance of the point to which said road may be constructed from time to time," and other similar provisions regarding the issuance of patent, that no such lands become subject to taxation as the property of the company, until a patent therefor is issued by the Governor.

Distinguished in Sioux City & St. P. R. R. Co. v. Osceola County, 43 Iowa 322-324, holding that where lands are granted by Act of Congress to the state of Iowa to aid in the construction of railroads, but no particular railroads are named therein, and the General Assembly of this state grants them to certain railroads, to be deeded as ordered by a later session thereof, that no such lands are taxable against any such company, until the later session authorizes the issuance of a certificate or patent thereto.

Distinguished in C. R. I. & P. R. R. Co. v. City of Davenport, 51 Iowa 454, 1 N. W. 723, holding that property cannot be taxed until authority therefor is conferred by the Legislature, and that the manner prescribed by law must be pursued: Holding further that the right of a railroad company to use a bridge owned by the United States Government is not subject to state, county nor municipal taxation; and that such bridge is also exempt therefrom.

Distinguished in Reynolds v. Plymouth County, 55 Iowa 93, 7 N. W. 469, the court holding that one who obtains a patent to land under a forged warrant or scrip, obtains no title thereto, and it is not taxable.

Distinguished, varied and narrowed in Moriarty v. Boone County, 39 Iowa 639, holding that land pre-empted as homestead is not subject to taxation during the five years it is occupied for the purpose of obtaining a certificate or patent thereto.

Distinguished and narrowed in Cedar Rapids & Mo. R. R. Co. v. Woodbury County, 29 Iowa 248, 249, holding that where a railroad company is granted a certain number of acres, or tracts of land by the United States and upon its completing a certain number of miles of railroad, but the Act of Congress does not identify or describe the land granted, and it cannot be definitely ascertained until a certificate issues therefor, it is not subject to taxation until the issuance thereof.

Distinguished and narrowed in Goodrich v. Beman, 37 Iowa 564-566, holding that although the Cedar Rapids & Mo. River R. Co., may have constructed the number of miles of railroad to entitle it to a certain number of sections of land, under Chap. 37, Acts of 1860, held by the state in aid of the construction of railroads under the Act of Congress of May 15, 1856 [Act of the text], still such lands are not taxable against it, until compliance with Secs. 6 and 7 of Chap. 37, Acts of 1860.

Cross reference. See further on this question, annotations and cross references under State, ex rel Lockwood, and Scholfield v. Kirkwood, Governor (14 Iowa 162), ante. p. 223.

DUBUQUE & PACIFIC R. R. CO. v. WEBSTER COUNTY, 21 IOWA 235

I. Taxation and Revenue—Railroads—Lands Granted to Railroad Company upon its Completing Road—When Taxable.—Where

under an Act of Congress and an Act of the General Assembly of Iowa conformably thereto, a railroad company is entitled to certain public lands, upon its completing a certain number of miles of railroad, then upon its completing the distance prescribed the lands become subject to taxation—under the Code of 1860, and Chap. 173, Acts of 1862—although a patent thereto be not issued until after their assessment, pp. 236, 237.

Reaffirmed and extended in Stryker v. Polk County, and Tiffin, treasurer, 22 Iowa 137, holding further that any right, interest or title in lands is taxable against the owner; and that lands held in trust by the United States for a railroad company (under the Act of Congress in aid of the construction of railroads), is taxable against the latter.

Special cross reference. For further cases citing, sustaining, qualifying and distinguishing, etc., the text, and others on the question, see annotations under Iowa Homestead Company v. Webster County (21 Iowa 221), next preceding this present case.

OSBORN v. CLOUD, 21 IOWA 238

1. Execution Sales—Motion to Set Aside—Notice to Purchaser.—Notice of a motion to set aside a sale under an execution must be given to the purchaser thereat, or the order setting it aside will be reversed upon appeal, pp. 238, 239.

Reaffirmed and varied in Iowa Sav. & Loan Ass'n v. Chase, 118 Iowa 54, 55, 91 N. W. 808, holding that after an unsuccessful party has paid attorneys fees taxed as costs, the court cannot entertain a motion to retax the costs, and thereupon enter judgment against the successful party for such attorneys fees, unless the latter party is served with notice of the making of such motion, or enters his appearance; and that the enforcement of such a judgment so entered, will be enjoined.

Cross reference. See further on this question, annotations and note under Lyster v. Brewer (13 Iowa 461), ante. p. 174.

2. Attachment Action—Service of Original Notice by Publication—Motion to Set Aside Sale—Appearance.—Where an original notice is served by publication in an attachment action, a motion by defendant to set aside the sheriff's sale of the attached property is not an appearance "for any purpose connected with the cause" within the meaning of Subsec. 3 of Sec. 2840 of the Code of 1860, and does not operate as a general appearance to the action, p. 239.

Reaffirmed and explained in Bank of Horton v. Knox, 133 Iowa 446, 447, 449, 109 N. W. 202, holding that the expression "for any purpose connected with the cause" in Sec. 3541 of the Code of 1897, providing that an appearance for any such purpose operates as a general appearance, means that the appearance must have some relation to the merits of the controversy, and that the purpose must be to

invoke some action of the court having, in some way, a direct bearing upon the question of the judgment or decree proper to be entered.

WHICHER, AND THOMPSON *v.* STEAMBOAT EWING, 21 IOWA 240

1. **Common Carriers—Delay in Shipping Perishable Freight—Negligence—Damages.**—Although a bill of lading for the shipment of vegetables provides that the common carrier is “not accountable for freezing,” still this does not exempt it from the duty of transporting and delivering without delay and with all reasonable diligence; and it is liable for all damages to the vegetables, by freezing or otherwise, occasioned by its failure to so transport and deliver them, p. 243.

Reaffirmed and extended in Green-Wheeler Shoe Co. *v.* C. R. I. & P. Ry. Co., 130 Iowa 129-132, 106 N. W. 501, 8 Am. & Eng. Ann. Cases 45, 5 L. R. A. (New Series) 882, holding further that where a carrier negligently delays to transport and deliver freight, and by reason of such delay it is lost or destroyed by flood, the carrier is liable therefor.

(Note.—See further, sustaining, explaining and extending, but not citing, the text, Hewett *v.* Ch. B. & Q. R. R. Co., 63 Iowa 611, 19 N. W. 790; Stewart *v.* Merchants' Dispatch Trans. Co., 47 Iowa 229; Robinson *v.* Merchants' Dispatch Trans. Co., 45 Iowa 470.—Ed.)

MCCRAMER *v.* THOMPSON, 21 IOWA 244

1. **Principal and Surety—Erasure of Name of One Surety on Note and Before Delivery—When Other Sureties Thereon are Thereby Released.**—Where, before delivery of a note signed by several sureties, the name of one is erased without the knowledge or consent of the others, and the note is then delivered to the payee who has knowledge of the erasure, or such fact may be seen by him and he accepts it without inquiry from the other sureties thereon, the latter are discharged from liability, pp. 246, 251-253.

Reaffirmed and extended in State *v.* Craig, 58 Iowa 240, 241, 12 N. W. 302, holding further that where the principal, before the delivery of a bond, erases the name of one of the sureties thereon, and without the knowledge or consent of sureties who signed subsequently to him, the latter are thereby released: Holding further that where such bond is signed by sureties with the understanding that the principal is to secure such an additional number of sureties as shall be found necessary to secure its approval, the erasure of the name of a surety who signed subsequently to them and without their knowledge or consent, and the release by law of the sureties who signed subsequent to the one whose name is erased, thereby, also, releases the prior sureties.

Cited with approval in Gage v. Sharp, 24 Iowa 20, the court holding that the fact that a note payable to a payee, or bearer is negotiated to another than the payee, is not of itself sufficient to charge the taker with notice of a defect therein, as against the maker.

Cited with approval in Rainbolt v. Eddy, 34 Iowa 442, 11 Am. Rep. 152, the court holding that where, after the execution and delivery, the payee without the maker's knowledge or consent, inserts "ten per ct. inst." in a blank in such note, and making the alteration in such a manner as to afford no suspicion thereof, or the means of detecting it, such note, as altered, is valid as against the maker in the hands of an innocent purchaser, for value and before maturity.

Cross reference. See further in this connection, annotations under Hall's Adm'x v. McHenry (19 Iowa 521), ante. p. 758.

STARRY v. STARRY, 21 IOWA 254

1. **Limitation of Actions—Assignment of Dower—Action in Equity for.**—The limitation provided by Sec. 2428 of the Code of 1860, applies to and bars the commencement of proceedings in the county court for the assignment of dower, but does not apply to or bar an action in equity in the district court, instituted for such purpose by a widow in peaceable possession of the real estate since the death of her husband, p. 256.

Reaffirmed and explained in Felch v. Finch, 52 Iowa 564, 3 N. W. 571, holding that the statute of limitation does not commence to run against the right of a widow to recover dower and for its assignment, and in favor of a grantee of the husband (in a deed in which she did not join), until there is adverse possession of the land by the latter.

Reaffirmed and explained in Wold & Olson v. Berkholtz, 105 Iowa 374-376, 75 N. W. 330, holding that the right of a widow to a distributive share or dower in the real estate of her deceased husband is primary, and an election is necessary in order for her to retain homestead for life in lieu thereof; still occupation of the entire land by the widow and minor children as a home for even more than ten years, will not be treated as such an election, when there is proof of a contrary election solemnly asserted in a suit for contribution instituted by the guardian of such heirs, and continually evinced by leasing, and demanding and receiving the rents of the distributive share, and bearing its portion of the burdens during all this time: And that in such case, the widow is not barred by Sec. 3369 of the Code of 1873, from asserting her right to dower and having it set apart to her after the lapse of ten years: That the remedy provided by such section is not exclusive.

Reaffirmed, explained and narrowed in Rice v. Nelson, 27 Iowa 155, 157-160, holding that in addition to the special proceedings allowed in the county court by Secs. 2426, 2477 of the Code of 1860,

and to a petition in equity to allot, a widow may recover her dower by an action in ejectment as allowed by Chap. 144 of that Code: That to such actions the general statute of limitation applies, but that such statute does not commence to run against the right of action of the widow, and in favor of the heir, his assignee, or other person, until he either denies the right of dower, or does some act equivalent thereto.

Reaffirmed and narrowed in Britt v. Gordon, 132 Iowa 439-441, 108 N. W. 322, 323, 11 Am. & Eng. Ann. Cases 407, holding that an action by a widow to recover, or for the assignment of dower, against one who holds possession of land through or under her husband, or adverse to her rights, is barred ten years after the death of her husband—under the Code of 1897.

Cited in Shawhan v. Loffer, 24 Iowa 225, holding that under Sec. 1394 of the Code of 1851, the county court had power and jurisdiction, concurrent with the district court to admeasure and assign dower.

Cited in Thomas v. Thomas, 73 Iowa 660, 35 N. W. 694, holding—as does the present case in argument—that courts of equity have concurrent jurisdiction with those of law in the matter of the assignment of dower.

2. Appeal—Questions not Raised and Objected to Below.—Questions not raised, and rulings not shown to have been objected to below will not be considered upon appeal to the Supreme Court, p. 256.

Cited with approval in Heaton v. Fryberger, 38 Iowa 207 (dissenting opinion), the majority court opinion turning upon other questions.

(Note.—There are many cases sustaining, but not citing, the text,—Ed.)

BURNS v. KEAS, 21 IOWA 257

(Case arising out of this Controversy, 23 Iowa 235.)

1. Husband and Wife—Homestead—Right of Husband to Occupy After Death of Wife.—Under Sec. 2295 of the Code of 1860, a husband has the right to possess and occupy the whole homestead upon the death of his wife, regardless of which one was the owner of the fee, and irrespective of whether or not the wife left issue, p. 260.

Reaffirmed in Dodds v. Dodds, 26 Iowa 312.

Cited in McClure v. Braniff, 75 Iowa 42, 43, 39 N. W. 173, turning upon other questions of homestead, and the right of the wife to protect it.

Cross reference. See further Rule 2 hereof.

2. Descent and Distribution—Homestead, who Inherits—Right of Occupancy of Surviving Consort—Subjection to Decedent's Debts.—Upon the death of a husband or wife who owns the

fee simple title to homestead, it descends (under Secs. 2296-2298 of the Code of 1860) to his or her issue, or, if no issue, heirs at law, in the absence of testamentary devise, subject to the right of occupancy as a homestead by the surviving consort, as provided by Sec. 2295 of the Code of 1860.

If, in such case, there be no surviving consort or issue, then it descends to the heirs at law subject—under 2297 of the Code of 1860—to the payment of the debts of the decedent.

If a husband or a wife dies owning the homestead in fee simple, leaving a surviving consort, and no issue, the survivor takes—under Sec. 2496 of the Code of 1860, and Chap. 151, Acts of 1862—the legal title to one-half of the realty, homestead, as dower and as heir at law, pp. 259-261, 263, 264.

Reaffirmed in part in Nicholas v. Purcell, 21 Iowa 266, 267, 89 Am. Dec. 572, holding that upon the death of a husband or a wife who is seized of a homestead in fee simple, and other lands, and who dies without issue, the surviving consort is entitled to possess and occupy the whole homestead, and is, also, entitled as heir at law to one-half of the other real estate of the decedent: And the subsequent remarriage of the survivor, does not affect such rights.

Reaffirmed in part in Cotton v. Wood, 25 Iowa 48, holding that the fee simple title to homestead descends to the heirs at law of the husband, or the wife, as the case may be, who dies seized of the simple title therein, subject to the right of occupancy of the surviving consort.

Reaffirmed in part in Johnson v. Gaylord, 41 Iowa 366, 367, holding that upon the death of the party owning the homestead, it descends to the heirs, subject to the right of occupancy of the surviving consort; and that, if thereafter the latter abandons its occupancy as a home, she (or he) becomes a tenant in common with the heirs to the extent of the dower interest or distributive share; and in such case the heirs take it free from the debts of the ancestor or deceased owner thereof.

Reaffirmed in part in McGuire v. Brown, 41 Iowa 657, holding that upon the death of a husband or a wife who leaves no issue, the surviving consort takes one-half of the estate as dower and as heir at law.

Reaffirmed and explained in part in Size v. Size, 24 Iowa 581, holding that where a husband dies seized of the fee simple title to homestead and leaving a widow and issue, the homestead descends to the heirs at law, subject to the right of the widow to use and occupy it as homestead: That in such case, the widow has no right to sell or convey the fee simple title to the homestead; and such act or acts on her part constitute an abandonment, and entitle the heirs at law to maintain an action for partition thereof.

Reaffirmed and explained in part in Strong v. Garrett, 90 Iowa 102-104, 57 N. W. 716, holding that upon the death of the husband

or wife in whom the legal title to a homestead is vested, the title there-to descends to the heirs of the decedent, subject to the rights of the survivor: And where the survivor elects to retain the homestead for life in lieu of his distributive share in the real estate of the intestate, who leaves children surviving, the interest of such survivor in the homestead is thereby limited to the right to use and occupy it during his or her lifetime: And if, in such case, a child of the decedent thereafter dies, the interest inherited by the surviving parent in the child's interest in the homestead, is no part thereof, and may be sold under execution against the living parent.

Reaffirmed and extended in part in *Dodds v. Dodds*, 23 Iowa 307, holding that—under Secs. 2422, 2477, 2479, and Secs. 1 and 3 of Chap. 151, Acts of 1862—upon the death of a husband or a wife without issue, the surviving consort takes, as heir at law, one-half of the decedent's property, whether real or personal.

Reaffirmed and narrowed in part in *Smith v. Zuckmeyer*, 53 Iowa 16, 17, 3 N. W. 782, holding that—under Sec. 2455 of the Code of 1873—where a husband or a wife dies without issue, the surviving consort takes one-third of the estate as dower and free from the decedent's debts; and takes an additional one-sixth of the estate as heir at law, and subject to the debts of the decedent; and this one-sixth is held as heir at law, and absolutely, and the surviving consort may sell and convey it.

Reaffirmed and narrowed in part in *Hornbeck v. Brown & Nichols*, 91 Iowa 319-322, 59 N. W. 35, holding that—under Secs. 2007, 2008 of the Code of 1873—where a wife dies leaving a husband and issue surviving her, and the husband neither occupies nor intends to occupy the homestead owned by the wife at the time of her death, or abandons it, such husband's distributive share therein is subject to the satisfaction of his debts.

Cited in *Phillips v. Carpenter*, 79 Iowa 602, 44 N. W. 899, holding that—under Sec. 2455 of the Code of 1873—if a husband dies leaving a wife and issue, the wife is not an "heir," and does not take any portion of a life insurance policy on the life of decedent payable to his "legal heirs."

Cited in *Kinzer v. Stephens*, 121 Iowa 348, 96 N. W. 859, the court holding that the interest of an heir in the proceeds of a homestead, sold by the heirs after the death of the widow who survived her husband who died seized thereof, is subject to the satisfaction of a debt of such heir.

Cited in *Kuhn v. Kuhn*, 125 Iowa 451, 101 N. W. 152, 2 Am. & Eng. Ann. Cases 657, holding that a widow takes her distributive share in the estate of her deceased husband, allowed her under Sec. 3366 of the Code of 1897, although she may be guilty of having taken his life, or of having caused it to have been taken, and will not take any part of his estate by inheritance, devise or legacy under Sec. 3386 of that

Code: That such distributive share is taken by a widow as a matter of right, and not by inheritance.

Cited in Sayers v. Childers, 112 Iowa 679, 680, 84 N. W. 939, not in point.

Cross reference. See further, annotations under Nicholas v. Purcell (21 Iowa 265), next succeeding.

3. **Homestead—"Owner," who is.**—The term "owner," under homestead statutes has been liberally construed, and never limited to owner in fee: Whatever title, therefore, the owner may have, be it occupancy, tenancy, freehold or fee, it is within his or her control to hold, change or alien at pleasure according to the law of the land, p. 263.

Cited with approval in Getchell & Martin Lumber & Mfg. Co. v. Peterson & Samson, et al, 124 Iowa 606, 100 N. W. 552, the case turning on other questions not germane.

NICHOLAS v. PURCELL, 21 IOWA 265, 89 AM. DEC. 572

1. **Homestead—Right of Widow to Occupy.**—Upon the death of a husband who is seized in fee simple of homestead, and other lands, and who dies without issue, his widow is entitled—under Sec. 2295 of the Code of 1860—to possess and occupy the whole homestead, and is, also, entitled as heir at law to one-half of the other real estate of the decedent: And the subsequent remarriage of the widow does not affect her rights, pp. 266, 267.

Reaffirmed and extended in Fehd v. City of Oskaloosa, 139 Iowa 624, 625, 117 N. W. 990, holding further that upon the death of her husband the widow is entitled to the use, occupation and enjoyment of the homestead during her lifetime, and may sue for damages to the land by reason of a nuisance maintained by another to its injury; but that a son of the decedent, husband, and the widow who lives with his mother cannot maintain such an action, without showing that he has acquired his mother's estate therein.

Distinguished and narrowed in Meyer v. Meyer, 23 Iowa 374, 92 Am. Dec. 432, holding that where, after the death of her husband who dies seized of homestead and other lands, and who devised the homestead to his sons by name, the widow causes her dower or distributive share to be allotted to her in the dwelling house and part of the acreage of the homestead, she cannot, thereafter, as against the sons or devisees, claim the residue of the homestead acres *as homestead*.

Special cross reference. For further cases citing, sustaining, etc., the text, and many others on the question, see annotations under Rule 1 of Burns v. Keas (21 Iowa 257), next preceding this present case.

BYERS v. BYERS, 21 IOWA 268

1. Homestead—Divorce and Alimony—Decree for—Homestead not Subject to Satisfaction of.—Homestead owned and occupied by the husband as the head of the family at the time of the entry of a decree of divorce and a general decree or judgment for alimony in an action by his wife therefor, is not subject to the satisfaction thereof, p. 270.

Reaffirmed and extended in Whitcomb v. Whitcomb, 52 Iowa 715, 719, 2 N. W. 1000, holding further that a husband's homestead owned and occupied as such at the time his wife obtains a judgment against him for temporary and permanent alimony is not subject to the satisfaction thereof.

Reaffirmed and varied in Woods v. Davis, 34 Iowa 265, holding that the fact that a wife has been granted a divorce and custody of the children, to be maintained by her without further charge to her divorced husband, does not render the husband's homestead subject to the satisfaction of his debt from which it is otherwise exempt.

2. Divorce and Alimony—Relief Granted in Action for—Power of Chancellor—Property Rights of Parties—Homestead.—In an action by a wife for divorce and permanent alimony, the property rights and equities of both husband and wife should be adjudicated and settled by the decree of the chancellor, and according to the circumstances of each case; but whether this rule allows the chancellor to decree the wife any part of the husband's homestead, or decree a lien thereon for alimony, is not determined, pp. 269, 270.

Reaffirmed and extended in Daniels v. Morris, 54 Iowa 371, 372, 6 N. W. 533, holding further that in a suit for divorce and alimony the court in adjusting the rights of the parties is not precluded from making such a division or disposition of the homestead between the parties as may appear to be just and equitable, taking into consideration the circumstances of the family and all the surroundings: That the same rule is applicable in an action by a woman to annul an illegal marriage; and that in either of such actions an attachment may be properly levied upon the homestead of the defendant, and its lien will be superior to the rights of a purchaser thereof from the defendant and after the levying of the writ.

Cited with approval in Hubbard v. Ellithorpe, 135 Iowa 262, 112 N. W. 798, involving the right of an attorney to a lien for his fee upon property or money adjudged the plaintiff in an action for divorce and alimony, upon his giving the statutory notice.

LEACH v. FORNEY, 21 IOWA 271, 89 AM. DEC. 574

1. Vendor and Purchaser—Title Bond by Husband—Wife Refusing to Join in Deed—Rights and Remedies of Purchaser.—Where a husband sells land and gives a title bond to convey with

covenants of general warranty, upon the purchaser paying the balance of the purchase price at a given time, upon the purchaser complying or tendering compliance at such time, and the vendor's wife refusing to join in the conveyance he (the purchaser) may, in equity, have specific performance of the contract as against the husband, and retain the value of the wife's contingent interest out of the purchase price, without interest, until the death of the wife; or he may elect to sue the husband for damages for breach of contract, p. 273.

Reaffirmed in Presser v. Hildenbrand, 23 Iowa 492; Zebley v. Sears, 38 Iowa 509; Miller v. Nelson, 64 Iowa 462, 20 N. W. 760; Hession v. Linastruth, 96 Iowa 487, 65 N. W. 400; Townsend v. Blanchard, 117 Iowa 41, 90 N. W. 521; Bradford v. Smith, 123 Iowa 47, 98 N. W. 379; Thompson v. Colby, 127 Iowa 237, 103 N. W. 118; Noecker v. Wallingford, 133 Iowa 611, 111 N. W. 39, 40, applying the rule in all cases where one consort fails to join in a deed, or contract for the sale or conveyance of the land of the other.

Reaffirmed and extended in Hession v. Linastruth, 96 Iowa 487, 65 N. W. 400, holding further that in an action by the purchaser of land against a vendor whose wife refuses to join in the conveyance, the plaintiff may be protected by the decree against the wife's contingent dower rights, under his general prayer for equitable relief.

Reaffirmed and qualified in Union Coal Mining Co. v. McAdam, 38 Iowa 665, holding that where in an action in equity by the purchaser of land who has paid the full consideration therefor, against the vendor whose wife refuses to join in a conveyance, the plaintiff prays for specific performance against the vendor, and that his (plaintiff's) rights and interests be "duly protected in case the defendant fails to procure the relinquishment of his wife's dower interest," it is not improper for the court to enter judgment against defendant for the amount proportionate to the utmost possible value of the dower interest, subject to the condition that it be ineffective if the defendant procures such relinquishment.

Cited with approval in Venator v. Swenson, 100 Iowa 296, 69 N. W. 523, the case turning on other points.

Unreported citation, 132 N. W. 65.

KEENEY v. LYON, 21 IOWA 277

1. Judgments—Motion to Set Aside—Notice to Parties in Interest.—All parties in interest must have notice of a motion to set aside a judgment, pp. 279, 280.

Reaffirmed and varied in Iowa Sav. & Loan Ass'n v. Chase, 118 Iowa 54, 55, 91 N. W. 808, holding that after an unsuccessful party has paid attorneys fees taxed as costs, the court cannot entertain a motion to retax the costs, and thereupon enter judgment against the successful party for such attorneys fees, unless the latter party is served with notice of the making of such motion, or enters his ap-

pearance; and that the enforcement of such a judgment so entered, will be enjoined.

Cross reference. See further in this connection, annotations and note under *Lyster v. Brewer* (13 Iowa 461), ante. p. 174.

THORN & STEIN *v.* MOORE, 21 IOWA 285

1. **Trial—Witnesses—Impeachment or Contradiction of Own Witness—To what Extent Allowed.**—A party cannot, as a general rule, assail the general character for truth and veracity of a witness whom he voluntarily introduces; but he may show that the facts are different from those testified to by such witness, p. 290.

Reaffirmed in *Clapp Bros. & Co. v. Peck*, 55 Iowa 272, 7 N. W. 588.

Reaffirmed and explained in *Hall v. Ch. R. I. & P. Ry. Co.*, 84 Iowa 316, 51 N. W. 151, holding that where a party is surprised by the testimony of his witness, he may ask the witness as to contradictory statements made by him at other times and places, but cannot, thereafter during the trial, introduce such other contradictory statements, or proof thereof.

Reaffirmed and qualified in *Steele, Smith Grocery Co. v. Potthast*, 109 Iowa 416, 80 N. W. 518, holding that declarations or admissions of a party to an action against his interest, are admissible.

Cross reference. See Rule 2 hereof, in this connection.

2. **Statutes of Frauds and Limitation—Testimony of Party Sought to be Bound as Taking Case Out of—Rule as to.**—Where a party seeks to take a case out of the statute of limitation by proof of the party sought to be bound that the claim still justly subsists, as provided by Sec. 2742 of the Code of 1860, the plaintiff is concluded by such testimony: And the same rule applies to actions to enforce contracts within the Statute of Frauds [Sec. 4010 of the Code of 1860], p. 290.

Reaffirmed and explained in *Marks v. McGookin*, 127 Iowa 718, 104 N. W. 373, holding that where one party to an action seeks to take an oral contract for the sale of land out of the Statute of Frauds by the testimony of the adverse party, the latter's testimony must be sufficient of itself to have such effect.

(Note.—This last decision is under the Code of 1897.—Ed.)

Reaffirmed, extended and qualified in *Mighell v. Dougherty*, 86 Iowa 484, 485, 53 N. W. 403, 41 Am. St. Rep. 511, 17 L. R. A. 755, holding further that the rule applies, under Sec. 3667 of the Code of 1873, to an action based on a sale of personal property within the Statute of Frauds—Secs. 3663, 3664 of that Code—except for the testimony of the defendant (person sought to be bound): Holding, however, that where, in such case, other evidence than that of defendant is introduced to establish the contract, and the court excludes it from the jury in his instructions, the error is cured.

Cross reference. See further on this question, annotations and cross references under Rule 2 of *Auter v. Miller* (18 Iowa 405), ante. p. 656.

3. Limitation of Actions—Open Account—When Statute Commences to Run on.—The statute of limitation commences to run, under Sec. 2743 of the Code of 1860, from the date of the last item, either of debit or credit, in an open, continuous, current account, pp. 390, 391.

Reaffirmed in *Mills & Co. v. Davies*, 42 Iowa 97; *Keller v. Jackson*, 58 Iowa 631, 12 N. W. 619, under Sec. 2531 of the Code of 1873, corresponding to the section of the text.

(Note.—See further, *Tucker v. Quimby*, 37 Iowa 17, not citing the text, but on what constitutes a “continuous, open, current account.”—Ed.)

FARGO & BILL v. BUELL, 21 IOWA 292

1. Contracts—Debtor and Creditor—Application of Payments—Rights of Debtor and Creditor Concerning.—Where a debtor owes two distinct debts to a creditor, and pays money to him, he may direct to which debt it is to be applied as a credit, or payment; but if the debtor fails to so direct at the time he makes the payment, the creditor may apply it as a credit on or in satisfaction of either, pp. 293, 294.

Reaffirmed in *Keairnes v. Durst*, 110 Iowa 122, 81 N. W. 241.

Reaffirmed and extended in *Cain v. Vogt*, 138 Iowa 634, 635, 116 N. W. 787, holding further that the fact that a creditor holds several debts, some secured and some unsecured, does not affect the rule: That where a debtor makes a payment to a creditor to whom he owes a secured and unsecured debt, and neither party makes application thereof, the law will apply it as a credit on the unsecured debt.

And see 146 Iowa 713, 125 N. W. 824.

Cross reference. See further on this question, annotations under Rule 2 of *Whiting v. Eichelberger* (16 Iowa 422), ante. p. 452.

WILCOX v. McCUNE, 21 IOWA 294

1. Pleadings — Demurrer — Standing on — Exception—Effect—Waiver of Ruling on Demurrer—Practice.—Where after the overruling of his demurrer a party answer or replies to the adverse party's pleading, or allows it to be denied by law, and proceeds to a trial, he thereby waives the error, if any, in the ruling on his demurrer.

If a party desires to take advantage, upon appeal to the Supreme Court, of error in the trial court's overruling his demurrer, he must, at the time it is overruled, announce to the court, and have entered of record, or preserved by bill of exceptions, that he excepts to the court's ruling and elects to stand on his demurrer.

By standing on his demurrer a party admits the truth of every fact which is well pleaded in the pleading demurred to; and if they

Cross reference. See further in this connection, anotations under Rules 2 and 3 of Campbell v. Long (20 Iowa 382), ante. p. 831.

JOURNEY v. DICKERSON, AND DOOLITTLE, 21 IOWA 308

1. **Actions—Original Notice—Misnomer of Defendant in—Personal and Substituted Service—Rights and Remedies of Defendant—Abatement, etc.—Practice.**—Where there is a misnomer of the defendant in an original notice, and he is personally served therewith, he must raise the question, if at all, by a plea in abatement.

But where a defendant is served with an original notice by substituted service, and there is a fatal and misleading misnomer of the defendant therein, he is not bound to raise the question by a plea in abatement.

So where a defendant is served with an original notice by substituted service, and there is a fatal and misleading misnomer of him therein, and it appears that the defendant was away from his usual place of residence at the time, and knew nothing of the action until long after judgment was therein rendered, and that the defendant notified the sheriff and the judgment creditor of these facts, and offered to pay the small amount due the latter at the time his (defendant's) property was levied on, but the officer and creditor refused to accept the money, and sold the property under the execution, the defendant may maintain an action of trespass against them for his property so sold, pp. 311-313, 319, 320.

Reaffirmed and extended as to first paragraph in Lindsey v. Delano, 78 Iowa 354, 43 N. W. 220, holding further that the fact that the name of the defendant is given wrong in the petition, is waived by him, if he is personally served with notice, unless he raises the question by a plea in abatement.

Reaffirmed and extended as to first paragraph in Breen v. Kuhn, 91 Iowa 328, 59 N. W. 344, holding further that a defendant who is personally served with original notice, cannot set aside a judgment by default, because his name was spelled wrong in the copy of the notice delivered to him.

Cited in Hass v. Leverton, 128 Iowa 82, 102 N. W. 813, on the point that a judgment entered upon a substituted service of notice is valid.

STATE v. ARTHUR, 21 IOWA 322

(Later Appeal, 23 Iowa 430.)

1. **Criminal Law—Indictment—Dismissal of for Want of Prosecution—When not Allowed.**—Although an accused person is entitled—under Sec. 5008 of the Code of 1860—to a trial at the next term after an indictment is returned against him, or it will be dismissed for want of prosecution, unless the trial was continued upon

his own application, or a good cause to the contrary be shown; still, where it appears that a criminal prosecution was continued from term to term without resistance on the part of accused, or without his demanding a trial, and that he made interlocutory or other motions not pertaining to a trial at each of the terms, he is not entitled to a dismissal of the indictment for want of prosecution under the above section, p. 324.

Reaffirmed in State v. Smith, 106 Iowa 710, 77 N. W. 502, under Sec. 4614 of the Code of 1873, corresponding to the section of the text.

Cited in State v. Scott, 99 Iowa 38, 68 N. W. 451, the court holding that the quashing an indictment does not operate as an acquittal under an indictment thereafter found, although the trial court at the time of quashing the first indictment does not enter an order resubmitting to the grand jury.

BRYANT v. WILLIAMS, 21 IOWA 329

1. Judgment upon Unauthorized Appearance by Attorney—Action to Set Aside.—A defendant who has been represented by an unauthorized attorney has the right to be relieved against the judgment by a direct action in equity to set it aside.

But the action to set aside the judgment must be brought promptly after a knowledge of its rendition has come home to the defendant: And if there should be an unreasonable delay in bringing the action, and third persons should, in the meantime, acquire interest in the judgment, the delay might operate as an estoppel in favor of such third persons, p. 331.

Reaffirmed in Lindberg v. Thomas, 137 Iowa 52, 53, 114 N. W. 564.

Special cross reference. For further cases citing, explaining and qualifying the text, and many others on the question, see annotations under Harshey v. Blackmarr (20 Iowa 161), ante. p. 797.

2. Judgment upon Unauthorized Appearance by Attorney—Action to Set Aside—Tender of Amount Due—Continuing Lien of Original Judgment, etc.—When in an action in equity to set aside a judgment entered upon the unauthorized appearance by an attorney, the plaintiff (defendant in the original action) admits that he is indebted to a certain amount of the judgment, it is the better practice for him to tender such admitted amount to the creditor before commencing his action; but when this is not done, and there has been delay in instituting the last action, the court will render such judgment in the latter and in favor of the defendant or creditor, as appears to be due to him, and will continue the lien of the original judgment therefor, pp. 331, 332.

Reaffirmed and extended in Lindberg v. Thomas, 137 Iowa 53, 114 N. W. 564, holding further that though the decree may have been

entered without jurisdiction, relief will not be granted against it if the judgment creditor has a valid claim whereon it was rendered and to which there is no defense.

Cited in Uehlein v. Burk, 119 Iowa 744, 94 N. W. 244, the court holding that where there is no personal judgment, a party seeking in an equitable action to set aside a void judgment *in rem* must allege and prove some equity in himself.

Distinguished in Parsons v. Nutting, 45 Iowa 405, 406, holding that where a defendant seeks to enjoin the collection of a judgment improperly entered, he must tender or offer to pay the amount which he admits to be justly due.

Cross reference. See further on this question, annotations under Taggart & Taggart v. Wood (20 Iowa 236), ante. p. 809.

WILSON v. SHORICK, 21 IOWA 332

1. **Appeal from County to District Court from Order Appointing Guardian for Person of Unsound Mind.**—An appeal lies to the district court from an order of the county court appointing a guardian for a person of unsound mind; it is to be taken within thirty days after the making of the order, under Sec. 267 of the Code of 1860, or, under Sec. 270 of such Code, within a year thereafter, upon due notice and upon application to the district court therefor, and upon reasonable terms: And Sec. 1457 of that Code, authorizing the probate judge or county court to terminate such guardianship, if the letters are improperly issued, or the insane person is restored to sound mind, does not take away the right of appeal given by the first mentioned sections, but only provides an additional remedy, pp. 334, 335.

Cited in Belding v. Torrence, 39 Iowa 517, as to what is a "final order or judgment" which permits an appeal from a justice's to the circuit court.

BURLINGTON GAS LIGHT CO. v. GREEN, THOMAS & CO., 21 IOWA 335 (Later Appeals, 22 Iowa 508, 28 Iowa 289.)

1. **Appeal—Bill of Exceptions to Contain All the Evidence—Insufficiency of—Review.**—Upon an appeal to the Supreme Court from a judgment in an action at law, the bill of exceptions must contain *all the evidence* adduced below, or it will be disregarded, and no question involving the facts of the case will be reviewed; and a bill of exceptions certified as containing *the substance* of the evidence, is insufficient to authorize a review of any such question, pp. 336, 337.

Reaffirmed and extended in Hubbard v. Epperson, 40 Iowa 409, holding further that a bill of exceptions certified as containing "all the material evidence produced in the cause," is insufficient to authorize the review of the question of whether or not a judgment in an action at law is supported by the evidence.

Cross references. See further on this question, annotations, notes and cross references under *State v. Lyon* (10 Iowa 340), Vol. I, p. 700; *Bell v. Rowland* (9 Iowa 281), Vol. I, p. 577.

2. New Trial—Appeal from Order Granting Because Verdict Against Evidence —Reversal, when.—The district court has a large judicial discretion in passing upon a motion for a new trial on the ground that the verdict was against the evidence; and a much stronger case of abuse of such discretion must be shown to authorize a reversal upon appeal from an order granting than from an order refusing to grant a new trial in such a case, p. 337.

Reaffirmed in *Burlington Gas Light Co. v. Green, Thomas & Co.*, 28 Iowa 290, 291; *Roberts & Bro. v. Jones*, 30 Iowa 525; *Laverenz v. Ch. R. I. & P. Ry. Co.*, 53 Iowa 324, 5 N. W. 156; *Halpin v. Nelson*, 76 Iowa 428, 41 N. W. 62.

Reaffirmed and extended in *Laverenz v. Ch. R. I. & P. Ry. Co.*, 53 Iowa 324, 5 N. W. 156; *Lyons v. Cooney*, 73 Iowa 294, 34 N. W. 865, holding further that the ruling of the trial court in setting aside a verdict because against the evidence will only be reversed upon appeal, when there is nothing in the record to support it.—The last case holding further that this rule applies to the action of the trial court in setting aside a finding of fact of a referee on such ground, such finding being regarded as the verdict of a jury.

Cited in *Schaeffer v. Anchor Mut. Fire Ins. Co.*, 113 Iowa 656, 85 N. W. 986, the court holding that where the evidence is conflicting, it is reversible error for the court to direct a verdict for either party.

Cross references. See further on this question, annotations under Rule 2 of *Shepherd v. Brenton* (15 Iowa 84), ante. p. 308; annotations and cross references under *Braddy & Braddy v. Lumery* (11 Iowa 29), Vol. I, p. 765.

DICKERMAN v. LORD & SMITH, 21 IOWA 338, 89 AM. DEC. 579

1. Payment Made Under Compulsion—Action to Recover, when Allowed.—To justify recovering back money paid, when all the facts were known to the party paying, such payment must not have been simply an unwilling payment, but a compulsory one, and the compulsion must have been illegal, unjust, or oppressive: And to sue a man by attachment in a state foreign to his residence does not constitute such compulsion, p. 342.

Reaffirmed and explained in *Anderson v. Cameron*, 122 Iowa 184, 185, 97 N. W. 1086, holding that money voluntarily paid in settlement of a claim, and with full knowledge of the facts by the payer at the time he makes the payment, cannot be recovered by him on the grounds that the claim was invalid or unenforceable: That money paid under duress or unlawful compulsion may be recovered; but payment *under protest merely* is not sufficient.—And this rule applies to redemption from an illegal and void tax sale.

Reaffirmed and explained in Carter v. Iowa State Business Men's Bld. & Loan Ass'n, 135 Iowa 370, 371, 112 N. W. 829, holding that where there is a doubt or at least a dispute as to the amount due, a sum voluntarily paid in settlement thereof, and not paid under duress or compulsion, and in the absence of fraud or bad faith, cannot be recovered.

Reaffirmed and extended in Weaver v. Stacy, 93 Iowa 690, 62 N. W. 24, holding further that one who, under no mistake of fact, and in the absence of compulsion or fraud, redeems from an execution sale of land, when it is not necessary to protect his interest, cannot recover the money so paid.

Reaffirmed and extended in Paulson v. Barger, 132 Iowa 548, 549, 109 N. W. 1082, holding further—as does the present case in argument—that a mere threat to begin a civil suit to recover on a contract, and to attach property in aid of such suit, does not constitute such duress as to make a payment made on account thereof an involuntary one, and entitle the payer to recover it.

Distinguished and narrowed in Lyman v. Lauderbaugh, 75 Iowa 484-486, 39 N. W. 813, holding that where money is paid, the party receiving it agreeing at the time to repay if the payer "could show that he was not indebted," then the payer may sue and recover it, by showing in such action that he was not so indebted.—And in such case the rule of the text is inapplicable.

(Note.—See further, James, and Haverstock v. Dalbey, 107 Iowa 463, 78 N. W. 51; Garner v. Fry, 104 Iowa 515, 73 N. W. 1079; Painter v. Polk County, 81 Iowa 242, 47 N. W. 65; King v. Williams, 65 Iowa 167, 21 N. W. 502; City of Muscatine, v. Keokuk Northern L. & Packet Co., 45 Iowa 185; Murphy v. Creighton, 45 Iowa 179; Morris v. Sioux County, 42 Iowa 416; Davenport & St. P. R. R. Co. v. Rogers, 39 Iowa 298; Adams v. Morton, 37 Iowa 255; Keefe v. Bogle, 36 Iowa 87, some important cases sustaining, explaining and intimately connected with, but not citing, the text.—Ed.)

WALLACE v. BARTLE, 21 IOWA 346, 89 AM. DEC. 584

1. **Execution Sale of Equity in Land—Purchaser Takes Subject to Prior Rights and Equities of Third Persons—Judgment Creditor Becoming Purchaser.**—A purchaser at an execution sale of a judgment debtor's equitable interest in land, the judgment debtor having no apparent or record title, takes subject to the rights of a third person who purchased such equity before such sale, although such execution purchaser had no notice of the third person's rights at the time of his purchase. This rule applies as well to a judgment creditor who becomes such purchaser as to another, pp. 350, 351.

Reaffirmed and extended in Churchill v. Morse, 23 Iowa 233, 92 Am. Dec. 422, holding that one who purchases the equity of redemption of a judgment debtor in land at an execution sale thereof, takes

subject to the rights of a good faith purchaser thereof from the judgment debtor before the rendition of the judgment.

Reaffirmed and varied in Hultz v. Zollars, 39 Iowa 593, holding that a judgment is not a lien upon an equitable interest in real estate of the judgment debtor, and is not such a lien as will affect a *bona fide* purchaser without notice.

Cited in Wright v. Howell, 35 Iowa 298, the court holding that where a fraudulent conveyance of land is executed and recorded, and the grantor thereafter remains in possession, a subsequent purchaser thereof, in good faith, for value and without actual notice, either from the fraudulent grantee or under an execution against him, takes it free from all claims of the fraudulent grantor, or his purchaser, or mortgagee who takes subsequent thereto.

Special cross reference. For further cases citing the text, and others in this connection, see annotations under Rule 3 of Evans v. McGlasson (18 Iowa 150), ante. p. 601; and see other rules of that case, and cross references thereunder.

STANDISH v. DOW, 21 IOWA 363

1. **Res Adjudicata—Former Judgment Binding Only as to Relief Prayed for in Pleadings.**—A judgment only concludes the parties to the action, to the extent that it is consistent with the relief prayed for in the pleading, or issue on which it was rendered, pp. 365-367.

Reaffirmed in Moomey v. Maas, 22 Iowa 383, 384, 92 Am. Dec. 395.

Reaffirmed and explained in Pfiffner v. Krapfel, 28 Iowa 33, 34, the court saying that "it is against the spirit and plain intent of our Code to allow parties to claim as fruits of their litigation that which was not by the fair and obvious import of the pleadings put in issue and litigated between them."

Reaffirmed and explained in Kern & Son v. Wilson, 82 Iowa 412, 413, 48 N. W. 920, holding that in an order to make the plea of *res adjudicata* applicable, the actual point in issue in a subsequent action must have been determined *on its merits* in a former action between the same parties.

Reaffirmed and narrowed in Oleson v. Bullard, 40 Iowa 13, 14, holding that where the fact that a mortgage on land executed by a husband *alone* is not shown by the mortgage itself, or by the petition in an action to foreclose, to be on homestead, then it is incumbent on the husband or the wife who are parties to the action, to interpose the defense therein, failing which they are concluded by the decree therein from thereafter attacking such decree on such ground in a collateral action.

Distinguished and explained in Davis v. Keith, 23 Iowa 420, holding that a defendant who is served with notice of the pendency of the

action against him, is charged with notice of everything contained in the petition, and is concluded by a decree therein which is consistent therewith.

Cross reference. See further on this question, annotations and cross references under *Griffin v. Seymour* (15 Iowa 30), ante. p. 299.

2. Pleadings—Demurrer Overruled—Subsequent Trial and Contrary Ruling by Court.—When a demurrer is overruled, but the party demurring does not stand thereon and no final decree is then rendered, the overruling thereof does not preclude the party who demurred from showing the exact rights of the parties, nor the court from making a contrary ruling in the final decree, p. 369.

Reaffirmed and explained in *Brown v. Cunningham*, 82 Iowa 514, 515, 48 N. W. 1042, 12 L. R. A. 583, holding that a judgment on a petition and proof which shows no legal liability is not authorized simply because the defendant after his demurrer to the petition has been overruled, answers over and denies its allegations: That the trial court is not bound by a prior decision under which no rights have been acquired; but it is his privilege and duty, at any time before final adjudication of the matters involved in the case, to change, modify or overrule it, if convinced of his error.

Reaffirmed and explained in *Tyler v. Coulthard*, 95 Iowa 709, 64 N. W. 682, 58 Am. St. Rep. 452, holding that the trial court may change his ruling on a demurrer, or make a ruling contrary thereto, at any time during the pendency of the action.

3. Lands—Action to Quiet or Remove Cloud from Title—Equitable Jurisdiction.—An action is maintainable in equity by the owner of land who is in possession thereof, to quiet his title thereto, or to remove a cloud cast thereon by the adverse claims of others, p. 569.

Reaffirmed in *Peck v. Sexton & Son*, 41 Iowa 568.

Unreported citation, 82 N. W. 1005.

STATE, EX REL. *STONE v. HELMER*, 21 IOWA 370

1. Bastardy Proceedings Must be Brought in State Where Cause of Action Arises—Action in this State on Foreign Judgment in Such Proceeding.—A proceeding for the support of a bastard child against the putative father is a matter of local and police regulation under the statutes of each state, and must be prosecuted in the state wherein the cause of action arises: But an action to enforce a foreign judgment in such proceeding is maintainable in a court of this state, pp. 371, 372.

Reaffirmed and extended in *Taylor, Farr & Co. v. Western Union, Telegraph Co.*, 95 Iowa 744, 64 N. W. 661, holding further that in an action of this state for damages for negligent delay in delivering a telegram sent from one place to another in a foreign state, the plain-

tiff cannot recover damages given, by way of an additional penalty, by the statute of such foreign state.

Distinguished in Boyce v. Wabash Ry. Co., 63 Iowa 73, 74, 18 N. W. 675, 50 Am. Rep. 730, holding that where a right of action for damages is conferred by a foreign statute which is consistent with the policy and statutes of this state, an action for damages based thereon, and thereunder, may be maintained in a court of this state, it otherwise having jurisdiction of the subject-matter and of the parties.

Unreported citation, 48 N. W. 730.

2. Foreign Judgments—Action On in this State—Faith and Credit to be Given—Defenses.—If the court which rendered a judgment had jurisdiction of the subject-matter and of the parties, it is sufficient to entitle the party in whose favor it was rendered to maintain an action for its enforcement in this state; and it will be given the same faith and credit here as it has in the foreign state; and irregularities which would have reversed it upon appeal, are not available as defenses to the action in this state, pp. 372, 373.

Reaffirmed and explained in Melhop & Kingman v. Doane & Co., 31 Iowa 399, 400, 402, 403, 7 Am. Rep. 147, holding that in personal actions, if the court has jurisdiction of the subject-matter and of the parties by the service of notice of its pendency, its judgment is binding and conclusive while it remains unreversed, however erroneous: But it is indispensable to the binding effect of a judgment that the court had jurisdiction of the subject-matter and of the parties; for if the jurisdiction fail as to either, the judgment is a mere nullity: Hence holding that service of notice by publication, or by personal service outside of the state, upon a person who is not a resident or citizen of this state, confers no jurisdiction either as to the person or the property of such nonresident on a court of this state; but that when a court of this state has, by its process of attachment, or otherwise seized or acquired jurisdiction *in rem* over property of a non-resident, it may perfect its jurisdiction as to the adjudication of the subject-matter by means of such kinds of service.

EVANS v. BURLINGTON & MISSOURI RIVER R. R. Co., 21 IOWA 374

1. Railroads—Liability of Railroad Company for Killing Stock.—A railroad company is liable in double the value of stock killed by its train at a public crossing, or at any place where it has a right to, but does not fence its track, upon the stock owner giving the notice required by Sec. 6, Chap. 169, Acts of 1862, thirty days before commencing his action, p. 376.

Cited in Murphy v. C. R. I. & P. R. R. Co., 38 Iowa 546 (dissenting opinion), the majority court opinion not in point.

Cited in Clampit v. Ch., St. P. & K. C. Ry. Co., 84 Iowa 75, 50 N. W. 673, not in point.

Special cross reference. See further cases citing and narrowing the text, see annotations under *Whitbeck v. Dub. & Pac. R. R. Co.* (21 Iowa 103), ante. p. 878; and see special cross reference and cross reference found there.

HENDRICKSON *v.* KINGSBURY, 21 IOWA 379

1. **Damages—When Punitive Damages Are Recoverable—Nature and Object of—Assault and Battery—Action for.—**Punitive damages may be allowed within the discretion of the jury in all civil actions arising from the malicious, or oppressive act of the defendant, or where an element of fraud is shown. The allowance of punitive damages against the defendant in a civil action for any of the acts mentioned has nothing to do with any criminal penalty which may be denounced against the commission of any such acts; and it is distinct from anything connected with the wrong done the public or the state.

So the jury may, in their discretion, award punitive damages to plaintiff in an action of damages for a malicious assault and battery committed by the defendant on him, pp. 385, 386, 391.

Reaffirmed as to first paragraph in Garland *v.* Wholeham, 26 Iowa 186; Reddin *v.* Gates, 52 Iowa 214, 2 N. W. 1083; Parkhurst *v.* Masteller, 57 Iowa 480, 481, 10 N. W. 867; Hauser *v.* Griffith, 102 Iowa 218, 71 N. W. 223.

Reaffirmed as to second paragraph in Guengerich *v.* Smith, 36 Iowa 587; Ward *v.* Ward, 41 Iowa 687; Root *v.* Sturdivant, 70 Iowa 58, 59, 29 N. W. 804; Hauser *v.* Griffith, 102 Iowa 218, 71 N. W. 223.

Reaffirmed and extended as to second paragraph in Reddin *v.* Gates, 52 Iowa 212, 2 N. W. 1081, holding further that in an action of damages for assault and battery, malice may be inferred from proof that the defendant assaulted plaintiff without just cause or provocation; and that in such a case and under such proof an instruction embodying this proposition is proper.

Distinguished in McKinley *v.* C. & N. W. R. R. Co., 44 Iowa 317, 320, 321, 24 Am. Rep. 748, holding a railroad company liable for an assault and battery of a brakeman on a passenger on a train, committed by the brakeman under the belief that he was executing the orders of the company in preventing the passenger from re-entering the car: Holding, also, that in such an action the mental anguish of plaintiff arising from the nature and character of the assault is an element of compensatory damages.

Distinguished and narrowed in Sheik *v.* Hobson, Adm'r, 64 Iowa 147, 148, 19 N. W. 876, holding that in an action of damages—under Sec. 2525 of the Code of 1873—against a personal representative for slanderous words published by his decedent concerning plaintiff, no punitive damages are recoverable: That this is the rule where the representative is substituted in such an action, pending which the defendant dies.

2. New Trial—Quotient Verdict Ground for—Affidavits of Jurors to Prove.—Where a verdict was determined by each juror marking down such sum as he thought fit, and the aggregate was then divided by twelve, and the quotient taken as the verdict, pursuant to a previous agreement by the jury to accept it as such, such facts constitute a ground for a motion to set the verdict aside.

Affidavits of jurors who returned such verdict are receivable in support of a motion for a new trial to show such facts, pp. 391, 392.

Special cross reference. For cases citing the text, and many more on this question, see annotations under *Wright v. Illinois & Miss. Telegraph Co.* (20 Iowa 195), ante. p. 800.

***BYAM v. COOK, 21 IOWA 392**

1. Tax Sale of Lands—Deed Showing Several Parcels Sold in Lump, void.—Where a tax deed to several parcels of land shows on its face that they were sold in a lump and for a gross sum, it is void, p. 396.

Special cross reference. For cases citing, sustaining, explaining and qualifying the text, and many others on the question, see annotations under *Boardman v. Bourne* (20 Iowa 134), ante. p. 791.

2. Actions—Pleadings—Relief Granted Pursuant to Prayer for.—In an action in equity plaintiff will not be granted relief in the decree which is not sought or prayed for in his petition, and which it was not framed with a view of obtaining, p. 397.

Reaffirmed and explained in *Browne v. Kiel*, 117 Iowa 318, 90 N. W. 625, holding that in an action in equity the judgment must follow the prayer for relief, and cannot be extended beyond it.

Reaffirmed and qualified in *Heins v. Wicke*, and *Iowa State Ins. Co.*, 102 Iowa 402, 403, 71 N. W. 347, holding that where a defendant served with notice of a suit does not appear and answer, but makes default, no decree or judgment can be entered against such defendant granting relief not specifically prayed for, or which is not clearly within the contemplation of a general prayer for relief.

Cited in *McCready v. Sexton & Son*, 29 Iowa 416, 4 Am. Rep. 214 (dissenting opinion), the case involving matters connected with Rule 1 hereof, and shown at the special cross reference above.

Unreported citation, 116 N. W. 137.

HALLEM v. HAYWOOD, 21 IOWA 398

1. Appeal—Finding of Facts Against Evidence—When not Ground for Reversal.—Where a law action is tried by the court, and the evidence is conflicting his finding will not be reversed, as against

*The case of *Crum v. Cotting*, 22 Iowa 422, cites this case on a point not decided or indicated in the opinion herein.—Ed.

the evidence, unless it appears from the record that the finding was decidedly against the weight thereof, p. 398.

Reaffirmed, explained and extended in Harper v. Buder, 88 Iowa 702 (Abstract), 54 N. W. 203, holding further that the judgment in a law action tried by the court will not be reversed upon appeal as against the evidence, unless there is such an absence of evidence to support it as raises the presumption that it was the result of passion or prejudice.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

ANDERSON v. SIMPSON, 21 IOWA 399

1. **Mines and Mining—Parol License—When not Within Statute of Frauds.**—A parol license to dig or mine in another's land is not within the Statute of Frauds when possession of the land is taken thereunder by the licensee, with the consent of the licensor, p. 401.

Cited in Ague v. Seitsinger, 85 Iowa 310, 52 N. W. 230, holding that where a county accepts the grant of an easement or highway, and under the conditions of the grant, enters into possession thereof, partially performs the conditions, and continuously uses it for thirty years, the grantor, or his heirs, grantees or privies cannot thereafter question the validity of the grant, or raise the question of the Statute of Frauds as to it.

Unreported citation, 132 N. W. 179.

Special cross reference. For further cases citing, explaining and extending the text, and many others on the question, see annotations under Beatty v. Gregory (17 Iowa 109), ante. p. 504.

2. **Statute of Frauds—Parol License Proved by Licensor, not Within.**—Where a parol contract or license to mine in the land of another is proved by the testimony of the defendant, licensor, in an action seeking to bind him thereon, it is not—under Sec. 4010 of the Code of 1860—within the Statute of Frauds, p. 401.

Reaffirmed and extended in Smith v. Phelps, 32 Iowa 539, holding further that a verbal executory contract for the sale of land is not within the Statute of Frauds, when, in an action thereon, it is proved by the party against whom it is sought to be enforced.

(Note.—There are many cases sustaining, but not citing, the text.—Ed.)

Cross references. See further on this question, annotations under Rule 2 of Mahana v. Blunt (20 Iowa 142), ante. p. 792; Rule 3 of Lyons v. Thompson (16 Iowa 62), ante. p. 407.

McCULLOM v. BLACK HAWK COUNTY, 21 IOWA 409

1. **Bridges—Liability of County and Cities for Injuries Resulting from Defective Bridges.**—A county is liable in certain cases

for injuries caused by a defective bridge upon a public road or highway of the county: But this rule is inapplicable to and a city of the second class is liable in damages for injuries resulting by reason of a defective bridge over a non-navigable stream within its limits; as the Code of 1860, in such case, gives the city control over and charges it with the duty of repairing such bridges, and the county is not liable, pp. 414-416.

Reaffirmed, explained and extended in Freeman v. City of Independence, 123 Iowa 3, 4, 97 N. W. 1084, holding further that under Secs. 753 and 757 of the Code of 1897, a city must keep bridges within its corporate limits in repair; and is liable in damages for personal injuries occasioned by such a bridge being out of repair.

Reaffirmed and varied in Gallaher v. Head, 72 Iowa 175, 33 N. W. 621, holding that the county board of supervisors has no power to establish a highway within the limits of an incorporated city or town.

Cited with approval in C. R. I. & P. Ry. Co. v. Murphy, 106 Iowa 47, 75 N. W. 682, holding that under Sec. 1, Chap. 200 of the Twentieth General Assembly, all taxable property within a county, whether within or without the limits of cities thereof, are subject to taxation for the county road fund as provided by such Act.

Cited in Aldrich v. Paine, 106 Iowa 469, 76 N. W. 815, the case turning on the power of the county board of supervisors to construct ditches in the city limits.

Special cross reference. For further cases citing the text, and many others intimately connected herewith, see annotations under Wilson & Gustin v. Jefferson County (13 Iowa 181), ante. p. 134.

Cross reference. See further on this question, annotations under Bell v. Foutch (21 Iowa 119), ante. p. 880.

PROVOST v. REBMAN, 21 IOWA 419

1. Mortgage on Land—Correction in Equity of Mistake in Description of Property After Decree of Foreclosure—Perfecting Title in Purchaser—Equity of Redemption.—Equity will not after a foreclosure of and sale under a mortgage on land, correct a mistake in description in the instrument so as to make it include property not described in it, without decreeing another sale of the newly described property; as this would, in effect, create a mortgage and bar or cut off the mortgagor's equity of redemption at the same time.

But where a decree of foreclosure of a mortgage on land is entered by agreement between the parties that the defendant (mortgagor) have a stay of execution for a definite period; and where, thereafter, it was agreed between the parties that the plaintiff (mortgagee) should take the property in satisfaction of his debt, interest and costs, and that in order to perfect the title in him, it should be sold under the decree; whereupon the defendant (mortgagor) waived the stay, and execution was issued, the property was sold to the plain-

tiff (mortgagee) at the price agreed upon, and the defendant (mortgagor) delivered possession to him, then equity will correct a description of the property in the mortgage, cut off the defendant's further right of redemption and perfect the title in the plaintiff (mortgagee), without ordering another sale; especially where, in such case, it appears that the parties believed that the land was included in the mortgage according to the corrected description, pp. 421, 422.

Reaffirmed as to first paragraph in Carrigg, et al v. Mechanics' Bank of Providence, Rhode Island, 136 Iowa 266, 267, 111 N. W. 331.

Distinguished in McKissick v. Mill Owners' Mut. Fire Ins Co., 50 Iowa 119, 120, holding that where a mortgage on land *incorrectly or erroneously* describes it, a decree of foreclosure thereof cuts off the mortgagor's equity of redemption, and the expiration of the statutory time thereafter cuts off his right to redeem under the statute.

BARRETT v. DEAN, 21 IOWA 423

1. Contracts—Unilateral—Proof Required to Support.—

While it is legal for parties to make a unilateral contract, still in order to sustain it, the proof must be plain and clear that such was the intention of the parties: In all other cases a contract will be construed to be mutual and binding upon both, or all, of the parties thereto, pp. 426, 427.

Reaffirmed in Flanders v. Merrill, 38 Iowa 587; Nowlin v. Pyne, 40 Iowa 168; Westervelt v. Huiskamp, 101 Iowa 200, 201, 70 N. W. 126; Steel v. Long, and Foster, 104 Iowa 44, 45, 73 N. W. 472, all holding that in order that a contract be construed as unilateral, proof that such was the intention of the parties must be plain, clear and beyond doubt; otherwise it will be construed as mutually obligatory upon the parties.

2. Vendor and Purchaser—Contracts for Sale of Land to be Void or Forfeited for Nonpayment of Installment of Purchase Price—Effect—For Whose Benefit—Remedies of Vendor.—A provision in a contract for the sale of land to be paid for in installments at definite periods, that the contract is to be void, and all payments thereon are to be forfeited, if the purchaser fails to pay any such installment when it becomes due, is for the benefit of the vendor; and upon such failure on the part of the purchaser the vendor may treat the contract as at an end and have the benefit of the forfeited payments, or sue for the unpaid purchase money and for a foreclosure of the purchaser's equity of redemption in the land sold. These rights survive to the personal representative of a deceased vendor, pp. 425, 427, 428.

Reaffirmed in Sigler v. Wick, 45 Iowa 692; Westervelt v. Huiskamp, 101 Iowa 200, 201, 70 N. W. 126; Steel v. Long, and Foster, 104 Iowa 44, 45, 73 N. W. 472; Zunkel, v. Colson, 109 Iowa 697, 81 N. W. 175; Clark v. Horn, auditor, 122 Iowa 378, 98 N. W. 149, all holding that a provision in an executory contract that it shall be void,

or forfeited in case of failure of the purchaser to comply with its conditions, is for the benefit of the vendor, to be enforced or waived by him at his pleasure.

Reaffirmed and narrowed in Mahoney v. McCrea, 104 Iowa 736, 739, 740, 74 N. W. 700, holding that where a contract for the sale of land provides that upon default in making payment by the purchaser he shall forfeit all rights to previous payments made and to the real estate sold, unless the vendor elects to the contrary, then upon such default, the vendor must, in order to insist upon the enforcement of the contract, or enforce the collection of the unpaid purchase money, notify the purchaser within a reasonable time thereafter, that he would not insist upon the forfeiture.

STATE v. CUNNINGHAM, 21 IOWA 433

1. **Indictment—Sufficiency of Allegation as to Person Injured—Larceny from Person of Another—Ownership of Property—Variance.**—When an offense is charged in an indictment with sufficient particularity and certainty to identify the act, a variance between the allegation therein as to the name of the person injured and the proof to sustain it, is not fatal, under Sec. 4656 of the Code of 1860.

So where in an indictment for larceny from the person of another, the offense is charged to have been committed by stealing money from the person of G. W. A., it belonging to him, and the offense is otherwise described with sufficient certainty to identify the act, it is sustained by proof that the money belonged to such person and another as partners, pp. 435, 436.

Reaffirmed as to first paragraph in State v. Carnagy, 106 Iowa 485, 76 N. W. 805; State v. Congrove, 109 Iowa 68, 80 N. W. 227, under Sec. 5286 of the Code of 1897, corresponding to the section of the text.

Reaffirmed and explained as to first paragraph in State v. King, 37 Iowa 363, 364, holding that an information for violation of a city ordinance in unlawfully selling beer to persons unknown, is sustained by proof of such selling to one person.

Reaffirmed and explained as to first paragraph in State v. Flynn, 42 Iowa 164, 165, holding that—under Sec. 4302 of the Code of 1873, corresponding to the section of the text—where an indictment for resisting an officer sets out his name as "Patrick Ryan," when his name is "Patrick Ryder," such variance is not fatal.

Reaffirmed and explained as to first paragraph in State v. Fogarty, 105 Iowa 34-36, 74 N. W. 754, holding that—under Sec. 5286 of the Code of 1897, corresponding to the section of the text—an indictment for larceny of property of and from the building of a certain manufacturing company, need not aver whether the company is a corporation or partnership; and may be sustained by proof of either—the offense

being otherwise described with sufficient certainty to identify the act.

Reaffirmed and explained as to first paragraph in State v. Cunningham, 111 Iowa 238, 82 N. W. 776, holding that if—under Sec. 5286 of the Code of 1897, corresponding to the section of the text—an offense is charged in an indictment, and from the facts in evidence the court is satisfied that defendant was not misled, this is enough to warrant the conclusion that the act intended to be charged was sufficiently described or indicated.

Distinguished in State v. Wasson, 126 Iowa 322, 323, 101 N. W. 1126, holding that an indictment for robbery must aver the ownership of the property.

Cross references. See further on this question, annotations under State v. McConkey (20 Iowa 574), ante. p. 863; State v. Emeigh (18 Iowa 122), ante. p. 594.

FERGUSON v. HEATH, 21 IOWA 438

(Later Appeal, 22 Iowa 519.)

1. **Tax Sale of Lands—Deed Showing Several Parcels Sold in Lump, void.**—Where a tax deed to several parcels of land shows on its face that they were sold in a lump and for a gross sum, it is void, p. 439.

Reaffirmed and extended in Williams v. Heath, 22 Iowa 522, 523, holding further that the legal title to land sold for taxes does not pass out of the former owner, until a valid tax deed is made to the tax purchaser.

Special cross reference. For further cases citing, sustaining, qualifying, distinguishing, etc., the text, and many others on the question, see annotations under Rule 1 of Boardman v. Bourne (20 Iowa 134), ante. p. 791.

MCGREGOR v. MCGREGOR, 21 IOWA 441

(Former Appeals concerning this controversy, 9 Iowa 65, 14 Iowa 326, 16 Iowa 528.)

1. **Lands—Lis Pendens—Deed from One Party to An Action to Another Party Thereto, Pending Action—Effect.**—Where, pending an action involving the title to land, one party thereto conveys the land to another party thereto, both are concluded as to their rights and title by the subsequent decree rendered in such action in reference thereto, p. 452.

Special cross reference. For cases citing and extending the text, and others on the question, see annotations under Rule 4 of Cooley v. Brayton (16 Iowa 10), ante. p. 394.

2. **Pleadings—Relief Granted to Defendant in Addition to Averments of Cross Petition, when.**—While it is true, as a general

rule, that a defendant is not entitled to any affirmative relief, except upon the averments of a cross petition, still if a balance is ultimately found in favor of the defendant, he is entitled to a decree for such balance against the plaintiff, p. 455.

Distinguished in Purslow v. Jackson, Patterson & Co., 93 Iowa 698, 62 N. W. 13, a case turning on *res adjudicata*, and other matters not in point.

SKIFF v. CROSS, 21 IOWA 459

1. **Principal and Surety—Officers—Sheriff—Money or Property Wrongfully or Illegally Turned Over by—Right of Sureties to Sue for.**—Where a sheriff pays or turns over money or property in his hands as such officer, either wrongfully or by mistake, to a person not entitled thereto, the sureties on his official bond may sue the person receiving it, therefor, p. 462.

Cited in Graves v. Merchants' & Bankers' Ins. Co., 82 Iowa 639, 49 N. W. 66, 31 Am. St. Rep. 507, the court holding that a husband and wife may sue jointly for total loss by fire under a policy of insurance issued to them jointly, on the wife's store house and the husband's goods therein, where the policy of insurance does not specify the amount for which each is insured.

Cited in Richman v. Board of Supervisors of Muscatine County, 70 Iowa 629, 26 N. W. 25, not in point.

Distinguished in Independent School District of Graham Township v. Independent Sch. Dist. No. 2, 50 Iowa 324, holding that several persons cannot sue in one action for separate and distinct claims and amounts requiring separate judgments against the defendant.

Cross reference. See further as to rights and liabilities of sureties, annotations under Charles v. Haskins (14 Iowa 471), ante. p. 269.

CITY OF PELLA v. SCHOLTE, 21 IOWA 463

(Later Appeal, 24 Iowa 283, 95 Am. Dec. 729.)

1. **Municipal Corporations—Dedication of Streets, Public Squares, etc.—What Constitutes—Title Vests in City or Town by.**—When a town is properly platted, and the plat is certified, acknowledged and recorded, such acts amount to a conveyance of the streets, alleys, public squares, commons, &c., to, and vests the title in the corporation or public for the uses specified or intended, p. 466.

Reaffirmed, explained and extended in Youngerman v. Board of Supervisors of Polk County, 110 Iowa 734, 737, 738, 81 N. W. 167, holding that in order to constitute a dedication, the intention to dedicate must have existed at the time thereof; and that in determining the question of intention, the acknowledgment will be considered in connection with the plat, the certificate of survey, and such circum-

stances as may throw light upon the transaction: Holding further that where land is reserved by the dedicator, the fee simple title remains in him.

Cited in Mosier v. Vincent, 34 Iowa 480, the court holding that a public road or highway may be proved to be such by the record establishing it, or by the written dedication made by the owner of land, or by prescription.

Cross reference. See further in this connection, annotations and note under Rule 1 of Grant v. City of Davenport (18 Iowa 179), ante. p. 610.

2. Municipal Corporations—Dedication of Streets, Squares, etc., to Public Use—Sale of Lots by Dedicator with Reference to—Estoppel.—Where the owner of land lays off and plats a town designating a public square therein, acknowledges and records the plat, and thereafter sells lots with reference to the square, and representing that the square is for the use and benefit of the public, on the faith of which plat, dedication, and representations the lots are bought, such dedicator, vendor, is thereby estopped from thereafter claiming such square as his private property, or attacking the validity of the prior dedication, pp. 465, 466.

Reaffirmed and explained in Snouffer v. C. R. & M. City Ry. Co., 118 Iowa 297, 92 N. W. 83, holding that the owners of abutting property may also divest themselves of all title in favor of the public, by laying out a street and selling lots or parcels of land with reference thereto; and this rule is not subject to any acceptance by the public generally or by the authorities.

Reaffirmed and extended in Fisher v. Beard, 40 Iowa 626, holding further that injunction lies upon the complaint and in favor of the purchaser of any lot, under the circumstances set out in the text, to restrain the dedicator, vendor, from taking possession of the square dedicated, laying it off into lots, and erecting buildings thereon.

STATE v. ROOS, AND MANN, 21 IOWA 467

1. Appeal—Motion not Ruled on Below—Presumption as to Waiver.—Where, upon an appeal to the Supreme Court, the record fails to show that a motion made below was passed upon, or that the trial court refused to decide thereon after having his attention called to it, it will be presumed to have been waived, and will not be considered or reviewed, p. 468.

Reaffirmed in State v. Smith, 137 Iowa 6, 114 N. W. 559.

2. Change of Venue in Criminal Cases—Discretion of Trial Court—Abuse of—Reversal.—An application for a change of venue in a criminal prosecution is—under Sec. 4733 of the Code of 1860—addressed to the sound judicial discretion of the trial court; he is to rule thereon looking to the very Right of the matter, and a refusal to

grant such change will not be ground for reversal, unless it appears that such court abused his discretion resulting in prejudice to the substantial rights of accused, p. 468.

Reaffirmed in State v. Felter, 32 Iowa 51.

Reaffirmed in State v. Beck, 73 Iowa 617, 35 N. W. 684, the decision being under the Code of 1873.

Cross reference. See further on this question, annotations and note under Rule 1 of State v. Arnold (12 Iowa 479), ante. p. 80.

3. Criminal Law—Fugitives from Justice—Arrest in Another State Without Requisition or Authority and Bringing into This State, no Defense to Indictment Here.—Where a fugitive from justice for an offense or crime committed in this state is arrested in another state without a requisition, or authority, and is forced into this state against his will, where he is turned over to the officers of the law, such facts constitute no defense to an indictment for the offense, or crime committed in this state, nor can they be made the basis of a motion for discharge by accused, pp. 470-472.

Reaffirmed and explained in State v. Kealy, 89 Iowa 97, 98, 56 N. W. 283, holding that when a person is properly charged with a crime, a court of this state will not inquire into the circumstances under which he was brought into this state, and within the jurisdiction of the court.

THOMPSON v. COOK, 21 IOWA 472

1. Pleadings—Petition—Conclusion of Fact Stated in—Motion to Make more Specific—Demurrer.—Where a petition states a conclusion of fact instead of a statement of fact in reference to a material part of the cause of action, or the right to sue thereon, it may be assailed by a motion to make more specific; but the question cannot be reached by demurrer, p. 474.

Distinguished in Prov. Bank Stock Co. v. Schafer, 110 Iowa 442, 443, 81 N. W. 890, holding that an answer which consists of general and specific denials of the allegations of facts of a petition, is sufficient, under Subsecs. 2 and 3 of Sec. 3566 of the Code of 1897.

JONES v. GRAVES, 21 IOWA 474

(Former Appeal, 20 Iowa 596, Abstract.)

1. Vendor and Purchaser—Purchaser of Land Under Contract to Convey upon Payment of Purchase Money is Not an Occupying Claimant—Improvements Made by, or by His Assignee or Purchaser.—A purchaser of land under a contract for a conveyance upon the payment of the purchase price, and who enters into possession and holds for more than five years, is not an occupying claimant under Secs. 2264 and 2269 of the Code of 1860, and is not entitled to the value of improvements made by him on the land, upon foreclosure of the lien for the purchase price by the vendor: And the same rule applies

to an assignee of the contract of sale, or a purchaser of the land from the purchaser, and to subsequent assignees or purchasers thereof, who take with notice of the conditions of the original contract, pp. 478, 479.

Reaffirmed and explained in Snell v. Meachan, 80 Iowa 55, 56, 45 N. W. 398, holding that a person who makes improvements upon land, with full knowledge that another is the owner thereof is entitled to no compensation therefor; and such improvements in such case becomes the property of the land owner.

Reaffirmed, explained and varied in Keas v. Burns, 23 Iowa 236, holding that in order for a party to recover for improvements of lands under the occupying claimant law, the possession under and during which they were made must be adverse to the holder of the paramount title.

Cross reference. See further on this question, annotations and cross references under Parsons v. Moses (16 Iowa 440), ante. p. 454.

SOUTHARD v. PERRY, AND TOWNSEND, 21 IOWA 488, 89 AM. DEC. 587

1. Mortgage on Land—Action to Set Aside Sheriff's Sale and Deed Under Foreclosure Decree—Estoppel by Acceptance of Surplus of Proceeds.—Where, after a sale of land under a decree of foreclosure of a mortgage thereon, the defendant (mortgagor), with full knowledge that original notice was served on his wife by substituted service, authorizes her to receive the surplus of the money arising from the sale, which she accordingly does and retains for nearly a year, the defendant is thereby estopped from claiming irregularity or illegality in the manner of service of the notice, in an action by him to set aside such sale and deed made thereunder, pp. 492, 493.

Special cross reference. For cases citing, explaining and qualifying the text, and others on the question, see annotations under Rule 3 of Newman v. Samuels (17 Iowa 528), ante. p. 565.

Cross reference. See further as to estoppel, annotations under Lucas v. Hart (5 Iowa 415), Vol. I, p. 364.

MARKHAM v. BUCKINGHAM, 21 IOWA 494, 89 AM. DEC. 590

1. Judgment Lien on Land—Proof of, Other than Judgment—When Allowed.—In a contest between the judgment debtor and a purchaser at an execution sale thereunder, the latter may show by the pleadings and the record in the action that the judgment attached as a lien upon the land purchased by him, although the judgment itself does not show such fact, p. 496.

Special cross reference. For cases citing the text, and others on the question, see annotations under Delavan v. Pratt (19 Iowa 429), ante. p. 746.

Cross reference. See further on this question, annotations under Rule 3 of Christy v. Dyer (14 Iowa 438), ante. p. 263.

HURST v. SHEETS, AND TRUSSELL, 21 IOWA 501

1. **Mutual Judgments—Right to Set-off—Attorney and Client—When Lien for Attorney's Fee Inferior to.**—The right to set-off mutual judgments exists against the lien of an attorney for an attorney's fee, where the judgment sought to be set-off existed before the attorney gave notice of his lien, under Sec. 2708 of the Code of 1860, pp. 504, 506, 507.

Reaffirmed and extended in Ward & Lamb v. Sherbondy, 96 Iowa 481, 65 N. W. 415, holding further that the notice for which the statute provides is effectual to create an attorney's lien only from the time it is served or given, and operates to create a lien on money in the hands of the person who receives it, subject to prior rights thereto.

Reaffirmed, varied and qualified in Cowen v. Boone, 48 Iowa 353, holding further that the statute does not give the attorney a lien *on a judgment* rendered in favor of his client; but he only has a lien on the money due his client in the hands of the adverse party from the time of the giving of the required notice: Hence holding that where an attorney sues on a debt of his client, attaches land of the defendant therein, obtains a judgment for the debt, files his lien and gives notice for an attorney's fee, and thereafter perfects the title to the attached property in the client, his rights are inferior to those of subsequent *bona fide* purchasers or mortgagees from the client in whom he perfects the title.

Reaffirmed and qualified in Larned v. City of Dubuque, 86 Iowa 180, 183, 53 N. W. 110, holding that an attorney has a lien upon money due his client in the hands of the adverse party, from the time he gives the statutory notice [Code of 1873], and that one who settles with the client after the giving of such notice and without the consent of the attorney, does so at the peril of being thereafter compelled to pay whatever sum may be due to him.

(Note.—See further, Winslow v. Iowa Cent. Ry. Co., 71 Iowa 200, 32 N. W. 259; Wishard v. Biddle, 64 Iowa 526, 21 N. W. 15; Tiffany v. Stewart, 60 Iowa 210, 14 N. W. 241; Brainard v. Elwood, 53 Iowa 30, 3 N. W. 799; Fisher v. City of Oskaloosa, 28 Iowa 383; Casar v. Sargent, 7 Iowa 317, some important cases on the subject of an attorney's lien for his fee, not citing the text.—Ed.)

Special cross reference. For further cases citing the text, and others on the right to set-off mutual judgments, rights of assignee, or purchaser of a judgment, etc., see annotations under Rule 2 of Ballinger v. Tarbell (16 Iowa 491), ante. p. 462; and see, also, cross references there found.

McCLUNG v. KELLEY, 21 IOWA 508

1. **Sales of Personal Property—When Contract Complete and Title Passes.**—A contract for the sale of personal property is not

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completed so as to pass the title to the buyer, until the happening of an event expressly provided for therein, or so long as anything remains to be done to the thing sold to put it in condition for sale, or to identify it, and distinguish it from other things, or, if the price depends on it, while anything remains to be done to determine its quantity, unless, in this latter case, the quantity is to be later determined by the buyer alone, p. 511.

Reaffirmed in Snyder v. Tibbals, 32 Iowa 449.

Reaffirmed and explained in Davis Gasoline Engine Works Co. v. McHew, and Rate, 115 Iowa 417, 418, 88 N. W. 948, holding that where a sale of personal property is conditioned upon the happening of a particular thing (such as that an engine sold is to be set up and made to run satisfactorily by the seller) the sale is not complete and the title does not pass to the buyer until the happening thereof.

Reaffirmed and extended in Harwick v. Weddington, 73 Iowa 302, 303, 34 N. W. 870, holding further that where a certain quantity of grain is sold, which is contained in a bulk along with more, such sale is void as against an attachment or execution creditor of the seller, who levies before it is separated from the bulk.

Reaffirmed and qualified in Welch v. Spies, 103 Iowa 391, 392, 72 N. W. 549; *Allen v. Elmore*, 121 Iowa 242, 243, 96 N. W. 769; *Sempel v. N. H. Lumber Co.*, 142 Iowa 590, 591, 597, 121 N. W. 25, 27, holding that the title to personal property which is specifically designated and identified and distinguished from other property may, as between the parties, pass by a sale, although it may require something to be done in relation thereto, such as weighing, measuring, separating, etc.; and that in such cases it is a question of the intention of the parties as shown by the contract.

Cross reference. See further on this question, annotations and note under *Courtright & Co. v. Leonard* (11 Iowa 32), Vol. I, p. 766.

2. Sales of Personal Property—Executory Sales of—Implied Warranty.—In all executory sales of personal property there is an implied warranty on the part of the seller that the property sold is merchantable, or at least of medium quality, and without any remarkable defect, p. 512.

Reaffirmed and explained in Davis & Sons v. Sweeney, 75 Iowa 49, 39 N. W. 176, holding that in all executory sales of personalty, the contract always carries with it an obligation that the article sold shall be merchantable, or, in other words, reasonably suited to the purposes for which it was intended.

Reaffirmed, explained and qualified in Russell v. Critchfield, 75 Iowa 70, 39 N. W. 187, holding that in case of executory contracts for the sale of personal property not open to the inspection of the buyer, or not in existence when the contract is made, and which is not so particularly described as to leave no room for question, there

is an implied warranty that the property to be furnished shall be merchantable.

Reaffirmed, explained and narrowed in Blackmore v. Fairbanks, Morse & Co., 79 Iowa 289, 290, 44 N. W. 548; Alpha Checkrower Co. v. Bradley & Co., 105 Iowa 546, 547, 75 N. W. 369, holding that so far as an ascertained specific chattel already existing, and which the buyer has inspected, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality; but where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the seller when the order is given: That in such last case there is an implied warranty, unless the contrary be expressed in the order, that the property, when delivered, was fit for the use for which it was designed, and that it was in a merchantable condition: Holding, also, that implied warranties are not excluded by express warranties, unless the contract expressly so provides, or they are in direct conflict therewith; and that an express warranty of title does not exclude the implied warranty of quality.

Unreported citations, 44 N. W. 550, 75 N. W. 272.

Cross references. See further in this connection, Kohl v. Lindley, 89 Am. Dec. 294; Bartlett v. Hoppock, 88 Am. Dec. 428; Hadley v. Clinton County Importing Co., 82 Am. Dec. 454; Scott v. Renick, 35 Am. Dec. 177; McQuaid v. Ross, 39 Am. St. Rep. 864, 22 L. R. A. 187.

3. Sales of Personal Property—Completed Sales of—Caveat Emptor—Fraud, or False Representations—Warranty.—In the case of a completed sale of personal property, it is a general rule, that, unless there has been a warranty, false representation, or fraudulent concealment, the purchaser must take the property regardless of its defects, and the seller is without liability therefor, p. 511.

Reaffirmed and qualified in Burnett v. Hensley, 118 Iowa 578, 579, 92 N. W. 678, holding that it is fraud for a vendor to fail to disclose to a purchaser a latent defect, not ascertainable upon inspection, in personal property sold: And if a vendor makes statements regarding the condition of the thing sold, with the intent to divert the eye or obscure the observation of the purchaser, it is fraud.

Unreported citations, 44 N. W. 550, 75 N. W. 272.

Cross references. See Rule 2 hereof, and cross references there found. See further on this question, annotations and cross reference under Street v. Rider (14 Iowa 506), ante. p. 275.

*KING v. GOTTSCHALK, 21 IOWA 512

1. **Promissory Note—Suing on and Producing, Prima Facie Evidence of Ownership.**—Being in possession of, suing on, and producing a promissory note at the trial of the action, is *prima facie* evidence of ownership, and entitles the plaintiff to recover thereon against the defendant (maker), unless his title or property therein be otherwise rebutted or disproved, p. 514.

Reaffirmed in Bigelow v. Burnham, 90 Iowa 301, 302, 57 N. W. 865, 48 Am. St. Rep. 442.

Distinguished and narrowed in Tuttle v. Becker, 47 Iowa 487, holding that in an action between the payee of a promissory note (or his personal representative) and a stranger thereto in possession thereof involving the title to and right to possession of it, the payee is *prima facie* the owner and entitled to recover, unless the stranger having the possession overcomes this presumption by other evidence.

(Note.—See further, Stoddard v. Burton, 41 Iowa 582; Hesser v. Doran, 41 Iowa 468; Rubey v. Culbertson, 35 Iowa 264; McCormick v. Grundy County, 24 Iowa 382; Allensworth v. Moore, 3 G. Greene 273, some important cases sustaining and explaining, but not citing the text.—Ed.)

SHERROD AND SHERROD v. LANGDON AND LANGDON, 21 IOWA 518

1. **Sale of Diseased Animals—False Representations as to Soundness—Measure of Damages.**—Where a party sells animals, falsely representing them to be sound and free from contagious or infectious diseases, and they are so diseased, he is liable in damages to the buyer for loss of the animals purchased, as well as for loss of others owned by the buyer or thereafter bought by him, occasioned by the disease, and not caused by the fault or negligence of the buyer: And this is the rule irrespective of whether the seller of the diseased animals knew that the buyer had others, pp. 519, 520.

Reaffirmed and extended in Joy v. Bitzer, 77 Iowa 80, 41 N. W. 577, 3 L. R. A. 184, holding further that the rule is the same in the case of a warranty; and that where animals sold are warranted to be sound and free from disease, and are not so in fact, the seller will be held liable for the loss occasioned without fault on the part of the purchaser, by the communication of the disease to other stock with which the diseased animals are properly placed, in the ordinary course of

*Note. The two cases, Blackmore v. Fairbanks, Morse & Co., 79 Iowa 289, 44 N. W. 548; and Alpha Checkrower Co. v. Bradley & Co., 105 Iowa 546, 75 N. W. 369, erroneously cite this case. As the court in these two cases manifestly intended to cite Rule 2 of McClung v. Kelly, 21 Iowa 508, next preceeding, they will be there found.—Ed.

business, and, also, for such other damages and expenses as are the direct and natural result of the breach of warranty: And it is not material that the seller does not know that his warranty is false, nor that it does not specify any kind or class of diseases: Holding further that a warranty that an animal is sound and free from disease is, necessarily, a warranty against diseases of all kinds.

ELLWOOD, AND LOWRIE *v.* WILSON, 21 IOWA 523

1. **Attorney and Client—Contracts Between Preventing Settlement by Client, not Favored.**—The law encourages the amicable adjustment of disputes; and a construction of a contract between an attorney and client which would operate to prevent the latter from settling, will not be favored by the courts, p. 527.

Cited in Boardman & Brown *v.* Thompson, 25 Iowa 504, 505, the court holding that a contract between an attorney and his client, whereby the former is to institute an action, to advance money for court costs, etc., and to receive payment therefor out of the amount recovered, together with a certain per cent. of the recovery for his services, all to be paid out of the amount recovered, the action not to be settled without the attorney's consent, is champertous and void.

WALKER *v.* ESTON, AND GREEN, 21 IOWA 529

1. **Unrecorded Deed or Mortgage to Land—Sale Under Subsequent Judgment—Purchase by Execution Plaintiff, Rights of.**—Where an execution plaintiff buys land at an execution sale under a judgment rendered subsequent to the execution of an unrecorded deed or mortgage of the judgment debtor thereto or thereon, the execution plaintiff having neither actual or constructive notice of the prior conveyance at the time of his purchase, he takes the land free from the claims or rights of the prior grantee or mortgagee: But this rule does not apply in equity, where equities of so strong a nature as to prevent its application, are alleged and proved, p. 531.

Reaffirmed and qualified in Pinckney *v.* Collie, 114 Iowa 443, 444, 87 N. W. 407, holding that where a judgment creditor buys the interest of a judgment debtor in the land of his deceased father at an execution sale under his judgment, he takes it subject to charges against such debtor as heir, for advancements made by his father; and that the fact that such debtor gave a receipt for such an advancement before the execution sale, does not change the rule; that such a paper is not required to be recorded under our statute.

Cross reference. See further on this question, annotations and cross references under *Evans v. McGlasson* (18 Iowa 150), ante, p. 601.

MARTIN & BRO. v. DAVIS & CO., 21 IOWA 535

1. Execution—Levy on Property or Fund in Custody of Law not Allowed.—Property in the custody of the law is not subject to be seized or sold under execution. This rule applies to property in the hands of a receiver of the court, p. 537.

Cited in Pugh, assignee v. Jones, Adm'r, 134 Iowa 748, 112 N. W. 225, 120 Am. St. Rep. 451, 13 Am. & Eng. Ann. Cases 499, 11 L. R. A. (New Series) 706, the court holding that when property or a fund is in custody of the law, the officer holding it is not liable to garnishment, unless it is expressly authorized by statute: Hence holding that—under Sec. 3936 of the Code of 1897—property or a fund in the hands of an executor or an administrator is subject to garnishment; but not such property or fund in the hands of a guardian; and that in this last case, the rule is the same although the ward be dead.

PURCELL v. SMIDT, 21 IOWA 540

1. Aliens—Right of Nonresident Aliens to Inherit Real Estate in This State.—On the question involved in this case of the right of nonresident aliens to acquire land in this state by descent—under the Code of 1860—the court is equally divided, p. 559.

Cited in Greenheld v. Stanforth, 21 Iowa 596, the court again being equally divided on the question.

Cited in Bennett v. Hibbert, 88 Iowa 165, 55 N. W. 97, the court holding that a nonresident alien may take land by devise, under Secs. 1 and 2 of Chap. 85, Acts of Twenty-second General Assembly, provided he complies with the conditions and requirements of such statute.

Special cross reference. For further cases citing this case on this point, and others on the question, see annotations, note and cross references under Rheim v. Robbins (20 Iowa 45), ante. p. 772.

Cross reference. See further on this question, annotations under Krogan v. Kinney (15 Iowa 242), ante. p. 333.

2. Constitutional Law—Legislative Powers.—In the construction of a state constitution it is a rule that the state Legislature may exercise all rightful legislative powers which are not expressly prohibited or necessarily included in the prohibited powers, p. 544.

Special cross reference. For cases citing the text, and many others on the question, see annotations under Rule 1 of Morrison v. Springer (15 Iowa 304), ante. p. 346.

INGALLS v. COOKE, 21 IOWA 560

1. Deeds and Mortgages—Covenant of Warranty in—Operation and Effect of.—A covenant of warranty in a deed, or mortgage to or on land, is limited to the condition of the title prior to and at the date of the execution of the instrument, and does not extend to or

cover incumbrances thereafter accruing, unless expressly stipulated therein, pp. 561, 562.

Reaffirmed and extended in Cemansky v. Fitch, 121 Iowa 189, 190, 96 N. W. 756, holding further that the covenant against liens and incumbrances is a covenant in *praesenti*, and does not relate to those which may thereafter attach.

DIVELY v. CITY OF CEDAR FALLS, 21 IOWA 565

(Later Appeal, 27 Iowa 227.)

1. **Trial—Challenge to Jury for Bias, or Interest in Cause—When Proper—Action Against City—Tax Payers Disqualified as Jurors.**—In an action between a city and another, it is proper for the trial court to sustain a challenge to a juror who is a citizen and tax payer of the city, and, upon the panel being exhausted, to direct the sheriff to summon talesmen who are not such citizens and tax payers, p. 567.

Reaffirmed in Cramer v. City of Burlington, 42 Iowa 318.

Special cross reference. For further cases sustaining, explaining and distinguishing the text, and others on the question, see annotations under Rule 2 of Davenport Gas Light & Coke Co. v. City of Davenport (13 Iowa 229), ante. p. 140.

2. **Contracts in Violation of Statute, void.**—Any contract made for or about anything or matter prohibited and made unlawful by statute, is void.

A repeal of the statute does not render a contract valid which was executed prior thereto, p. 569.

Reaffirmed in Gorman v. Williams, 117 Iowa 562, 91 N. W. 820.

Cross reference. See further on this question, annotations under Reynolds v. Nichols & Co. (12 Iowa 398), ante. p. 67.

3. **Municipal Corporations—Powers of Officers and Agents of—Duty of Persons Dealing with—Negotiable Paper of City Issued Without Authority, Void.**—A municipal corporation is only liable for the acts of its officers or agents within the scope of corporate powers. Persons dealing with municipal officers or agents whose powers and duties are prescribed by statute, are charged with knowledge of the extent thereof.

Unless authority therefor is expressly conferred by charter, a municipal corporation cannot bind itself by negotiable paper; and such paper issued without such authority is *void*, even in the hands of a *bona fide* indorsee, for value and before maturity, pp. 569, 570.

Special cross reference. For cases citing, sustaining, etc., the text, and many more on the question, see annotations under Clark v. City of Des Moines (19 Iowa 199), ante. p. 715.

CITY OF DES MOINES *v.* CASADY, 21 IOWA 570

1. **Municipal Corporations—Ordinances—Evidence—Parol Evidence of Publication of City Ordinance.**—Parol evidence is admissible to prove the publication of a city ordinance as required by law, pp. 572, 573.

Reaffirmed in Larkin *v.* Burlington, Cedar Rapids & Northern Ry. Co., 91 Iowa 656, 60 N. W. 196.

KELLOGG *v.* PAYNE, 21 IOWA 575

1. **Principal and Agent—Master and Servant—Liability of Principal or Master for Acts or Negligence of Agent or Servant—Nature and Scope of.**—The principal's or master's liability for the acts or negligence of his agent or servant is governed by the fact of the control exercised by the former over the conduct of the latter, p. 578.

Reaffirmed in Brown *v.* McLeish, 71 Iowa 382, 32 N. W. 386; Buchanan *v.* Ch. M. & St. P. Ry. Co., 75 Iowa 397-399, 39 N. W. 663.

Reaffirmed and explained in Callahan *v.* B. & M. Riv. R. R. Co., 23 Iowa 565, holding that in order to create the liability it is especially necessary that the control of the employer over the servant should be of such a character as to enable him to direct the manner of performing the services, and to prescribe what particular acts shall be done in order to accomplish the end intended.

Reaffirmed and explained in Miller *v.* Minn. & N. W. Ry. Co., 76 Iowa 659, 39 N. W. 188, 14 Am. St. Rep. 258; Humpton *v.* Unterkircher & Sons, 97 Iowa 516, 66 N. W. 778, holding that where an independent contractor is employed to construct a building, or to perform any other work, and the employer reserves no control as to the manner of performance, the employer is not liable for the contractor's negligence, or that of his employes.—The court in the last case saying, however, in argument, that "There are some exceptions to the rule above stated: for instance, if the injurious act complained of was contemplated by the contract, or if the work was necessarily dangerous or harmful *per se*, and in some other cases, the person contracting for the work to be done, is liable."

Cited in Peterson *v.* Whitebreast Coal & Mining Co., 50 Iowa 675, 32 Am. Rep. 143, turning on another point.

SOWDON & Co. *v.* CRAIG, 21 IOWA 580

(Former Appeal, 20 Iowa 477.)

1. **Appeal—Insufficient Bill of Exceptions—Questions Involving Evidence not Reviewed.**—Upon appeal to the Supreme Court, questions involving evidence will not be reviewed or determined, when the bill of exceptions is not certified as containing *all of the evidence* adduced below, p. 581.

Distinguished and narrowed in McGovern v. Keokuk Lumber Co., 61 Iowa 268, 16 N. W. 107, holding that upon an appeal from an order changing venue of an action, that an abstract of the record below setting out the affidavits on which the motion was based, and certified as being "all the papers, affidavits and evidence filed in support of the motion, or used upon the hearing thereof," is sufficient to allow a review thereof upon the appeal.

MITCHELL & SONS v. SAWYER AND WIFE, 21 IOWA 582

1. Husband and Wife—Rights of Wife in Reference to Her Separate Property.—Under the Code of 1860, where a wife has separate property she may use it in trading for real or personal property, like any other person, without subjecting the profits to seizure for the payment of the debts of the husband, p. 583.

Special cross reference. For cases citing the text, and many others in this connection, see annotations under Jones v. Crosthwaite (17 Iowa 393), ante. p. 546.

Cross references. See, also, on this subject, annotations under Rules 2 and 3 of Logan v. Hall (19 Iowa 491), ante. p. 752; Duncan v. Roselle (15 Iowa 501), ante. p. 372.

WRIGHT v. GERMAIN, 21 IOWA 585

1. Infancy—Contracts and Deeds by Infants—Validity—Disaffirmance by Infant—When and How—Reasonable Time.—Contracts and deeds of an infant are voidable and not void; and unless the infant, within a reasonable time after attaining his majority, disaffirms such contract, or deed, and restores to the other party the consideration therefor remaining within his control at any time after his attaining his majority, he is bound thereby: What constitutes a "reasonable time" depends upon the circumstances of each case. This is the rule under our statute—Codes of 1851 and 1860, p. 587.

Reaffirmed in Parkins v. Alexander, 105 Iowa 76, 74 N. W. 769, under the Code of 1873.

Special cross reference. For further cases citing, sustaining and extending the text, and others on the question, see annotations under Jenkins v. Jenkins (12 Iowa 195), ante. p. 32.

EASTMAN v. DISTRICT TOWNSHIP OF RAPIDS, 21 IOWA 590

1. Debtor and Creditor—Tender, what Does not Constitute.—A mere readiness or willingness evinced on the part of a debtor to pay to his creditor a sum claimed to be due, will not, without more, constitute a valid tender, p. 592.

Cited in Hamilton v. Finnegan, 117 Iowa 626, 91 N. W. 1040, the court holding that where plaintiff sells defendant certain shares of stock in a corporation, under an agreement that the plaintiff may at a

specified date, accept or reject the price agreed upon therefor, and the plaintiff, within a reasonable time after such date, notifies the defendant in writing to come and take them and pay him the money, such written notice is equivalent to a valid tender under Sec. 3061 of the Code of 1897.

Special cross reference. For further cases citing, sustaining and extending the text, and others on the question, see annotations under Mohn v. Stoner (11 Iowa 30), Vol. I, p. 765.

Cross reference. See further on this question, annotations and cross references under Mohn v. Stoner (14 Iowa 115), ante. p. 213.

GREENHELD v. STANFORTH, 21 IOWA 595

1. **Aliens—Right of Nonresident Aliens to Inherit Real Estate in this State.**—On the question involved in this case of the right of nonresident aliens to acquire land in this state by descent—under the Code of 1860—the court is equally divided, p. 596.

Cited in Bennett v. Hibbert, 88 Iowa 166, 55 N. W. 97, the court holding that a nonresident alien may take land by devise, under Secs. 1 and 2 of Chap. 85, Acts of Twenty-second General Assembly, provided he complies with the conditions and requirements of such statute.

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Cross reference. See further on this question, annotations under Krogan v. Kinney (15 Iowa 242), ante. p. 333.

Ex. M. P.
18/16/25

